

TECO Guatemala Holdings LLC

v.

Republic of Guatemala

**(ICSID Case No. ARB/10/23)
(Annulment Proceedings)**

**Decision on Guatemala’s Request for a Continuation
of the Stay of Enforcement of the Award
(Rule 54 of the ICSID Arbitration Rules)**

Members of the *ad hoc* Committee

Professor Bernard Hanotiau, President
Ms. Tinuade Oyekunle
Professor Klaus Sachs

Secretary of the *ad hoc* Committee

Ms. Mercedes Cordido-F. de Kurowski

Assistant to the *ad hoc* Committee

Ms. Iuliana Iancu

A. Introduction

1. On 22 April 2014, the International Centre for Settlement of Investment Disputes (ICSID or the Centre), pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), registered an application by the Republic of Guatemala (Guatemala) for the annulment of the Award of the Tribunal rendered on 19 December 2013 (the Award) in the case of *Teco Guatemala Holdings LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/23) (Guatemala's Application). On the same day, ICSID also registered an application by TECO Guatemala Holdings LLC for the partial annulment of the Award (TECO's Application).
2. In Guatemala's Application, Guatemala sought annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), specifically claiming that:
 - a) The Tribunal manifestly exceeded its powers;
 - b) The Award failed to state the reasons on which it is based; and
 - c) The Tribunal seriously departed from a fundamental rule of procedure.
3. Guatemala's Application also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the Arbitration Rules, for a stay of enforcement of the Award until Guatemala's Application for Annulment is decided.
4. Upon registering Guatemala's Application for Annulment on 22 April 2014, the Secretary General of ICSID notified the Parties that, pursuant to Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.
5. On 17 October 2014, Guatemala reiterated its request for the stay of enforcement of the Award in its Memorial on Annulment. On the same day, in its Memorial on Partial

Annulment, TECO requested the Committee to either terminate the provisional stay of enforcement of the Award, or condition the continuation of the stay upon Guatemala posting a bond in the full amount of the Award.

6. On 25 November 2014, the *ad hoc* Committee invited the Parties to agree on a procedural schedule for the filing of their submissions concerning the continuation/termination of the stay of enforcement of the Award.
7. On 3 December 2014, the Parties informed the *ad hoc* Committee of their agreement on a schedule for submissions on the continuation/termination of the stay of enforcement of the Award.
8. On 19 December 2014, Guatemala filed its Request for the Continuation of the Stay of Enforcement of the Award (Guatemala’s Request).
9. On 9 January 2015, TECO filed its Response to Guatemala’s Request for the Continuation of the Stay of Enforcement of the Award (TECO’s Response).
10. On 16 January 2015, the *ad hoc* Committee invited Guatemala to comment on TECO’s representation that, in light of Guatemala’s assurances that it would comply with the Award if it is not annulled, TECO would not oppose the stay of enforcement of the Award in the absence of Guatemala posting a bond, should the *ad hoc* Committee consider such a stay appropriate.
11. On 30 January 2015, Guatemala submitted a letter pursuant to the *ad hoc* Committee’s instructions of 16 January 2015.
12. On 3 February 2015, TECO replied to Guatemala’s 30 January 2015 letter.

B. The Parties’ Contentions

13. In its 19 December 2014 Request for the Continuation of the Stay of Enforcement of the Award, Guatemala requested that the *ad hoc* Committee continue the stay of enforcement of

the Award, without Respondent having to provide security for the eventual payment of the Award.

