

**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 REQUEST  
FOR THE CONTINUATION OF THE STAY OF  
ENFORCEMENT OF THE AWARD**

**19 December 2014**

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This brief is submitted by the Republic of Guatemala (*Guatemala*) in accordance with the email from the Secretary of the Annulment Committee to the Parties dated 4 December 2014 containing the schedule of written submissions on the continuation/termination of the stay of enforcement of the Award.<sup>1</sup>
2. Guatemala submits that the Tribunal should continue the stay of enforcement, without Guatemala having to “provide security for the eventual payment of the award” as TGH requests,<sup>2</sup> for the following reasons:
  - (a) The CAFTA-DR, which is the treaty on which TGH has relied in the present case, unequivocally mandates a stay of enforcement. Article 10.26.6 of the CAFTA-DR provides that “[a] disputing party may not seek enforcement of a final award until [...] [ICSID] revision or annulment proceedings have been completed.” The analysis could end here. However, for the sake of completeness, Guatemala elaborates on further reasons why the stay of enforcement should be continued;
  - (b) The stay of enforcement of an ICSID award until a decision on annulment is issued is the usual practice of ICSID annulment committees, which only lift such stays in “very exceptional circumstances.”<sup>3</sup> This is because “the application for a stay is a justified exercise of the applicant’s procedural rights of defense,”<sup>4</sup> and not granting a stay or subjecting it to the obligation to post a

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<sup>1</sup> Capitalized terms not specifically defined in the present brief correspond to terms defined in previous briefs in these annulment proceedings.

<sup>2</sup> TGH’s Memorial on Partial Annulment, paras. 144-145.

<sup>3</sup> *Enron Corporation Poderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Stay of Enforcement of the Award, 7 October 2008, **Exhibit RL-89**, para. 43.

<sup>4</sup> *Ibid.*, para. 47.

bond would “risk compromising the important confidence-balancing function for state parties served by the annulment procedure”;<sup>5</sup>

- (c) The “very exceptional circumstances” that could justify the termination of the stay of enforcement are not present here. In particular, it should be noted that this case involves annulment applications from both Parties. This is a scenario in which a stay of enforcement without any security or bond is particularly warranted. As an annulment committee has held, “it would not in general be appropriate for an award to be enforced in circumstances where neither of the parties considers the award to be final with extant applications for Annulment having been made for the entire Award”;<sup>6</sup>
- (d) While evidence that the debtor may not comply with an award has sometimes been considered as a possible exceptional circumstance justifying the termination of the stay of enforcement, there is simply no evidence of this sort in relation to Guatemala. TGH affirms that the President of Guatemala has stated that Guatemala “does not have the funds to pay that amount,” *i.e.*, the amount of the Award.<sup>7</sup> However, that quote is the mere opinion of a newspaper journalist, and not a statement of the Guatemalan President. Guatemala has no record of non-compliance with ICSID on any other arbitral awards. In fact Guatemala has recently complied voluntarily with the one and only ICSID award made against it, and has reiterated its respect for the ICSID mechanism;

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<sup>5</sup> *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, **Exhibit RL-90**, para. 31.

<sup>6</sup> *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Argentina’s Application for a Stay of Enforcement of the Award, 23 October 2009, **Exhibit RL-91**, para. 14 (emphasis added).

<sup>7</sup> TGH’s Memorial on Partial Annulment, para. 143, quoting “The State to Appeal ICSID Award of Millions,” *Prensa Libre*, 22 December 2013, **Exhibit C-N-637**.

- (e) Guatemala's Application for Annulment is not dilatory. Suffice it to note that the challenged Award plainly contradicts the award in *Iberdrola v. Guatemala* (ICSID Case No. ARB/09/5) (*Iberdrola*). The *Iberdrola* case concerned the same facts and controversy at issue here, and the tribunal held that the claims brought by the investor were merely domestic law matters for which the tribunal had no jurisdiction. This direct contradiction between the two awards sufficiently indicates that Guatemala cannot be seen as pursuing a frivolous or merely dilatory annulment process;
- (f) The continuation of the stay would not cause any particular harm to TGH. This is clear from TGH's own conduct, which shows no urgency in enforcing the Award. TGH has never requested Guatemala to pay the Award, nor did it oppose promptly the stay of enforcement that Guatemala requested with its annulment application dated 18 April 2014. No doubt, because it is seeking annulment of a damages part of the Award. Indeed, TGH raised its objection to the continuation of the stay only on 17 October 2014, 6 months after Guatemala filed its Application for Annulment. Further, the case law is clear that a delay in an award being enforced while annulment proceedings are ongoing is remedied by interest, as would be the case here, and it is not a sufficient justification for lifting a stay of enforcement or requiring the provision of a bond or other security;
- (g) Conversely, case law acknowledges that requiring security or a guarantee for a stay of enforcement, not only is not provided by the ICSID Convention, but usually creates an unjustified imbalance between the parties, and serious harm to the debtor.

