

**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**

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**PROCEDURAL ORDER NO. 4**

*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

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February 11, 2022

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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 [the **“Arbitration Rules”**]. The Claimant in the Resubmission Proceedings is TECO Guatemala Holdings, LLC [**“Claimant”** or **“TECO”**]. The Applicant and Claimant will be jointly referred to 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 Order No. 1 [**“PO No. 1”**], following consultation with the Parties.
5. On August 23, 2021, the Committee informed the Parties of its summary decision granting Guatemala’s request to submit new evidence with its Memorial, which was followed by a fully motivated decision issued on September 1, 2021, recorded in Procedural Order No. 2 [**“PO No. 2”**].
6. On December 8, 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 December 15, 2021, recorded in Procedural Order No. 3 [**“PO No. 3”**].
7. On January 25 and 31, 2022, Guatemala presented two requests asking the Committee to order the exclusion of certain evidence presented by TECO with its Counter-Memorial on Annulment [**“Requests I and II”**].
8. On February 3, 2022, TECO submitted its **Responses I and II**.

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**II. THE APPLICABLE LAW**

9. These annulment proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006<sup>1</sup>. In accordance with Arbitration Rule 53, the ICSID Arbitration Rules apply *mutatis mutandis* to annulment proceedings.

10. Arbitration Rule 34 sets forth that:

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

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

“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”.

12. 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) [...]”.

13. Article 9(2) of the International Bar Association Rules for the Taking of Evidence in International Arbitration (2010) [**“IBA Rules on Evidence”**] states that:

“The [Committee] shall, at the request of a Party or on its own motion, exclude from evidence [...] any Document [...] for:

(a) Lack of sufficient relevance to the case or materiality to its outcome [...]

(g) Considerations of procedural economy, proportionality, fairness or equality of the Parties that the [Committee] determines to be compelling”.

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<sup>1</sup> 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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**III. REQUEST I**

14. Applicant asks the Committee to exclude from the record<sup>2</sup>:
- The documents presented by TECO with its Counter-Memorial, numbered CLAA-001 to CLAA-019, CLAA-117 and CLAA-118, that relate to the U.S. enforcement proceeding [the “**Enforcement Proceeding Documents**”];
  - Section III.C of the Counter-Memorial, titled “Guatemala Obstructed The Enforcement of the Unannulled Portions of the Original Tribunal’s Award”; and para. 390 of the Counter-Memorial, to the extent it relies on the Enforcement Proceeding Documents.

**1. GUATEMALA’S POSITION**

15. Guatemala raises two main arguments:
16. *First*, Applicant argues that the Enforcement Proceeding Documents support allegations of fact rather than legal arguments. Guatemala points out that TECO must have been aware that these local court documents constitute new fact evidence – and not legal authorities – because previously, TECO had asked for the Committee’s permission to introduce court documents<sup>3</sup> as factual evidence<sup>4</sup>. TECO should have requested back then for leave to also introduce the Enforcement Proceeding Documents<sup>5</sup> instead of now disguising them as legal authorities<sup>6</sup>. Claimant has contravened PO No. 1, and for this reason alone, the Committee should exclude this new evidence<sup>7</sup>.
17. *Second*, the Committee has already ruled in PO No. 3 that information concerning the U.S. enforcement proceeding is not *prima facie* relevant<sup>8</sup>. TECO thus directly contravened said ruling by producing the Enforcement Proceeding Documents and making allegations in relation to those proceedings<sup>9</sup>.

**2. TECO’S POSITION**

18. Claimant asks the Committee to dismiss Guatemala’s Request I for the following reasons:
19. *First*, Claimant’s understanding is that the Enforcement Proceeding Documents fall into the same category as ICSID pleadings, correspondence and rulings in the

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<sup>2</sup> Request I, pp. 2-4.

<sup>3</sup> (i) *Stearns, et al. v. Navigant Consulting Inc., et al.*, 1: 99-CV-07617 (N.D. Ill. Nov 23, 1999); and (ii) *Denari v. Genesis Insurance Co.*, No. 01 C 2015 (N.D. Ill. 12 Dec. 2003)

<sup>4</sup> Request I, p. 5.

<sup>5</sup> Request I, p. 5.

<sup>6</sup> Request I, pp. 2 and 5.

