

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

TECO Guatemala Holdings, LLC
(Claimant)

v.
Republic of Guatemala
(Applicant)

(ICSID Case No. ARB/10/23)
Third Annulment Proceeding

PROCEDURAL ORDER NO. 2

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

September 1, 2021

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I. PROCEDURAL BACKGROUND

1. On February 12, 2021, the Republic of Guatemala [**“Applicant”** or **“Guatemala”**] filed with the International Centre for Settlement of Investment Disputes [**“ICSID”**] an Application for Annulment of the Resubmission Award rendered on May 13, 2020 and the appended Supplementary Decision dated October 16, 2020, in the **Resubmission Proceedings** in *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), [the **“Annulment Application”**]. The Annulment Application was filed pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the **“ICSID Convention”**) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (**“Arbitration Rules”**). The Claimant in the Resubmission Proceedings is TECO Guatemala Holdings, LLC [**“Claimant”** or **“TECO”**]. The Applicant and Claimant will be jointly referred as the **Parties**.
2. On February 22, 2021, the Secretary-General of ICSID registered the Annulment Application, and notified the Parties of the provisional stay of enforcement of the Award.
3. On March 31, 2021, the Secretary-General of ICSID notified the Parties of the constitution of the *ad hoc* Committee [the **“Committee”**] in accordance with Article 52(3) of the ICSID Convention.
4. On May 17, 2021, the Committee issued Procedural No. 1 [**“PO No. 1”**], following consultation with the Parties. Pursuant to the procedural calendar agreed upon by the Parties, Guatemala’s Memorial on Annulment is due on August 25, 2021.
5. On August 11, 2021, the Republic of Guatemala submitted a request asking the Committee to admit new evidence into the record [the **“Request”**] that the Applicant intends to submit with its Memorial on Annulment.
6. On August 17, 2021, Claimant filed a response opposing the Request [the **“Answer”**].
7. The Committee granted the Parties an additional round of submissions to address the Request, which they presented on August 18 and 19, 2021 [the **“Reply”** and **“Rejoinder”**].

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II. THE PARTIES' POSITIONS

1. GUATEMALA'S REQUEST

8. Guatemala accepts the rule that in annulment proceedings no new evidence should in principle be allowed; an exception to this rule, however, is that a party may present evidence in order to prove that the arbitral tribunal was improperly constituted¹.
9. This is precisely the reason why Guatemala requests leave to introduce new documentary evidence [the “**New Documents**”] into the record, which it would file with its Memorial on Annulment. Guatemala provided an index with a short description of the New Documents it seeks to be included in the file, which include publicly available reports, investment arbitration decisions, other U.S. judicial rulings, and press articles².
10. Guatemala maintains that the New Documents are necessary to substantiate its allegation that Dr. Stanimir Alexandrov – one of the arbitrators in the Resubmission Proceedings – lacked independence and impartiality, and as a result thereof: (i) the arbitral tribunal that rendered the Resubmission Award was not properly constituted, and (ii) there was a serious departure from a fundamental rule of procedure³.
11. Guatemala’s position is that Dr. Alexandrov concealed his longstanding relationship with Mr. Brent Kaczmarek, of Navigant Consulting Inc. [“**Navigant**”], who was TECO’s damages expert in the Resubmission Proceedings. According to the Applicant, the New Documents are relevant because they demonstrate that:
 - (i) the arbitrator and the expert had more than ten years of direct working relationship in litigation⁴ that was still ongoing during the Resubmission Proceedings⁵;
 - (ii) Dr. Alexandrov’s former firm, Sidley Austin LLP, was involved with Navigant in other litigations and transactions from 1999 until August 2019⁶; and, despite his resignation in August 2017, Dr. Alexandrov continues to work as co-counsel with Sidley Austin LLP in several cases⁷;
12. Guatemala asserts that Dr. Alexandrov’s failure to disclose these relationships in the Resubmission Proceedings casts doubt as to his independence and impartiality⁸; especially because, while the Resubmission Proceedings were ongoing, his

¹ Reply, p. 1.

² The full list is attached as Annex I to this Procedural Order No. 1.

³ Request, p. 2; Reply, p. 2. See also the Annulment Application, paras. 37-52.

⁴ Request, p. 3; Reply, p. 2.

