

**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. 6**

*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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June 3, 2022

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**I. PROCEDURAL BACKGROUND**

1. On February 12, 2021, the Republic of Guatemala [**“Guatemala”** or the **“Republic”**] 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 Republic 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 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 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 3”**].
7. On February 11, 2022, the Committee issued Procedural Order No. 4 [**“PO 4”**] addressing Guatemala’s request to exclude certain evidence produced by TECO with its Counter-Memorial.
8. On February 22, 22, the Committee transmitted to the Parties its summary decision granting Guatemala’s petition to present new evidence with its Reply and a time extension to file the Reply, which was followed by a fully motivated decision rendered on March 1, 2022, recorded in Procedural Order No. 5 [**“PO 5”**].

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9. On May 31, 2022, TECO requested authorisation to present new evidence with its Rejoinder [the “**Request**”]; and the next day, it submitted a petition asking for a two-day extension of the deadline to file the Rejoinder.
10. On June 1, 2022, Guatemala presented its response asking the Committee to dismiss Claimant’s requests to submit new evidence [the “**Response**”]; and on the following day, Guatemala also objected to TECO’s request for an extension of the deadline for the filing of the Rejoinder.

## II. THE PARTIES’ POSITIONS

### 1. TECO’S REQUEST

11. TECO seeks permission to introduce five documents [the “**New Documents**”]<sup>1</sup> into the record, pertaining to two categories of issues address by Guatemala in is Reply and on which Claimant wishes to respond:
  - **Category A:** these are two press articles to rebut Guatemala’s contention that TECO’s counsel has consistent views with those of the Republic on the extent of the arbitrator’s duties of disclosure. Guatemala has relied on a public speech made by Ms. Carolyn Lamm of White & Case, submitted with its Reply as RLAA-72. TECO argues that these press articles are necessary to put Ms. Lamm’s speech in context and respond to the Republic’s argument<sup>2</sup>.
  - **Category B:** these are two documents from the docket of the U.S. enforcement proceeding of the Original Award and another U.S. court document related to the enforcement proceeding of the award rendered in ICSID Case No. ARB/07/23, *Railroad Development Corp. v. Guatemala*. These documents would be *prima facie* relevant to contest Guatemala’s allegation in its Reply that the Republic has a “clean track record”<sup>3</sup> of complying with investment awards<sup>4</sup>.
12. Claimant also requests a two-day extension to file its Rejoinder, *i.e.*, until June 8, 2022.

### 2. GUATEMALA’S RESPONSE

13. The Republic asks the Committee to reject Claimant’s request:

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<sup>1</sup> See Annex I.

<sup>2</sup> TECO’s Request, p. 1.

<sup>3</sup> TECO’s Request, p. 2, citing to Guatemala’s Reply, Section IV.A.

<sup>4</sup> TECO’s Request, p. 2.

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- **Category A:** Guatemala says that TECO has failed to establish the *prima facie* relevance of the two press articles it seeks to produce. One of the articles simply refers to Ms. Lamm’s participation as counsel in an unrelated case; the other one also concerns an unrelated proceeding in which Ms. Lamm is not even mentioned. In sum, none of the articles are related to Ms. Lamm’s speech nor do they contain any qualifications of her opinions on the duties of disclosure. In any case, the position that Ms. Lamm might have taken in an adversarial proceeding is irrelevant and does not rebut her views expressed in an impartial forum<sup>5</sup>.
- **Category B:** the Republic says that TECO has also failed to sufficiently describe the three U.S. court documents it wishes to introduce and why it considers they are *prima facie* relevant to this case. None of these documents rebut the uncontested fact that Guatemala paid approximately USD 37 million representing the unannulled portions of the Original Award of this case and that it also satisfied the award in *Railroad Development Corp. v. Guatemala*<sup>6</sup>.

### **III. THE COMMITTEE’S DECISIONS**

#### **1. THE APPLICABLE LAW**

14. These annulment proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006<sup>7</sup>. Pursuant to ICSID Arbitration Rule 53, the ICSID Arbitration Rules apply *mutatis mutandis* to annulment proceedings.
15. ICSID Arbitration Rule 34 sets forth that:

“The [Committee] shall be the judge of the admissibility of any evidence adduced and of its probative value”.
16. Further, in consultation with the Parties, the Committee established certain rules concerning the marshalling of evidence in Sections 16.4 and 16.5 of PO 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

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<sup>5</sup> Guatemala’s Response, p. 2.

<sup>6</sup> Guatemala’s Response, p. 3.

<sup>7</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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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”.

17. Additionally, in Section 16.1 the Committee established that the Parties could present rebuttal evidence with their Reply and Rejoinder:

“16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the Parties, including exhibits and legal authorities. Further documentary evidence relied upon by the Parties in rebuttal shall be submitted with the Reply and Rejoinder”.

