

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID Case No. ARB/10/23 - Annulment Proceedings**

TECO GUATEMALA HOLDINGS LLC

v.

REPUBLIC OF GUATEMALA

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**REPUBLIC OF GUATEMALA'S COSTS SUBMISSION**

**4 November 2015**

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## I. INTRODUCTION

1. Pursuant to the instructions of the Committee at the close of the annulment hearing,<sup>1</sup> the Republic of Guatemala (*Guatemala*) hereby presents its submission on costs. This submission summarises the costs Guatemala incurred in the annulment proceedings and respectfully requests that the Committee order TGH to bear Guatemala's costs in their entirety, plus compound interest assessed at a reasonable commercial rate applicable from the date of the annulment decision to the date of payment of costs.

## II. THE TRIBUNAL HAS THE DISCRETION TO REQUIRE PARTIES TO PAY EXPENSES OF THEIR OPPONENTS

2. Article 52(4) of the Convention expressly incorporates into annulment proceedings the costs provisions that apply to ICSID arbitrations. Just like ICSID tribunals, ICSID annulment committees have the discretion to require parties to pay the expenses of their opponents when the circumstances justify such a step.
3. *Ad hoc* committees have on several occasions ordered unsuccessful applicants to pay part or all of the prevailing party's costs.<sup>2</sup> These committees are generally guided by the principle of "costs follow the event," as explained by the *AES v. Hungary* committee:

In its decision on the allocation of costs the Committee has been guided, as other committees and tribunals before it, that "costs follow the event" if no specific circumstances impose a different approach.<sup>3</sup>

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<sup>1</sup> Annulment Hearing, tr. (English), Day Three, 643:10-16, Hanotiau.

<sup>2</sup> See, e.g., *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13) Decision on Annulment, 10 July 2014, **Exhibit RL-51**, para. 263 ("In deciding how to allocate the costs of these proceedings, the Committee has been guided by the principle that "costs follow the event" if there are no indications that a different approach is called for. The Committee has found no such indications in this case. Indeed, the Respondent has prevailed in totality [...]"); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) Decision of the ad hoc Committee on the Application for Annulment, 29 June 2012, **Exhibit RL-53**, para. 181.

<sup>3</sup> *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) Decision of the ad hoc Committee on the Application for Annulment, 29 June 2012, **Exhibit RL-53**, para. 181.

4. Similarly, *ad hoc* committees have allocated costs taking into account whether the state prevailed on its application to annul the award.<sup>4</sup> As the committee in *Sempra v. Argentina* explained, this “is in line with equitable principles to let the rule that the costs-follow-the-event apply.”<sup>5</sup>

5. In addition, the costs award should reflect the circumstances of the annulment proceedings, including the manner in which the parties litigated their respective cases.<sup>6</sup> Most importantly, it is well-established that costs may be allocated taking into account whether a party has raised unmeritorious objections.<sup>7</sup>

**A. TGH SHOULD BEAR GUATEMALA’S COSTS RELATED TO TGH’S APPLICATION FOR ANNULMENT**

6. Based upon the principle that costs follow the event, if Guatemala is successful in its defense of TGH’s application for partial annulment, TGH should bear the costs that Guatemala incurred to defend against such application. As explained at the hearing, TGH’s application for annulment should be rejected as the Tribunal’s decision to deny future losses did not incur in any annulable errors. In particular, the Tribunal carefully reviewed the evidence on the record (or the lack thereof) and concluded that TGH had not proven such losses. It provided clear reasons for such decision and was not inconsistent.<sup>8</sup> Further, the Tribunal did not ignore any agreement between the parties as to damages or interest (as there was none) and the use of the phrase “unjust

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<sup>4</sup> *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **Exhibit RL-117**, para. 425.

<sup>5</sup> *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, **Exhibit RL-71**, paras. 227-28 (ordering Sempra to pay the ICSID administrative costs incurred by Argentina).

<sup>6</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award, 20 May 1992, **Exhibit RL-139**, para. 211.

<sup>7</sup> *Olguín v. Republic of Paraguay* (ICSID Case No ARB/98/5) Award, 26 July 2001, **Exhibit RL-140**, para. 85; *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011, **Exhibit RL-43**, para. 563 (the need to “take due account [...] of the costs implications of procedural motions raised by one or another party”); C Schreuer, *The ICSID Convention: A commentary* (2009), **Exhibit RL-141**, pgs. 1230-1231.