⁵ Reply, p. 4.

⁶ Request, p. 3.

⁷ Reply, p. 6.

⁸ Reply, p. 4

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appointment as arbitrator had been challenged for not disclosing similar relationships, one of which (*Eiser v. Spain*) resulted in the annulment of the award⁹.

13. In the alternative to its principal request, Guatemala suggests that the Parties be allowed to use the New Documents in their submissions and that the Committee rule on their admissibility in its final decision on Guatemala's application for annulment¹⁰.

2. TECO'S ANSWER

14. TECO asks the Committee to deny the Request for three main reasons¹¹:
15. First, the New Documents are not *prima facie* relevant to proving or disproving Guatemala's allegations that Dr. Alexandrov breached his duties of disclosure¹². Some are press articles that cannot constitute evidence in these proceedings and are immaterial to the issues posed by Guatemala; others are documents that relate to Sidley Austin LLP's representation of Navigant in unrelated transactions that have no bearing on any alleged relationship between Dr. Alexandrov and Navigant. Guatemala seeks to introduce the Annual Workshop Reports 2012-2014 of the ITA, where Dr. Alexandrov and Mr. Kaczmarek served on the advisory board, along with 350 other international arbitration experts – including Guatemala's expert, Dr. Manuel Abdala. These documents are thus irrelevant and immaterial to the issues before this Committee.
16. Second, Guatemala knew (or should have known) that, during the course of the Resubmission Proceedings, three challenges had been raised against Dr. Alexandrov on similar grounds, and in one of them (*Eiser v. Spain*), the annulment decision was rendered before the Supplementary Decision of October 16, 2020¹³. Claimant argues that Guatemala is barred from seeking to introduce the New Documents because all of them (except for one) were in the public domain while the Resubmission Proceedings were pending, and despite this, Guatemala never presented them in order to challenge Dr. Alexandrov's independence and impartiality at the time. Guatemala most likely knew (or should have known) of the existence of these New Documents and should not have withheld, until after the conclusion of the Resubmission Proceedings, the challenge that it is now raising. By extemporaneously raising this challenge in these annulment proceedings Guatemala is attempting an impermissible ambush on the Resubmission Award¹⁴.
17. In line with this argument, TECO suggests that even if Guatemala had "discovered" the New Documents after the issuance of the Resubmission Award, it ought to have sought the revision of the Resubmission Award under Article 51 of the ICSID

⁹ Reply, p. 5.

¹⁰ Reply, p. 14.

¹¹ Answer, pp. 3-7.

¹² Answer, pp. 3-7.

¹³ Rejoinder, p. 2.

¹⁴ Rejoinder, p. 3.

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Convention, rather than seeking an annulment, because, as determined by the *Azurix* committee¹⁵, such “new fact” does not provide ground for annulment¹⁶.

3. GUATEMALA’S REPLY

18. Guatemala argues that the fact that the majority of the New Documents were in the public domain during the Resubmission Proceedings bears no relevance regarding their admissibility in these annulment proceedings. Dr. Alexandrov’s relationship with Mr. Brent Kaczmarek was unknown to Guatemala, and in any case, it was Dr. Alexandrov’s ongoing duty to disclose these relationships¹⁷; had the arbitrator done so, Guatemala would have had some basis to investigate and, after that, to seek his disqualification while the Resubmission Proceedings were still underway¹⁸.
19. To further counter TECO’s argument, Guatemala heavily relies on the annulment decision in *Eiser v. Spain*¹⁹, in which the committee admitted evidence to prove the improper constitution of the *Eiser* tribunal, despite the documents in question being publicly available²⁰.

4. TECO’S REJOINDER

20. Contrary to what Guatemala suggests, the annulment decision in *Eiser* sheds no light on the standards for the admissibility of new publicly available documents in an annulment proceeding. The parties in that case discussed the impact of the public nature of certain allegations raised by Spain (the applicant in that proceeding), but that discussion did not concern the admissibility of evidence²¹.
21. Lastly, TECO maintains that the Request is simply based on the false premise that an arbitrator has an unlimited duty to disclose and that each party should not be responsible for conducting adequate due diligence when confirming the appointment of an arbitrator²².

¹⁵ *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) – Annulment Proceeding, Decision on Annulment, September 1, 2009, paras. 281.