18. Finally, and without prejudice to the above rules, pursuant to Section 24 of PO 1,

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

**2. DISCUSSION**

19. The Parties have made numerous requests for admission and exclusion of evidence in this annulment proceeding and the Committee has established in PO 2 through PO 5 that new evidence may be introduced into the record if it is *prima facie* relevant to the adjudication of the case and the circumstances justify its admission<sup>8</sup>.
20. When adopting its decisions with respect to each individual request, the Committee has generally adopted a flexible approach. Within the ample margin offered, both Parties have submitted a quantity of documentary evidence to address two points that the Committee has already deemed *prima facie* relevant:
- The limits and extent of the arbitrator’s duties of disclosure: the Parties have presented legal authorities on this issue, as well as press articles from IAR and GAR, commenting on the development of cases concerning the challenge of arbitrators<sup>9</sup>;
  - Guatemala’s conduct during the U.S. enforcement proceeding of the Original Award, including its alleged intention to delay payment and its position on the interests ordered in the Original Award: the Committee has allowed evidence to substantiate and rebut factual assertions and both Parties have submitted the U.S. court documents as well as other press articles commenting on its course<sup>10</sup>.

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<sup>8</sup> PO 2, para. 27; PO 3, para. 21; PO 5, para. 29.

<sup>9</sup> PO 2, para. 31.

<sup>10</sup> PO 4, paras. 29-32; PO 5, paras. 47-51.

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21. Four of the New Documents that TECO seeks to introduce with its Rejoinder squarely fall within these two categories:
  - The two press articles of Category A contain information related to cases regarding requests for disqualification of arbitrators;
  - The two pleadings of TECO submitted in the U.S. enforcement proceeding of the Original Award, described in Category B, which – as per TECO’s submission – seem *prima facie* relevant for its argument that the Republic delayed the payment of the award.
22. As to the remaining document, it is the U.S. court pleading related to the enforcement proceeding of the award rendered in ICSID Case No. ARB/07/23, *Railroad Development Corp. v. Guatemala*.
23. The Committee notes that with its Reply, Guatemala submitted the request for continuation of the stay of enforcement in that case (REA-91) to prove that it voluntarily paid that award and that it has a general policy of compliance with investment awards. TECO now wishes to present a responsive New Document on this issue.
24. The Parties agreed to allow the introduction of rebuttal evidence with the Reply and Rejoinder<sup>11</sup>:

“[...] Further documentary evidence relied upon by the Parties in rebuttal shall be submitted with the Reply and Rejoinder”.
25. In the Committee’s view, the New Document is intended to refute the argument put forward by Guatemala that it voluntarily complies with investment awards and that TECO’s contention that the Republic intentionally delayed payment of the Original Award is without merit.
26. For the above reasons, the Committee grants TECO leave to submit the five New Documents with its Rejoinder.
27. For avoidance of doubt the Committee confirms that it has formed no conclusive view on the relevance or weight (if any) of the New Documents admitted regarding Guatemala’s Annulment Application or TECO’s response.

TECO’s request for an extension
28. Claimant says that part of its legal team has fallen ill with COVID, and thus, it requires a two-day extension to file its Rejoinder

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<sup>11</sup> PO 1, Section 16.1.

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29. The Republic does not consider the request for extension to be justified, considering that TECO's counsel are part of a big law firm with a large enough legal team that should be able to meet the deadline.
30. The Committee wishes to express its sympathy for the health situation of Claimants' legal team and hopes for their prompt recovery. A short two-day extension will not significantly impact the procedural calendar; accordingly, the Committee accepts TECO's request.

**3. DECISION**

31. In light of the above, pursuant to Rule 34 of the ICSID Arbitration Rules, the Committee admits the New Documents.
32. Further, in line with Rule 26 of the ICSID Arbitration Rules, the Committee allows TECO to file its Rejoinder by June 8, 2022.
33. All other dates of the procedural calendar established in Annex A to PO 1 remain unaltered.

[signed]

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Ms. Deva Villanúa  
President of the Committee  
Date: June 3, 2022

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**ANNEX I**

No.	Evidence
A. Evidence rebutting Guatemala’s new contentions concerning Ms. Lamm’s speech <sup>10</sup>	
1.	Jack Ballantyne, <i>Panama Canal Arbitrators Cleared of Bias</i> , GLOBAL ARBITRATION REVIEW, dated 19 November 2021
2.	Alison Ross, <i>Hobér disqualified from treaty claim against Poland</i> , GLOBAL ARBITRATION REVIEW, dated 3 November 2021
B. Evidence rebutting Guatemala’s new contentions concerning the U.S. enforcement proceedings	
3.	TECO’s Opposition to Guatemala’s Motion to Stay Judgement Pending Appeal, dated 20 April 2020
4.	TECO’s Reply on its Motion for Judgment and Opposition to Guatemala’s Motion, dated 28 January 2019
5.	<i>Railroad Development Corp. v. Guatemala</i> , Verified Petition to Confirm ICSID Arbitration Award and Enter Judgment, dated 23 May 2013