<sup>8</sup> See Annulment Hearing, tr. (English), Day Two, 407:6-452:3, Paradell; Annulment Hearing, tr. (English), Day Two, 453:14-458:5, Marigo.

enrichment” as shorthand for double recovery did not deprive TGH of its right to be heard.<sup>9</sup> As a result, TGH should be ordered to bear Guatemala’s costs.

7. The fact that TGH misused the annulment phase as an appeal process should also be taken into account in the exercise of the panel’s discretion. While parties to ICSID arbitration have an undeniable right to challenge an award, such right should not be abused in order to seek an appeal on the merits,<sup>10</sup> or a reassessment of the evidence on the record.<sup>11</sup>
8. As was clear at the hearing, TGH’s annulment application was largely an attempt to reargue the merits of its claim for damages for future losses. Indeed, TGH’s case rested upon a reassessment of the factual, expert and witness evidence that it presented during the original arbitration proceedings. Clear evidence of this is the fact that TGH dedicated the first forty minutes of its opening statement,<sup>12</sup> and its first 47 PowerPoint slides, to a restatement of its factual case from the original arbitration, without referring to a single legal argument on annulment.<sup>13</sup> More seriously, a series of factual allegations were presented in direct contradiction to the findings of the Tribunal, including the allegations that (a) the CNEE tried to “rig the system” by

<sup>9</sup> See Annulment Hearing, tr. (English), Day Two, 466:6-476:16, Marigo.

<sup>10</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102; *Maritime International Nominees Establishment (MINE) v. Government of Guinea* (ICSID Case No. ARB/84/4) Decision on the Application by Guinea for Partial Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08. See also TGH’s Counter-Memorial on Partial Annulment, para. 35.

<sup>11</sup> *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL- 64**, para. 65 (“[I]t is in the Tribunal’s discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced.”); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 96 (“An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties [...] it would not be proper for an *ad hoc* committee to overturn a tribunal’s treatment of the evidence to which it was referred.”); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) Decision on Annulment, 23 December 2010, **Exhibit RL-118**, para. 84 (“It is not for the *ad hoc* Committee to review, within the confines of the annulment proceeding, the consideration of the factual record by the Arbitral Tribunal”).

<sup>12</sup> See Annulment Hearing, tr. (English), Day One, 134:4-171:21, Menaker.

<sup>13</sup> See TGH’s Opening Presentation, Annulment Hearing, Day One, slides 1-47 (referencing Exhibits C-7, C-15, C-17, C-21, C-26, C-29, C-38, C-51, C-61, C-81, C-88, C-105, C-112, C-209, C-212, C-272, C-281, C-288, C-305, C-327, C-353, C-417, C-496, C-500, C-547, C-567, C-607, Expert report CER-2 and witness testimony CWS-7).

appointing two of the three experts (rejected as irrelevant by the Tribunal);<sup>14</sup> (b) the CNEE engaged in “improper” expert communications (rejected by the Tribunal);<sup>15</sup> (c) Guatemala arrested EEGSA managers in retaliation (rejected by the Tribunal);<sup>16</sup> and (d) Guatemala stole the laptop of an EEGSA foreign manager (rejected by the Tribunal).<sup>17</sup> Yet TGH ignored the Tribunal’s findings and even developed new interpretations for certain pieces of evidence during the annulment phase.<sup>18</sup> In this context, it was noteworthy that while TGH referred to the Citibank Fairness Opinion on just four occasions during the merits phase of the case, in the annulment phase – where evidentiary discussion is irrelevant – it referred to this exhibit 18 times.<sup>19</sup> Similarly, while it referred to EPM’s Non-Binding Offer Letter just three times during the merits phase, it referred to that same document on 16 different occasions in its annulment pleadings.<sup>20</sup>

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<sup>14</sup> Compare Annulment Hearing, tr. (English), Day One, 157:15-18, Menaker (“Then there’s a call for an Expert Commission, and then they try to rig the system to say, well, we appoint two of the three experts on the Expert Commission”) with Award, paras. 195-96 (“Government Resolution No. 145-2008 added an Article 98 bis to the RLGE [....]. If no agreement could be reached on the third member of the Expert Commission, that member would be appointed by the MEM from amongst the candidates proposed by the Parties. [...] This Government resolution [...] was not applicable to the current tariff review process [...]”).