¹⁶ Rejoinder, p. 3.

¹⁷ Reply, p. 4.

¹⁸ Reply, pp. 3 and 9.

¹⁹ **RLAA-3** - *Eiser Infrastructure Limited and Energía Solar Luxembourg S.À.R.L. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Annulment, June 11, 2020.

²⁰ Reply, p. 2, citing **RLAA-3** - *Eiser Infrastructure Limited and Energía Solar Luxembourg S.À.R.L. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Annulment, June 11, 2020, paras. 23, 29, 30, 36, 38, 72, 73 and 186.

²¹ Rejoinder, p. 2.

²² Rejoinder p. 3.

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III. THE COMMITTEE’S DECISION

1. APPLICABLE LAW

22. These annulment proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006²³. In accordance with Arbitration Rule 53, the ICSID Arbitration Rules apply *mutatis mutandis* to annulment proceedings.

23. Arbitration Rule 34 sets forth that:

“The [Committee] shall be the judge of the admissibility of any evidence adduced and of its probative value”.

24. Further, in consultation with the Parties, the Committee determined in Sections 16.4 and 16.5 of PO No. 1 certain rules concerning the marshalling of evidence:

“16.4. Given the nature of an annulment proceeding, the Committee expects that the Parties will primarily refer to the evidentiary record of the arbitration proceeding and it does not expect to receive new witness statements or expert reports.

16.5. In principle, no new evidence shall be admitted in this proceeding. Should either Party wish to introduce new documents or other evidence (other than legal authorities) – including factual evidence, witness statements, or expert reports - that Party shall file a request to the Committee to that effect. A Party may not annex the evidence it seeks to file to its request. The Committee will promptly decide on the admissibility of these new documents and/or evidence, after hearing from the other Party”.

25. Finally, and without prejudice to the above rules, pursuant to Section 24 of PO No. 1,

“[...] the Committee may take into consideration the International Bar Association Rules for the Taking of Evidence in International Arbitration (2010) [...]”.

2. DISCUSSION

26. PO No. 1 already establishes that in view of the nature of an annulment proceeding, *in principle*, no new evidence should be presented; this said, the Committee may admit new evidence if so warranted. Both Parties also agree that, for any new evidence to be admissible, such evidence must bear significant relevance to the dispute.

²³ Except to the extent modified and/or supplemented by the Dominican Republic-Central America Free Trade Agreement (“**DR-CAFTA**” or the “**Treaty**”), in force for the United States since March 1, 2006, and for Guatemala since July 1, 2006. See PO No. 1, para. 1.1.

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27. The Committee will decide whether the New Documents are *prima facie* relevant to the adjudication of the case (A.) and then it will assess whether given the present circumstances the admissibility of the New Documents is warranted (B.).

A. Prima facie relevance to the grounds of annulment

28. Guatemala seeks leave to submit the New Documents which would, allegedly, prove that Dr. Alexandrov and Mr. Kaczmarek had maintained a close professional relationship, working together as counsel and expert²⁴. The Republic argues that by failing to disclose this relationship, the arbitrator breached his duties, resulting in the improper constitution of the arbitral tribunal (Article 52(1)(a)) and creating a serious departure from a fundamental rule of procedure (Article 52(1)(d))²⁵.
29. The Committee agrees that the New Documents relate to former cases in which Dr. Alexandrov and Mr. Kaczmarek were directly or indirectly involved, as well as other documentation relating to their alleged professional relationship and that of their firms. Hence, the *prima facie* relevance of the New Documents is established.

Counter-arguments by TECO

30. *First*, TECO counters that Guatemala has not even established the applicable standard regarding the arbitrators' duties of disclosure.
31. The Committee believes that TECO's argument goes to the core of the dispute put before this Committee: the extent to which prior and/or current professional relations between an arbitrator and an expert impact the former's ability to sit as arbitrator and render independent and impartial judgment in an arbitration in which the expert participates – and thus whether the relationship should be disclosed. If the Committee were to rule now on the scope of the arbitrator's duty of disclosure, it would prejudge its final decision before having had the opportunity to hear the Parties' full case.
32. *Second*, TECO raises the issue that the New Documents were public before the Resubmission Award, and if Guatemala had real concerns as to Mr. Alexandrov's relations, it should have raised the issue before. Additionally, TECO asserts that if Guatemala only learnt of the facts after the Resubmission Award, it should have sought revision of the Resubmission Award under Article 51 of the ICSID Convention²⁶, and not the annulment it seeks in these proceedings. Since it did neither of the above, it is now precluded from doing so.
33. The Committee feels that TECO's point is more directed at proving the lack of merit of the Annulment Application than arguing the inadmissibility of the New Documents. For the same reasons explained above, the Committee cannot decide

²⁴ Annulment Application, paras. 39 and 40.