3. All these arguments are further developed in sections II to VIII below, and section IX contains Guatemala's request for relief.

## **II. THE STAY OF ENFORCEMENT IS MANDATED BY THE CAFTA-DR**

4. The CAFTA-DR, which is the treaty on which TGH relies in the present case, and whose provisions apply to these proceedings, specifically provides for the stay of enforcement of the Award.

5. Article 10.26.6 of the CAFTA-DR reads:

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.

6. This is not a conditional provision, subject to a party having to offer some “security for the eventual payment of the award,” as TGH argues.<sup>8</sup> It is an absolute rule. 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.” Clearly, the annulment proceedings have not been completed and that is the end of the question. By making this application, TGH is in breach of Article 10.26.6.

7. The analysis could end here. However, for the sake of completeness, Guatemala wishes to underline that even if that mandate did not exist in the CAFTA-DR, there are no circumstances in this case that could warrant the termination of the stay of enforcement or the ordering of security.

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<sup>8</sup> TGH’s Memorial on Partial Annulment, para. 144.

### III. THE STAY OF ENFORCEMENT IS USUALLY GRANTED WITH THE EXCEPTION ONLY OF CASES INVOLVING “VERY EXCEPTIONAL CIRCUMSTANCES”

8. Article 52(5) of the ICSID Convention and Rule 54 of the Arbitration Rules provide an automatic stay of enforcement of an award subject to annulment, pending the constitution of the annulment committee that will decide on the annulment application. Further, if we set aside for one moment the mandate of the CAFTA-DR which supplements the ICSID Convention and Rules, these provisions set forth the power of an annulment committee, upon request of a party, to maintain the stay of enforcement of the award pending its decision on annulment. While these provisions provide no guidance regarding the applicable standard for the continuation or termination of the stay of enforcement,<sup>9</sup> such standard has been discussed by various ICSID annulment committees.
9. Ever since the first ICSID annulment case, most annulment committees have accepted the need to continue the stay of enforcement of awards while an annulment is pending.<sup>10</sup>

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<sup>9</sup> *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, 30 November 2004, **Exhibit RL-92**, para. 23 (“No indication is given as to what kind of circumstances require a stay; therefore the Committee is free to evaluate the arguments of the Parties in view of the particularities of each case”).

<sup>10</sup> *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Indonesia* (ICSID Case No. ARB/81/1), Decision on the Application for Annulment, 16 May 1986, **Exhibit RL-70**, paras. 8-9; *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* (ICSID Case No. ARB/84/4) Interim Order No. 1 on Guinea’s Application for Stay of Enforcement of the Award, 12 August 1988, **Exhibit RL-93**, para. 28; *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Indonesia* (ICSID Case No. ARB/81/1-Resubmission), Interim Order No. 1 concerning the Stay of Enforcement of the Award, 2 March 1991, **Exhibit RL-94**, para. 19; *Wena Hotels LTD. v. Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002, **Exhibit RL-64**, paras. 10-12; *CDC Group PLC v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on whether or not to Continue Stay and Order, 14 July 2004, **Exhibit RL-95**, para. 23; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7) Decision on the Stay of Enforcement of the Award, 30 November 2004, **Exhibit RL-92**, Section IV; *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on the Respondent’s Request for a Continued Stay of Execution, 1 June 2005, **Exhibit RL-96**, para. 37; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/01/10), Procedural Order