<sup>15</sup> Compare TGH’s Opening Presentation, Annulment Hearing, Day One, slide 29 (“The CNEE Acted in Bad Faith and Engaged in Improper *Ex Parte* Communications”) with Award, para. 652 (“The Arbitral Tribunal is not convinced that, in communicating with Mr. Riubrugent, the regulator acted improperly.”).

<sup>16</sup> Compare Annulment Hearing, tr. (English), Day One, 167:10-13, Menaker (“the prosecutor’s office petitioned the criminal court to issue arrest warrants for two of EEGSA’s senior foreign managers, including Mr. Maté, who was EEGSA’s general manager, on baseless charges.”) with Award, para. 713 (“The Arbitral Tribunal, first of all, finds no evidence in the record that the arrest warrants issued in August 2008 against the managers of Mr. Maté and Mr. Gómez were such retaliatory measures. It rather appears that such arrest warrants were in connection with an unrelated dispute between EEGSA and a private company [...]”).

<sup>17</sup> Compare Annulment Hearing, tr. (English), Day One, 168:4-8, Menaker (“the other main foreign manager, who was also integrally involved in EEGSA’s Tariff Review, had his laptop stolen. And then he – at that point he and the other foreign managers fled the country, not to return”) with Award, paras. 714-15 (“his car had been broken into and his laptop computer had been stolen [...]. There is however no evidence that such events are attributable to the Respondent.”).

<sup>18</sup> Annulment Hearing, tr. (English), Day Two, 395:20-22, Blackaby.

<sup>19</sup> Annulment Hearing, tr. (English), Day Two, 387:3-13, Blackaby. In the merits phase of the arbitration, Exhibit C-531 was referred to a total of four times: Claimant’s Post-Hearing Brief, paras. 169, 171, 173; Reply, para. 293. Exhibit C-531 was referred to in order to justify EEGSA’s actual value and the reasonability of TGH’s comparable companies analysis. See also Guatemala’s Counter-Memorial on Partial Annulment, paras. 45-52.

<sup>20</sup> Annulment Hearing, tr. (English), Day Two, 387:3-13, Blackaby. In the merits phase of the arbitration, Exhibit C-557 was referred to only once: Reply, para. 293. Exhibit C-557 was referred to exclusively to justify the reasonability of TGH’s comparable companies analysis, as a response to Guatemala’s

9. In sum, TGH effectively requested that the Committee consider an appeal of the Tribunal's conclusions on the factual evidence and the findings on lost future damages.<sup>21</sup> This violates the well-established principle that an ICSID annulment committee cannot enter into the merits of a case,<sup>22</sup> and in particular cannot reconsider the weight that a tribunal afforded to evidence on the record.<sup>23</sup> The improper attempt to have this Annulment Committee review the Tribunal's factual findings also resulted in additional costs for Guatemala, which should be taken into account in the costs award.
10. Finally, irrespective of the panel's conclusions on the merits of the annulment application, it should make a partial costs award in favor of Guatemala in relation to TGH's untenable attempt to remove the stay of enforcement of the award. In its Memorial on Partial Annulment, TGH objected to Guatemala's request for the continuation of the stay of enforcement of the Award,<sup>24</sup> an objection that initiated a separate set of briefings by the parties, which resulted in 37 pages of pleadings and the submission of 23 new legal authorities.
11. TGH's application to remove the stay was completely untenable since the CAFTA-DR, the Treaty upon which TGH has relied in the present case, unequivocally mandates a stay of enforcement of any Award challenged in annulment. Article 10.26.6 of the CAFTA-DR provides that "[a] disputing party may not seek enforcement of a final award until [...] revision or annulment proceedings have been completed."

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argument that there were no companies comparable to EEGSA (Reply, para. 293, footnote 1427). See also Guatemala's Counter-Memorial on Partial Annulment, paras. 45-52.

<sup>21</sup> Annulment Hearing, tr. (English), Day Three, 485:21-487:9, Blackaby.