²⁵ Annulment Application, paras. 37-52.

²⁶ Answer, p. 2.

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on this counter-argument without similarly prejudging the case at a very early stage of the proceedings.

34. In conclusion, the Committee finds that the New Documents are *prima facie* relevant and will make a final determination on their relevance and evidentiary weight in its final decision on Guatemala’s Annulment Application.
35. For avoidance of doubt the Committee confirms it has formed no conclusive view on the relevance or weight (if any) of the New Documents to Guatemala’s Annulment Application.
36. The Committee will now turn to the question of whether the present circumstances warrant the admissibility of the New Documents.

B. Admissibility under present circumstances

37. The annulment proceeding under Article 52 of the ICSID Convention is restricted to reviewing the legitimacy of the process of decision, and not its substantive correctness²⁷. Accordingly, the annulment does not constitute a second chance for a party that is dissatisfied with the resulting award, to make new arguments or submit new evidence not brought to the original proceeding, with the prospects of altering the substance of the award²⁸.
38. Such special nature of the annulment proceeding guides the principles applicable regarding the admissibility of new evidence. These are recorded in PO No. 1, that establishes that “the Parties will primarily refer to the evidentiary record of the arbitration proceeding” and “[i]n principle, no new evidence shall be admitted in this proceeding”. Since the limited task entrusted to the Committee does not comprise revisiting or reassessing the factual and legal dispute that the parties put before the arbitral tribunal, any new evidence would apparently be irrelevant²⁹.
39. This being said, the above rule is not an absolute one: PO No. 1 acknowledges that new evidence may be warranted³⁰. The Committee acknowledges that allegations of serious departure from a fundamental rule of procedure and the improper constitution of the arbitral tribunal – as formulated by Guatemala in its Application – are grounds for annulment based on facts which, until now, had never been put

²⁷ Christoph Schreuer, et al: “The ICSID Convention: a Commentary”, 2009, p. 901.

²⁸ *RSM Prod. Corp. v. Grenada* (ICSID Case No. ARB/05/14), Annulment Proceeding, Decision on RSM Production Corporation’s Application for a Preliminary Ruling, October 29, 2009, para. 21; *Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16), Annulment Proceeding, Procedural Order No. 2, February 4, 2021, para. 14.

²⁹ *Sociedad Anónima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7), Annulment Proceeding, Decision on Annulment, December 10, 2010, para. 237; *Sempra Energy International v. The Argentine Republic* (ICSID Case No. ARB/02/16), Annulment Proceeding, Decision on Annulment, June 29, 2010, para. 74; *Ioan Micula, Viorel Micula and others. v. Romania* (ICSID Case No. ARB/05/20), Annulment Proceeding, Decision on Annulment, February 26, 2016, para. 79; *Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16), Annulment Proceeding, Procedural Order No. 2, February 4, 2021, para. 25.

³⁰ PO No. 1, Sections 16.4 and 16.5.

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before the Resubmission Tribunal. Since the serious departure from a fundamental rule of procedure and the improper constitution of the arbitral tribunal are two issues claimed for the first time before this Committee, if Guatemala were to rely solely on the evidentiary record of the Resubmission Proceedings, where these points were never discussed, the Republic would *de facto* be stripped off all evidentiary means to prove its case.

40. In conclusion, the Committee finds that the New Documents are *prima facie* relevant to the adjudication of the claims of serious departure of a fundamental rule of procedure and improper constitution of the arbitral tribunal and that the present circumstances warrant their admissibility.

3. DECISION

41. In light of the above, and pursuant to Arbitration Rule 34, the Committee finds that the New Documents are admissible and the Parties may thus use them in their submissions in these proceedings.