10. As recently as earlier this year, the *Elsamex v. Honduras* annulment committee held that: “[t]he practice in previous annulment proceedings has been to grant the continuation of the stay.”<sup>11</sup> The annulment committee in *Patrick Mitchell v. Democratic Republic of Congo* found that “the Committee is inclined to accept the stay of enforcement, all the more so as this seems to be in conformity with the general practice [...] [T]he stay of enforcement of the award, pending an annulment procedure, was granted in

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No. 1 concerning the Stay of Enforcement of the Award, 22 December 2005, **Exhibit RL-97**, Section III; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 September 2006, **Exhibit RL-98**, para. 53; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, **Exhibit RL-90**, para. 45; *Enron Corporation & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Stay of Enforcement of the Award, 7 October 2008, **Exhibit RL-89**, para. 102; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 4 November 2008, **Exhibit RL-99**, para. 46; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 5 March 2009, **Exhibit RL-100**, para. 117; *Enron Corporation & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on the Claimants’ Second Request to Lift Provisional Stay of Enforcement of the Award, 20 May 2009, **Exhibit RL-101**, para. 46; *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Argentina’s Application for a Stay of Enforcement of the Award, 23 October 2009, **Exhibit RL-91**, para. 16; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, 5 May 2010, **Exhibit RL-102**, para. 35; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ICSID Cases No. ARB/05/18 and ARB/07/15), Decision on the Stay of Enforcement of the Award, 12 November 2010, **Exhibit RL-103**, para. 45; *Togo Electricité and GDF-Suez Energie Services v. Togo* (ICSID Case No. ARB/06/7), Decision on Annulment, 6 September 2011, **Exhibit RL-87**, para. 15; *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, 7 May 2012, **Exhibit RL-104**, para. 63; *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Argentina’s Request for Stay of Enforcement of the Award, 14 November 2012, **Exhibit RL-105**, para. 60; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (ICSID Case No. ARB/06/11), Decision on the Stay of Enforcement of the Award, 30 September 2013, **Exhibit RL-106**, para. 101; *Elsamex, S.A. v. Honduras* (ICSID Case No. ARB/09/4), Decision on the Continuation of the Stay of Enforcement of the Award, 7 January 2014, **Exhibit RL-107**, Section VI.

<sup>11</sup> *Ibid.*, para. 86. Unofficial English translation. In its original Spanish language it reads: “[l]a práctica en casos previos de anulación ha consistido en el otorgamiento de la continuación de la suspensión.”

all cases where such stay was requested.”<sup>12</sup> In 2010, the annulment committee in *Pey Casado v. Chile* even considered that the stay of enforcement “has now become almost automatic”.<sup>13</sup>

11. The reason for this general practice is that “the application for a stay is a justified exercise of the applicant’s procedural rights of defense.”<sup>14</sup> In the words of an annulment committee, not granting a stay or granting it with the request to post a bond would “risk compromising the important confidence-balancing function for state parties served by the annulment procedure.”<sup>15</sup>
12. In *Enron v. Argentina*, the annulment committee reaffirmed the practice of granting stays of enforcement during annulment proceedings, and added that a stay should be rejected only in “very exceptional circumstances”:

[U]pon an application for annulment, in general, a requested stay should be granted under Article 52(5) if requested, unless the Committee finds that there are very exceptional circumstances why this should not occur.<sup>16</sup>

13. It follows that the stay of enforcement should be granted unless there are “very”, *i.e.*, extremely or especially, exceptional circumstances that render it inadmissible.<sup>17</sup> In this case such extremely or very exceptional circumstances do not exist. Quite the contrary, even absent the mandate of

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<sup>12</sup> *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, 30 November 2004, **Exhibit RL-92**, para. 28.

<sup>13</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, 5 May 2010, **Exhibit RL-102**, para. 25.

<sup>14</sup> *Enron Corporation Poderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Stay of Enforcement of the Award, 7 October 2008, **Exhibit RL-89**, para. 47.

<sup>15</sup> *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic’s Request for a Continued Stay of the Enforcement of the Award, 28 December 2007, **Exhibit RL-90**, para. 31.

<sup>16</sup> *Enron Corporation Poderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Stay of Enforcement of the Award, 7 October 2008, **Exhibit RL-89**, para. 43.

<sup>17</sup> *Ibid.*

the CAFTA-DR, all circumstances point to the appropriateness of the continuation of the stay.