<sup>7</sup> Request I, pp. 5 and 8.

<sup>8</sup> Request I, p. 6.

<sup>9</sup> Request I, p. 2.

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underlying arbitration, because they are related to the arbitration, concern the same subject matter and the same parties<sup>10</sup>; Claimant thought it appropriate to label them as legal authorities, rather than factual exhibits, because they are part of the law of this case (unlike CEA-065 and CEA-066 which are other U.S. court documents unrelated to the case<sup>11</sup>). Hence, there was no requirement, as per PO No. 1, to seek the Committee's permission<sup>12</sup>.

20. *Second*, in PO No. 3 the Committee only ruled that press articles commenting on the Enforcement Proceeding were not sufficiently relevant; it did not, however, prejudge the relevance of the Enforcement Proceeding Documents, which comprise pleadings and court rulings<sup>13</sup>. In fact, the Enforcement Proceeding Documents are *prima facie* relevant and should be allowed to stand in the record for the following reasons:
21. (i) They are necessary for the Committee to understand the full procedural history of this 12-year-old dispute<sup>14</sup> and they show Guatemala's pattern of making contradictory arguments, taking inconsistent positions in different phases of this proceeding<sup>15</sup> and attempting to delay the conclusion of this case<sup>16</sup>.
22. (ii) They are also relevant to the grounds of annulment raised by Guatemala relating to the alleged excess of powers by the Resubmission Tribunal and serious departure from a fundamental rule of procedure by applying U.S. prime rate plus two percent as the interest rate and not a risk-free rate as had been decided, with *res judicata* effect, in the Original Award<sup>17</sup>. The U.S. court enforced the Original Award including the interest at U.S. prime rate plus two percent and Guatemala eventually paid the full amount of interest thereby accepting that such rate was in line with the Original Award<sup>18</sup>.

**3. THE COMMITTEE'S DECISION**

23. The Parties have different views on whether the Enforcement Proceeding Documents should be part of the record for the sake of procedural completeness or whether they are factual exhibits and, if they are, whether they are sufficiently relevant. The Committee finds that both Parties are partially correct:
24. (i) The Committee is not convinced by TECO's argument that the Enforcement Proceeding should be regarded as an extension of the arbitration proceedings and,

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<sup>10</sup> Response I, p. 4.

<sup>11</sup> Response I, p. 4.

<sup>12</sup> Response I, p. 8.

<sup>13</sup> Response I, p. 2.

<sup>14</sup> Response I, pp. 5 and 6.

<sup>15</sup> Response I, p. 6.

<sup>16</sup> Response I, p. 7.

<sup>17</sup> Response I, p. 6.

<sup>18</sup> Response I, pp. 6 and 7.

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thus, that the Enforcement Proceeding Documents should be treated like any other procedural document from the underlying arbitrations.

25. While the procedural documents from the underlying arbitrations provide a procedural factual background to these annulment proceedings, the Enforcement Proceeding is merely a corollary of the arbitrations underlying the present annulment proceedings. As such, the Enforcement Proceeding takes a separate and distinct direction from these annulment proceedings and, as a consequence, the development of those corollary court proceedings should – in theory – have no relevance to the procedural factual background analyzed by the Committee.
26. TECO believes that its arguments in these annulment proceedings are supported by certain actions taken by Guatemala as recorded in the Enforcement Proceeding Documents; it claims to have submitted these Documents as legal authorities as this labeling was more accurate than referring to these Documents as factual exhibits. The Committee disagrees: the Enforcement Proceeding Documents are aimed at proving events and hence, should be deemed factual exhibits, as Guatemala correctly claims.
27. (ii) The introduction of factual exhibits beyond the initial evidentiary record of the arbitration proceeding is governed by paras. 16.4 and 16.5 of PO No. 1, which require the Committee’s authorization upon proof of sufficient relevance. Guatemala argues that the Enforcement Proceeding Documents lack relevance and should, therefore, be stricken from the record; Guatemala finds that the Committee has already decided on the irrelevance of the Enforcement Proceeding Documents in PO No. 3. The Committee does not agree.
28. Claimant sought authorization to introduce press article news on the Enforcement Proceeding in order to better illustrate the procedural factual background of the current annulment proceedings. In PO No. 3 the Committee refused to grant said authorization because of lack of relevance. In paras. 24 and 25 *supra* the Committee confirms this view.
29. The Committee notes, however, that unlike the press article news, the Enforcement Proceeding Documents are not introduced solely for the sake of completeness of the procedural record. The Documents are also filed in support of two defensive arguments and, therefore, the Committee finds that they are *prima facie* relevant:
30. *First*, Claimant says that these annulment proceedings are yet another instance of Guatemala’s recurrent dilatory tactics to postpone the compensation due to TECO. TECO presents the Enforcement Proceeding Documents to substantiate its allegation that Guatemala “obstructed” and “delayed” the enforcement of the unannulled portions of the Original Award<sup>19</sup>; and that Guatemala attempted to