[signed]

Ms. Deva Villanúa
President of the Committee
Date: September 1, 2021

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ANNEX I

No.	New Documents
1	Sidley Austin, Sidley Represents Navigant in US\$1.1 Billion Sale to Guidehouse (August 2, 2019)
2	Ankura, Navigant announces a definitive agreement to sell its disputes, forensics and legal technology segment and transaction advisory services practice to Ankura for \$ 470 million (June 25, 2018)
3	GAR, Alexandrov quits Sidley Austin to go solo (August 2, 2017)
4	IA Reporter, As Spain seeks to annul energy charter treaty award government hires outside law firm and complains about arbitrator’s relationship with Damages experts (July 27, 2017)
5	IA Reporter, As damages phase unfolds in Pakistan mining case, a challenge is lodged against Stanimir Alexandrov-citing his client’s alleged interest in a rarely-used valuation method under scrutiny (July 11, 2017)
6	GAR, Pakistan challenges arbitrator over valuation method (July 12, 2017)
7	GAR, Spain seeks to overturn ECT defeat (July 27, 2017)
8	GAR, Spain again targets Alexandrov (September 19, 2017)
9	GAR, Embattled over Brattle – Spain’s challenge to Alexandrov divides co-arbitrators (October 24, 2017)
10	GAR, Alexandrov and Joubin-Bret resign from ECT case against Spain (October 25, 2017)
11	<i>Gordon v. Goodyear</i> 2012 WL 2885695 (N.D. Ill. July 13, 2012)
12	<i>Grimes v. Navigant Consulting Inc.</i> , 185 F. Supp. 2d 906 (N.D. Ill. 2002)
13	<i>Stearns v. Navigant Consulting, Inc.</i> , 89 F. Supp. 2d 1014, 1014 (N.D. Ill. 2000)
14	<i>Marion Unglaube v. Republic of Costa Rica</i> , ICSID Case No. ARB/08/1, Award (May 16, 2012)
15	<i>Marion Unglaube and Reinhard Hans v. Republic of Costa Rica</i> , ICSID Case No. ARB/09/20, Award (May 16, 2012)
16	<i>Renée Rose Levy de Levi v. Republic of Peru</i> , ICSID Case No. ARB/10/17, Award (February 26, 2014)
17	<i>Renée Rose Levy and Gremcitel S.A. v. Republic of Peru</i> , ICSID Case No. ARB/11/17, Award (January 9, 2015)

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18	<i>Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay</i> , ICSID Case No. ARB/10/7, Decision on the Rectification of the Award (September 26, 2016)
19	<i>Spence International Investments, LLC, Berkowitz et al v. the Republic of Costa Rica</i> , ICSID Case No. UNCT/13/2, Interim Award of the Tribunal (Corrected) (May 30, 2017)
20	<i>Lidercón, S.L. v. Republic of Peru</i> , ICSID Case No. ARB/17/9, Award (March 6, 2020)
21	<i>SMM Cerro Verde Netherlands B.V. v. Republic of Peru</i> , ICSID Case No. ARB/20/14, ICSID Case Details
22	<i>Freeport-McMoRan Inc. v. Republic of Peru</i> , ICSID Case No. ARB/20/8, ICSID Case Details
23	<i>IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru</i> (ICSID Case No. ARB/19/19, ICSID Case Details
24	<i>Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru</i> , ICSID Case No. ARB/18/27, ICSID Case Details
25	<i>Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia</i> , ICSID Case No. UNCT/18/1, ICSID Case Details
26	<i>LSF-KEB Holdings SCA and others v. Republic of Korea</i> , ICSID Case No. ARB/12/37, ICSID Case Details
27	<i>Veolia Environnement S.A. and others v. Republic of Lithuania</i> , ICSID Case No. ARB/16/3, ICSID Case Details
28	SEC Filing of Agreement and Plan of Merger among Navigant Consulting Inc, Bobcat Acquisition Corporation, Cymetrix Corporation and The Securities Holders of Cymetrix Corporation (May 14, 2004)
29	Bloomberg Company Profile, Navigant Consulting
30	Navigant Consulting Inc. Annual Reports 1999-2009
31	Institute for Transnational Arbitration Annual ITA Workshop Reports 2012-2014