**IV. THE TERMINATION OF THE STAY IS PARTICULARLY INAPPROPRIATE WHERE, AS HERE, NEITHER PARTY REGARDS THE AWARD AS FINAL**

14. The termination of a stay of enforcement is particularly inappropriate in an instance such as the present one, in which both parties seek annulment of the Award. Enforcement of the Award is at odds with the fact that, in these circumstances, neither party regards the Award as final. Indeed, as a matter of simple logic, how can TGH seek enforcement of the Award when it seeks annulment of a part of the Award itself?
15. This was held by the annulment committee in *Continental Casualty v. Argentina*, in which both parties filed for annulment, but the applicant sought to enforce the parts of the award favourable to it, just as TGH here. In the words of the annulment committee:

A distinguishing feature of the present case is that each of Continental and Argentina has made applications for annulment of the Award. Of course Continental has not sought annulment of that part of the Award which was in Continental's favour, and which Continental seeks to be at liberty to enforce in the event that the stay of enforcement is terminated. Nevertheless, in the Committee's view, it would not in general be appropriate for an award to be enforced in circumstances where neither of the parties considers the award to be final with extant applications for Annulment having been made for the entire Award. This is a factor to which the Committee gives particular weight in deciding whether it is necessary or appropriate to impose a condition of security for any continuation of the stay.<sup>18</sup> (Emphasis added.)

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<sup>18</sup> *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Argentina's Application for a Stay of Enforcement of the Award, 23 October 2009, **Exhibit RL-91**, para. 14.

16. As indicated in this passage the annulment committee considered that the existence of cross-annulment applications was a key factor in justifying both the maintenance of the stay of enforcement and the rejection of the applicant's request for the respondent to provide security for the payment of the award:

Having considered all of the arguments of the parties, and all of the circumstances as a whole, the Committee concludes that in consideration of the [...] presence of cross applications for annulment, practical considerations may allow a continued stay of the enforcement of the Award pending the conclusion of the annulment proceedings without imposing any condition of security.<sup>19</sup>

**V. THERE IS NO PROOF THAT GUATEMALA WOULD NOT COMPLY WITH THE AWARD IF IT WERE NOT ANNULLED**

17. The only reason invoked by TGH for the termination of the stay of enforcement of the Award appears to be that Guatemala may ultimately not comply with the Award, if not annulled.<sup>20</sup> In support, TGH cites certain decisions of annulment committees.<sup>21</sup> However, TGH ignores that annulment committees have only considered clear and strong evidence of the intention not to comply with an award as a “very” exceptional circumstance that could justify the denial of the stay.
18. For example, TGH refers to the decisions in *CMS v. Argentina* and *MTD v. Chile*. However, these decisions do not support but rather contradict TGH's position. In *MTD v. Chile* the annulment committee held as follows:

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<sup>19</sup> *Ibid.*, para. 16.

<sup>20</sup> TGH's Memorial on Partial Annulment, paras. 142-143.

<sup>21</sup> *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 5 March 2009, **Exhibit RL-100**, para. 30; *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, **Exhibit RL-96**, para. 29; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006, **Exhibit RL-98**, para. 38.

The point for the Committee is to be satisfied that the State Party has taken appropriate steps in accordance with its constitutional arrangements to give effect to Article 54. Where it has done so, subsequent compliance by that State with a final award will be a matter of legal right under its own law, as well as under international law.<sup>22</sup> (Emphasis added.)

19. The committee in *CMS v. Argentina* adopted exactly this same language in its decision on the stay of enforcement.<sup>23</sup> Here, Guatemala has incorporated the ICSID Convention into its own legal system,<sup>24</sup> and thus compliance with an ICSID award is a legal requirement under its own law. This contradicts TGH's non-compliance argument.
20. Further, TGH provides no evidence that Guatemala may not comply with the Award. The only evidence TGH purports to submit is a Guatemalan newspaper article. It argues that the article quotes the Guatemalan President stating that "[a]chieving the annulment of the compensation ordered by ICSID is an automatic priority for the State *because it does not have the funds to pay that amount*".<sup>25</sup> TGH even emphasizes the sentence in italics.
21. However, it is sufficient to check the article to realize that TGH's argument is highly misleading: the sentence quoted is not a statement by the President, indeed it is not in quotation marks in the article, but a mere assertion by the

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<sup>22</sup> *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, **Exhibit RL-96**, para. 32.