a) Guatemala's Position

14. In this respect, Guatemala contended that Article 10.26.6 of the CAFTA-DR unequivocally provides that a final award may not be enforced by a Party until revision or annulment proceedings have been completed. This automatic stay is not conditioned upon a party offering some form of security for the payment of the award.
15. Respondent added that the usual practice of ICSID annulment committees favors the continuation of the stay of enforcement of awards, and the stay is only lifted in exceptional circumstances. Guatemala considers that no such exceptional circumstances exist in the present case, where both Parties have filed requests for annulment and where there is no evidence that Respondent will not comply with the Award if it is not annulled. In this respect, Guatemala claims that it has no record of non-compliance with ICSID or other arbitral awards and that the only evidence purportedly to the contrary that was proffered by TECO is a statement in a newspaper article which was not made by the President of Guatemala, but is merely the opinion of a journalist.
16. Guatemala also argued that its Application for annulment is not dilatory in nature and is not manifestly abusive. Guatemala stated that its good faith is evidenced by the diametrically divergent conclusions of the *Iberdrola v. Guatemala*¹ tribunal, who found that it had no jurisdiction *ratione materiae* over a case based on the same facts and controversy. Thus, Guatemala is justified in bringing its application.
17. Moreover, Guatemala considers that the continuation of the stay of enforcement will not be detrimental to TECO, who could be compensated for the delay in enforcement by the payment of interest.
18. Finally, Respondent argued that posting a bond as a condition for the continuation of the stay of enforcement of the Award is not provided for in the ICSID Convention and was

¹ *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award of 17 August 2012 (RL-32).

specifically excluded by the negotiators of the Convention. Posting a bond would create an imbalance between the Parties, as it would put TECO in a more favorable situation than it had been in prior to the application for the stay of enforcement.

19. Guatemala also requested that it be awarded the costs it incurred for the defense of its Request.

b) TECO's position

20. In its Memorial on Partial Annulment of the Award, dated 17 October 2014, TECO requested that the *ad hoc* Committee either deny Guatemala's request for a continuation of the stay of enforcement of the Award, or condition such a stay on Guatemala posting a bond in the full amount of the Award.

21. Claimant argued that the posting of a bond was required in light of Guatemala having failed to give any reasonable assurances that it would pay the Award, if the Award was not annulled. TECO alleged that several *ad hoc* committees held that, in circumstances where the enforcement of an award is stayed, the award debtor must provide security for the eventual payment of the award if it is not annulled.

22. In its 9 January 2015 Response to Guatemala's Request, TECO submitted the following:

“[I]n light of the assurances provided by Guatemala in its Request for the Continuation of the Stay of Enforcement that Guatemala would comply with the Award if it is not annulled, TECO does not oppose the stay of enforcement of the Award in the absence of Guatemala posting a bond, should the Committee consider such a stay to be appropriate in the circumstances. Accordingly, in Claimant's view, further submissions on the stay of enforcement requested by Guatemala are unnecessary. There is no basis, however, for the Committee to order Claimant to pay Respondents' costs in defending its request for the continuation of the stay of enforcement of the Award, as elaborated below.”² [emphasis added]

23. TECO contended that there was no basis for Guatemala being awarded the costs for defending its Request. In this respect, TECO invoked the fact that Guatemala first referred to Article 10.26.6 of the CAFTA-DR in its Request. In its Memorial on Annulment, Guatemala had instead relied on the ICSID Convention and the Arbitration Rules. TECO

² Response, ¶ 2.

considers that the stay of enforcement of an award may only be ordered pursuant to the absolute provisions of the ICSID Convention, and not based on the provisions of other agreements or treaties. Pursuant to ICSID Arbitration Rule 54(2), since the *ad hoc* Committee did not make a ruling on Guatemala’s request for a continuation of the stay of enforcement within 30 days from Respondent’s 17 October 2014 Annulment Memorial, the provisional stay of enforcement has already automatically terminated. In light of this termination, the *ad hoc* Committee has discretion to decide whether the enforcement of the Award should be stayed.