<sup>22</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102; *Maritime International Nominees Establishment (MINE) v. Government of Guinea* (ICSID Case No. ARB/84/4) Decision on the Application by Guinea for Partial Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08. See also TGH's Counter-Memorial on Partial Annulment, para. 35.

<sup>23</sup> *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, **Exhibit RL-60**, para. 112; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25) Decision on Annulment, 23 December 2010, **Exhibit RL-118**, para. 84.

<sup>24</sup> TGH's Memorial on Partial Annulment, paras. 140-145.

12. This is an absolute rule with no exceptions. No party to ICSID proceedings brought under the CAFTA-DR can seek enforcement of an award rendered in such proceedings until “revision or annulment proceedings have been completed.” Therefore, TGH’s request in its Memorial on Partial Annulment was inconsistent with its own attempt to annul part of the award and in open breach of Article 10.26.6 of the CAFTA-DR.
13. The Committee properly decided to reject the application.<sup>25</sup> Therefore, apart from the direct contradiction with the governing Treaty, in accordance with the principle of costs follow the event, the Committee should order TGH to reimburse Guatemala for the costs it incurred in this phase of the proceedings. Pursuant to the order of the Committee,<sup>26</sup> in this brief Guatemala presents a separate line item to detail the costs it incurred in defending against this unwarranted application.
14. In sum, the Committee should require TGH to reimburse Guatemala for the costs it incurred in defending against TGH’s annulment application, as that application lacked merit and misused the annulment process. As part of this costs award, the Committee ought to require TGH to reimburse Guatemala for the costs it incurred in defending against TGH’s baseless application to lift the stay of enforcement.

**B. TGH SHOULD BEAR GUATEMALA’S COSTS RELATED TO GUATEMALA’S APPLICATION FOR ANNULMENT**

15. In contrast with TGH’s application, Guatemala’s application raised serious annulment issues concerning jurisdiction, the absence of reasoning, plain contradictions in the Award (regarding the decision on historical damage, and the treatment of the Guatemalan Constitutional Court decisions), and the failure to apply international law. Each of these issues directly impacts the integrity of the ICSID process. As explained at the hearing, Guatemala’s application for annulment is well-founded.<sup>27</sup>

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<sup>25</sup> Decision on Guatemala’s Request for the Continuation of the Stay of Enforcement of the Award, 10 February 2015.

<sup>26</sup> *Ibid*, para. 36.

<sup>27</sup> Annulment Hearing, tr. (English), Day Three, 485:21-487:9, Blackaby. *See also*, for example, Annulment Hearing, tr. (English), Day Three, 552:3-16, Marigo.

16. Unlike TGH, Guatemala refrained from an improper review of the evidence and the merits. Guatemala's application focused solely on the adequacy of the Award itself. Further, as is clear from its opening slides, the only evidence that Guatemala asked that this Committee review were submissions and testimony by Mr. Damonte. This was because the Tribunal had stated in its award that such evidence did not exist and then proceeded to rely (and wholly accept) TGH's evidence in breach of basic due process.<sup>28</sup> Guatemala did not ask this Committee to evaluate or interpret the evidence but rather to note its existence contrary to the statement of the Tribunal.
17. The only exception to this related to Guatemala's examination of the decision on jurisdiction, given that such a review "allows the *ad hoc* committee full control over the findings of the arbitral tribunal."<sup>29</sup> As Guatemala explained at the hearing, unlike other bases for annulment, *ad hoc* committees consider the substance of a tribunal's decision to accept or reject jurisdiction.<sup>30</sup> Therefore, the review of certain factual evidence, such as the decisions of the Constitutional Courts of Guatemala, was appropriate in order to evaluate the substantive correctness of the decision on jurisdiction.
18. In sum, Guatemala's application raised crucial annulment issues and avoided an improper review of the evidence and the merits. Thus, TGH should bear its own costs as well as Guatemala's costs with respect to Guatemala's application for annulment, as that application should prevail.

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<sup>28</sup> Guatemala's Opening Statement, Day One, slides 89-92; Annulment Hearing, tr. (English), Day One, 115:4-116:10, Marigo. *See generally* Guatemala's complete submissions to the Annulment Committee at the Hearing on this issue: Annulment Hearing, tr. (English), Day One, 108:2-116:10, Marigo.