<sup>23</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006, **Exhibit RL-98**, para. 41.

<sup>24</sup> Decree No. 50-96 of the Congress of the Republic of Guatemala, 20 June 1996, published in *Diario de Centroamérica* No. 45-1467 on 24 July 1996, **Exhibit R-252** (Guatemala is aware of section 14.1 of Procedural Order No. 1 and agrees with TGH's statement at footnote 438 of its Memorial on Partial Annulment. In this regard, the new factual evidence submitted by Guatemala is solely in connection with TGH's request for termination of the stay of enforcement of the Award. Specifically, **Exhibit R-252** is submitted solely in connection with TGH's argument that Guatemala will not comply with the Award, if not annulled (See TGH's Memorial on Partial Annulment, para. 143)).

<sup>25</sup> TGH's Memorial on Partial Annulment, para. 143, quoting *Prensa Libre, The State to Appeal ICSID Award of Millions*, 22 December 2013, **Exhibit C-N-637**.

journalist. Further, nothing in the statement quoted, which is not attributed to the President, refers to non-compliance with the Award. It alludes to a mere supposed, and seemingly only immediate (as the use of the present tense suggests), non-availability of funds.

22. TGH cannot provide any evidence regarding Guatemala's likely non-compliance with the Award because there is none. The evidence is to the contrary. Guatemala was found liable and ordered to pay compensation to the claimant in another ICSID case, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) (**RDC**). Such award has been satisfied voluntarily by Guatemala in agreement with the claimant.<sup>26</sup> Incidentally, Guatemala did not resort to annulment in that case, which indicates that Guatemala does not use annulment proceedings in a dilatory manner, an issue which will be examined in the section immediately below.
23. What is more, the current Government of Guatemala has publicly ratified its support for international dispute settlement and ICSID in particular. In relation to the dispute submitted to ICSID arbitration by Iberdrola, which is the same as the one brought by TGH, the Office of the President<sup>27</sup> stated in 2012, before the *Iberdrola* award was issued, that "the State of Guatemala ratifies its intention to protect foreign investment and its commitment to submit to the decision rendered by ICSID."<sup>28</sup> Further, Rubén Morales,

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<sup>26</sup> Proof of Bank Transfer from Fegua to Railroad Development Corporation of 115,347,592 Guatemalan Quetzals (equivalent to US\$14.6 million), 29 November 2013, **Exhibit R-253**; "Government Transfers US\$14.6 million", *Prensa Libre*, 30 November 2013, **Exhibit R-254** (the Spanish original reads as follows: "Gobierno Transfiere US\$14.6 Millones.") (Guatemala is aware of section 14.1 of Procedural Order No. 1 and agrees with TGH's statement at footnote 438 of its Memorial on Partial Annulment. In this regard, the new factual evidence submitted by Guatemala is solely in connection with TGH's request for termination of the stay of the enforcement of the Award. Specifically, **Exhibits R-253** and **R-254** are submitted solely in connection with TGH's assumption that Guatemala "has failed to give any reasonable assurances that it will pay the Award, if the Award is not annulled" (See TGH's Memorial on Partial Annulment, para. 143)).

<sup>27</sup> English translation of the term "*Casa Presidencial*."

<sup>28</sup> "Three Years Later: Tomorrow a Claim by Iberdrola Against Guatemala is to be Settled", *El Periódico*, 20 August 2012, **Exhibit R-255** (Spanish original reads as follows: "Después de tres años: Mañana se resuelve una demanda de Iberdrola contra Guatemala."). Unofficial

former Minister of Economy, referred to the outcomes of both the *RDC* and *Iberdrola* claims against Guatemala, stating that “Guatemala is reliable because as a State it commits to respect the legal framework, the principles contained in agreements and the outcomes of arbitral awards.”<sup>29</sup>

## VI. THE APPLICATION FOR ANNULMENT IS NOT DILATORY

24. Another factor that annulment committees have taken into consideration, when deciding whether there are “very” exceptional circumstances requiring the termination of the stay of enforcement of the award, is whether the application for annulment is of a dilatory nature.<sup>30</sup> However, committees have been clear that they “must assume that any application for annulment is made in good faith, and that the application for a stay is a justified exercise of the applicant’s procedural rights of defense.”<sup>31</sup>; “a *prima facie* dilatory application would be the one with a manifestly abusive character and would

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English translation. In its original Spanish language it reads: “el Estado de Guatemala ratifica su intención de proteger a la inversión extranjera y su compromiso de someterse a lo que legalmente establezca la sentencia dictada por Ciadi.” (See footnote 26 on section 14.1 of Procedural Order No. 1).