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<sup>19</sup> Counter-Memorial on Annulment, Section III.C.

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evade the enforcement of the Original Award by putting before the U.S Court arguments on the merits that it had never raised before<sup>20</sup>.

31. *Second*, Claimant avers that Guatemala’s argument on the *res judicata* status of the risk-free rate decision of the Original Award is contradictory to its prior conduct, when it acknowledged and paid the interest at the U.S. prime rate plus two percent as ordered in the Enforcement Proceeding<sup>21</sup>.
32. The Committee considers that, through these arguments and the supporting Enforcement Proceeding Documents, TECO makes a *bona fide* defense against Guatemala’s pleaded grounds for annulment. The Enforcement Proceeding Documents are thus *prima facie* relevant to the issues the Committee must decide.
33. For the avoidance of doubt, the Committee confirms that it has formed no conclusive view on the relevance or weight (if any) of the Enforcement Proceeding Documents.
34. The Committee is aware that, in strict observance of PO No. 1, TECO should have asked for authorization before submitting the Enforcement Proceeding Documents. It did not do so, and Guatemala suggests that these documents be stricken for this procedural breach. The Committee agrees that TECO did not follow the procedural rules on this point but finds that the Enforcement Proceeding Documents should be maintained in the file, nonetheless, because:
  - They are *prima facie* relevant and thus, had an authorization to file the Documents with the Counter-Memorial been sought in time, the Committee would have granted it;
  - Guatemala has not suffered any procedural imbalance: Guatemala has had access to the Enforcement Proceeding Documents together with the Counter-Memorial and will have the opportunity in its Reply Memorial to rebut TECO’s case as it sees fit.
35. In light of the above, the Committee rejects Guatemala’s Request I. The Committee notes that the Enforcement Proceeding Documents are labelled as legal authorities, when in fact, they are factual exhibits; for convenience reasons, the Committee will allow that the Enforcement Proceeding Documents keep their label.

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<sup>20</sup> Counter-Memorial on Annulment, para. 120.

<sup>21</sup> Counter-Memorial on Annulment, paras. 10 and 390.

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**IV. REQUEST II**

36. Applicant has additionally asked the Committee to expunge from the record<sup>22</sup>:
- Exhibit CLAA-060, which is the claimant’s Counter-Memorial on Annulment filed in *TCC v. Pakistan*, ICSID Case No. ARB/12/21 [the “**TCC Counter-Memorial**”]; and
  - The allegations in TECO’s Counter-Memorial pertaining to and in connection with this document.

**1. GUATEMALA’S POSITION**

37. Guatemala makes two arguments to support its petition:
38. *First*, in its Counter-Memorial on Annulment, TECO adduces the TCC Counter-Memorial to support factual allegations – namely, to counter Guatemala’s assertions that Dr. Alexandrov concealed his relationships with various claimants’ experts. As such, Claimant should have asked permission from the Committee to present this document, but failed to do so. TECO did in fact request permission from the Committee to file as factual exhibits certain documents related to the *TCC v. Pakistan* case, but not the TCC Counter-Memorial. For this reason alone, the exhibit and the allegations supported by the document should be stricken from the record<sup>23</sup>.
39. *Second*, considerations of fairness and equality of the Parties weigh against maintaining the TCC Counter-Memorial in the file. The other pleadings of the *TCC v. Pakistan* case are not available in the public domain, and therefore, Guatemala cannot present them as rebuttal evidence<sup>24</sup>. If the Committee should accept the TCC Counter-Memorial as evidence, Guatemala requests that this be under the condition that Guatemala can present Pakistan’s written submissions in the *TCC v. Pakistan* case as rebuttal evidence<sup>25</sup>.