<sup>29</sup> Guatemala's Opening Statement, Day One, slide 20 (citing to P Pinsolle, "Jurisdictional Review of ICSID Awards", presentation, British Institute of International and Comparative Law (BIICL), 7 May 2004, **Exhibit RL-66**, p. 7).

<sup>30</sup> Guatemala's Opening Statement, Day One, slide 20 (citing F Berman, "Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration" in: E Gaillard (ed), *The Review of International Arbitral Awards* (2010) 253, **Exhibit RL-69**, p. 260).

### C. GUATEMALA'S COSTS ARE REASONABLE

19. Finally, in their decisions on costs allocation, *ad hoc* committees take into account the reasonableness of the costs claimed by each party, including the comparative costs incurred by one party versus the other.<sup>31</sup>
20. Guatemala's costs in these proceedings are reasonable given the two separate annulment applications. Those applications led to separate briefings, and required Guatemala to submit six briefs totalling more than 300 pages.<sup>32</sup> Those briefings addressed six separate grounds for annulment raised by TGH<sup>33</sup> as well as nine grounds for annulment raised by Guatemala. Given the volume and complexity of the issues raised, the costs incurred by Guatemala are reasonable.

### III. GUATEMALA'S COSTS

21. For the above reasons and pursuant to Article 52(4) of the ICSID Convention, Guatemala hereby requests reimbursement for the costs it has incurred in this arbitration, plus compound interest assessed at a reasonable commercial rate applicable from the date of the annulment decision to the date of payment of costs. These costs are as follows:

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<sup>31</sup> See *e.g. Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **Exhibit RL-117**, para. 425.

<sup>32</sup> See Guatemala's Application for Annulment, Guatemala's Memorial on Annulment, Guatemala's Counter-Memorial on Partial Annulment, Guatemala's Reply on Annulment, Guatemala's Rejoinder on Partial Annulment, Guatemala's Brief on the Stay of Enforcement.

<sup>33</sup> The grounds for annulment put forth by TGH were: (1) the Tribunal's reasoning for denying TECO's damages for loss of value cannot be reconciled with its other findings, (2) the Tribunal failed to state any reasons for disregarding the extensive documentary and expert evidence of loss of value, (3) the Tribunal unjustifiably penalized TECO for the purported evidentiary difficulties caused by Guatemala's Treaty breach, and imposed an impossible evidentiary burden upon TECO, seriously departing from a fundamental rule of procedure, (4) the Tribunal's treatment of evidence deprived TECO of its right to be heard, (5) the Tribunal overstepped the Parties' dispute, manifestly exceeding its powers and violating a fundamental rule of procedure, (6) the Tribunal's failure to award interest on the damages awarded for the period until 21 October 2010 and to apply the agreed-upon pre-award interest rate went beyond the Parties' dispute, and violated TECO's fundamental right to be heard. See TGH's Memorial on Partial Annulment, pgs. 2-3, Table of Contents.

Guatemala's Costs (in US\$)

<b>Guatemala's Application</b>	Total	1,186,480
	Fees	1,159,300
	Expenses	27,180
	Withholding tax*	177,972
	Total net of taxes	1,008,508
<b>TGH's Application</b>	Total	770,000.00
	Fees	739,335
	Expenses	30,665
	Withholding tax*	115,500
	Total net of taxes	654,500
<b>Stay of Enforcement Phase</b>	Total	135,295
	Fees	133,855
	Expenses	1440
	Withholding tax*	20,294.25
	Total net of taxes	115,000.75
	<b>Total net of taxes</b>	<b>1,778,008.75</b>

<b>ICSID Advance Payments</b>		450,000.00
	<b>Total</b>	<b>2,228,008.75</b>

\* Amount retained by Guatemala as non-recoverable withholding tax

Guatemala hereby offers to make available all underlying fee notes and disbursement information that the Committee may require in respect of the aforementioned costs. Respectfully submitted,



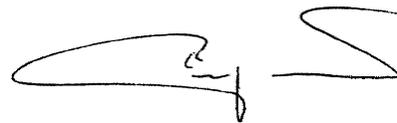
NIGEL BLACKABY



ALEJANDRO ARENALES



ALFREDO SKINNER KLÉE



RODOLFO SALAZAR