<sup>29</sup> “Rubén Morales: Guatemala is a Reliable Country”, *Prensa Libre*, 22 August 2012, **Exhibit R-256** (the Spanish original reads as follows: “Rubén Morales: Guatemala es un país confiable.”). Unofficial English translation. In its original Spanish language it reads: “Guatemala es confiable porque como Estado se compromete a respetar el marco jurídico, los principios de convenios y los resultados de los laudos arbitrales.” (See footnote 26 on section 14.1 of Procedural Order No. 1).

<sup>30</sup> *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* (ICSID Case No. ARB/84/4) Interim Order No. 1 on Guinea’s Application for Stay of Enforcement of the Award, 12 August 1988, **Exhibit RL-93**, para. 17; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, 30 November 2004, **Exhibit RL-92**, para. 26; *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, 7 May 2012, **Exhibit RL-104**, paras. 48-49; *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on the Respondent’s Request for a Continued Stay of Execution, 1 June 2005, **Exhibit RL-96**, para. 28.

<sup>31</sup> *Enron Corporation Poderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Stay of Enforcement of the Award, 7 October 2008, **Exhibit RL-89**, para. 47 (emphasis added).

for that reason only exclude the stay of enforcement.”<sup>32</sup> Clearly, this is not the case here.

25. Suffice it to consider the diametrically divergent conclusions reached by the ICSID tribunal in the *Iberdrola* case, which concerned the same facts and controversy. As is well known, the *Iberdrola* tribunal found that it had no jurisdiction *ratione materiae* because the fundamental basis of the claim presented related purely to domestic law matters and did not raise, even *prima facie*, to a credible claim of breach of investment treaty protections. This radical distinction between the two awards sufficiently indicates that Guatemala cannot be seen as pursuing a frivolous or merely dilatory annulment remedy.
26. It is also noteworthy that TGH itself believes that the award suffers from important defects such as to give rise to annulment so it cannot claim that Guatemala’s application is dilatory; rather, it should be wholly justified if the object of each application is to question the same award.

## **VII. CONTINUING THE STAY OF ENFORCEMENT WILL NOT BE DETRIMENTAL TO TGH**

27. Some annulment committees have found, among the exceptional circumstances that could justify lifting a stay of enforcement, or ordering the posting of a bond or other form of security, “where real prejudice beyond delay compensated for by interest may be shown, such as where a state denounces its obligations under the Convention or otherwise evinces an intention not to comply with the award.”<sup>33</sup> TGH cannot claim any prejudice of this sort since, as discussed above, Guatemala has always shown respect for the ICSID system.

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<sup>32</sup> *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, 30 November 2004, **Exhibit RL-92**, para. 26.

<sup>33</sup> *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, **Exhibit RL-90**, para. 44 (emphasis added).

28. TGH's conduct itself reveals no concern for the stay of enforcement of the Award. The Award is dated from exactly a year ago, 19 December 2013, and TGH has not yet sent any letter of demand to Guatemala requesting payment (presumably recognizing the inconsistency of demanding payment of a damages award that it is itself challenging). Further, Guatemala first requested the stay of enforcement and its maintenance during the entirety of the annulment proceedings in its Application for Annulment dated 18 April 2014.<sup>34</sup> TGH, however, only expressed its opposition to the stay in its Memorial on Partial Annulment of the Award dated 17 October 2014, *i.e.*, 6 months after Guatemala filed its Application for Annulment.<sup>35</sup> Thus, it is simply not credible that the non-enforcement of the Award is causing TGH any real harm.
29. Finally, in the event the Award were not annulled, the interest accrued during the annulment proceeding will compensate TGH for the passage of time. This conclusion is supported by several annulment committees.<sup>36</sup> For example, the *MTD* annulment committee found that "MTD will not be prejudiced by the grant of a stay, other than in respect of the delay which is, however, [...] remedied by the payment of interest in the event that the annulment application is unsuccessful."<sup>37</sup>

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<sup>34</sup> Guatemala's Application for Annulment, paras. 83-84, 86.