**2. TECO’S POSITION**

40. TECO asks the Committee to dismiss Guatemala’s Request II for the following reasons:
41. *First*, Guatemala argues in its Memorial on Annulment that Dr. Alexandrov has shown a recurring pattern of concealing information, as an arbitrator, on his relations with experts he had previously engaged as counsel, as evidenced by numerous challenges on that account (such as in *TCC v. Pakistan*)<sup>26</sup>. However, Guatemala has failed to inform that the challenge against Dr. Alexandrov in the

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<sup>22</sup> Request II, p. 1.

<sup>23</sup> Request II, pp. 2-4.

<sup>24</sup> Request II, p. 4.

<sup>25</sup> Request II, p. 1.

<sup>26</sup> Response II, p. 2.



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*TCC v. Pakistan* was dismissed by three different decision-making bodies [in “**Three Challenge Decisions**”]. The Three Challenge Decisions are not publicly available but are referenced in the TCC Counter-Memorial; this is why TECO relies on this document as a legal authority<sup>27</sup>.

42. *Second*, there are no compelling reasons of fairness or procedural equality that weigh against excluding the TCC Counter-Memorial. Both Parties are constrained to use the documents in the *TCC v. Pakistan* case that are available<sup>28</sup> and the proceedings should not be extended to allow Guatemala to cherry-pick the confidential documents of that arbitration that it wishes to use in these annulment proceedings<sup>29</sup>.

**3. THE COMMITTEE’S DECISION**

43. Legal authorities comprehend provisions of law, regulations, statutes, judgements, treatises or other scholarly writings, cited in support of a legal argument<sup>30</sup>. There is no dispute that the Three Challenge Decisions are a legal authority.
44. Here, the TCC Counter-Memorial is not produced as a direct legal authority but as a secondary source: it makes reference to a legal authority, namely, the Three Challenge Decisions, which are not publicly available as a first-hand source.
45. Guatemala objects to the admission of the TCC Counter-Memorial as a secondary source, because the document is allegedly a one-sided memorial, the content of which cannot be counter-balanced using the written pleadings of the other party in the same arbitration. The Committee does not agree: Guatemala’s objection does not affect the admissibility of the TCC Counter-Memorial but rather speaks to its probative value. The Committee will pay due regard to Guatemala’s arguments when attributing evidentiary weight to the TCC Counter-Memorial.
46. In light of the above, the Committee dismisses Guatemala’s Request II.

**4. ALLEGATIONS OF PROCEDURAL MISCONDUCT**

47. Both Parties have presented allegations of the other Party acting against the principles of good faith and in violation of procedural fairness in international arbitration.
48. Guatemala says that Claimant’s attempt to introduce the Enforcement Proceeding Documents and the TCC Counter-Memorial was made surreptitiously, in clear violation of the Committee’s orders, and amounts to procedural misconduct under the IBA Guidelines on Party Representation; thus it should not go unpunished. The

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<sup>27</sup> Response II, p. 2.

<sup>28</sup> Response II, p. 5.

<sup>29</sup> Response II, pp. 6-7.

<sup>30</sup> B. Garner ed: *Black’s Law Dictionary*, Ninth Edition (2009), p. 153.

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Committee should issue an admonition to Claimant’s counsel and should consider their conduct in the decision on costs<sup>31</sup>.

49. TECO submits that Applicant’s allegations of misconduct are baseless; and that it is Guatemala who has failed to act in good faith by failing to assign exhibit numbers to factual evidence cited in its Memorial and continuing to submit baseless allegations against TECO and its counsel<sup>32</sup>.
50. The Committee takes good note of the arguments made by both Parties and will address them at the appropriate procedural moment.

**V. DECISION**

51. In light of the above, and pursuant to Arbitration Rule 34, the Committee rejects Guatemala’s Requests I and II.

[signed]

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Ms. Deva Villanúa  
President of the Committee  
Date: February 11, 2022

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<sup>31</sup> Request I, pp. 6-7; Request II, pp. 6-7.

<sup>32</sup> Response II, p. 8.