24. In its 30 January 2015 letter to the *ad hoc* Committee, Respondent indicated its agreement with Claimant’s proposal to have no more submissions on the issue of the continuation of the stay of enforcement of the Award. However, Guatemala argued that TECO’s agreement to the continuation of the stay of enforcement of the Award appeared to be inconsistent with its request that the Committee decide on the appropriateness of the stay. Guatemala considers that the Committee’s decision is not discretionary and should be based on Article 10.26.6 of the CAFTA-DR, which in effect represents the agreement of the Parties for an automatic stay of enforcement. Within this letter, Guatemala reiterated its request to be awarded the costs of this stage of the proceedings.
25. In response to Guatemala’s position, TECO argued in its 3 February 2015 letter that Article 10.26.6 of the CAFTA-DR does not provide for an automatic stay of enforcement of the Award, but only that a disputing party may not seek enforcement until annulment proceedings are completed. An *ad hoc* Committee has discretion to stay the enforcement of an award only if it considers that the circumstances so require. TECO also contended that there was no basis for Guatemala being awarded the costs of this stage of the arbitration.

C. Relevant provisions

26. Article 52(5) of the ICSID Convention provides:

“The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.”

27. Arbitration Rule 54 reads:

“(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.”

28. Article 10.26.5 and 10.26.6 of the CAFTA-DR read in relevant part:

“5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

(a) In the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed”.

D. The *ad hoc* Committee’s views

29. After having carefully examined the Parties’ submissions in this regard, the *ad hoc* Committee decides that the stay of enforcement of the Award shall continue until a decision

on the Parties' respective applications for annulment is rendered, without Guatemala being required to post a bond.

30. In this respect, the *ad hoc* Committee observes that the Parties are in substantial agreement that a continuation of the stay of enforcement is warranted without Guatemala posting a bond. What the Parties do not agree on are the grounds for such an outcome. While Guatemala contends that this is the result of the application of Article 10.26.6 of the CAFTA-DR, which provides for an automatic stay of enforcement of a challenged award, TECO considers that the stay of enforcement of the Award is at the discretion of the *ad hoc* Committee, in light of the circumstances of the case.
31. The *ad hoc* Committee first observes that both the ICSID Convention and Arbitration Rules, and the CAFTA-DR are applicable to the present proceedings.
32. Pursuant to Article 52(5) of the ICSID Convention, the *ad hoc* Committee has discretion when deciding whether to continue the stay of enforcement of the Award or not. In the present case, the Committee observes that there is agreement between the Parties that the stay of enforcement of the Award may continue without Guatemala posting a bond until a decision on annulment is rendered.
33. In addition, Article 10.26.6 of the CAFTA-DR does not allow the disputing Parties to seek enforcement of the challenged Award before annulment proceedings are finalized.
34. Moreover, Guatemala has represented to this Committee that it undertakes to comply with the Award if it is not annulled.
35. As a result, this *ad hoc* Committee sees no reason not to continue the stay of enforcement of the Award pending the finalization of the annulment proceedings. The *ad hoc* Committee also decides that Guatemala shall not be required to post a bond.
36. With respect to the issue of costs, the *ad hoc* Committee is guided by the provisions of Article 61(2) of the ICSID Convention and Arbitration Rule 47(1), corroborated with Article 52(4) of the ICSID Convention and Arbitration Rule 53, which stipulate that the Committee has discretion with regard to the allocation of costs. The *ad hoc* Committee sees no need to

make a decision on costs at this preliminary stage of the proceedings. However, the Committee takes note of the Parties' respective positions on this matter, and will take them into account when rendering a decision on costs at the end of the annulment proceedings. The Parties are therefore advised to keep a separate account of the costs incurred in this phase of the arbitration.

Decision

37. For the foregoing reasons, the *ad hoc* Committee unanimously decides:
- (1) The stay of enforcement of the Award shall continue in effect for the duration of these annulment proceedings;
 - (2) To reserve all other issues, including any question as to costs, to a further order or decision at the end of the annulment proceedings.

[signed]

On behalf of the *ad hoc* Committee
Professor Bernard Hanotiau
President of the *ad hoc* Committee
Date: 10 February 2015