<sup>35</sup> TGH's memorial on Partial Annulment, paras. 140-145, 147.

<sup>36</sup> *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, **Exhibit RL-96**, para. 36; *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 28 December 2007, **Exhibit RL-90**, para. 40; *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Argentina's Request for Stay of Enforcement of the Award, 14 November 2012, **Exhibit RL-105**, para. 53.

<sup>37</sup> *MTD Equity Sdn Bhd. & MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on the Respondent's Request for a Continued Stay of Execution, 1 June 2005, **Exhibit RL-96**, para. 36 (emphasis added).

**VIII. REQUIRING SECURITY FOR A STAY OF ENFORCEMENT IS NOT PROVIDED BY THE ICSID CONVENTION, WOULD CREATE AN UNJUSTIFIED IMBALANCE BETWEEN THE PARTIES, AND SERIOUS HARM TO GUATEMALA**

30. Posting a bond, or any other form of security or guarantee of payment of an award, as a condition for the continuation of the stay of enforcement of the Award, is not provided by the ICSID Convention. In this regard, the *Azurix v. Argentina* annulment committee held that:

To apply a strict rule that the price for a stay is the provision of security appears to the Committee to create a positive gloss to the enforcement regime provided for under Section 6 of the Convention. Effectively, such an approach would be to add a provision that is neither express nor implicit in the ICSID Convention. Indeed, it would effectively abrogate the scheme for security in Section 6 (particularly under Article 54) and substitute for those expressly qualified rights an entitlement to absolute security.<sup>38</sup> (Emphasis added.)

31. The annulment committee concluded that the entitlement to security “would work in a *de facto* sense impermissibly to amend the ICSID Convention by substituting a new and absolute enforcement mechanism for the qualified provisions of the Convention itself.”<sup>39</sup>
32. Such conclusion is confirmed by the *travaux préparatoires* of the ICSID Convention. Indeed, the first draft of the current Article 52(5) of the Convention provided for the possibility that an annulment committee could require the provision of a guarantee in order to continue the stay of enforcement of the award.<sup>40</sup> However, the negotiators then specifically

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<sup>38</sup> *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 28 December 2007, **Exhibit RL-90**, para. 34.

<sup>39</sup> *Ibid.*, para. 35 (emphasis added).

<sup>40</sup> *History of the ICSID Convention* (1968), vol. I, **Exhibit RL-108**, p. 238.

decided against such rule.<sup>41</sup> In contrast, Article VI of the New York Convention establishes that “[...] the authority before which the award is sought to be relied upon may, if it considers it proper, [...] on the application of the party claiming enforcement of the award order the other party to give suitable security.”<sup>42</sup> Such possibility was explicitly rejected by the negotiators of the ICSID Convention.

33. Further, the posting of a bond would create an imbalance between the Parties. In the words of the *CMS* annulment committee, “it [would convert] the undertaking of compliance under Article 53 of the Convention into a financial guarantee and [would avoid] any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention.”<sup>43</sup>
34. In other words, subjecting Guatemala’s stay of enforcement to the posting of a guarantee would place TGH in a more favorable situation than it had prior to the application for the stay of enforcement. As held by an annulment committee, ensuring compliance with awards, if they are not annulled, is not a task of the annulment committee: “[i]t is not their [annulment committees’] task to ensure compliance with the respective award, regardless of the actions of the debtor in the case at hand or in others.”<sup>44</sup>
35. Moreover, as the annulment committee in *Enron* held, posting security as a condition to continue the stay of enforcement of an award penalizes annulment applications, and creates excessive hardship on the award debtor:

[T]he Committee [does not] accept the contention that  
a general requirement for security in return for a stay

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<sup>41</sup> *History of the ICSID Convention* (1968), vol. II, **Exhibit RL-109**, p. 858.

<sup>42</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 6 July 1958), Article VI.

<sup>43</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 September 2006, **Exhibit RL-98**, para. 39.

<sup>44</sup> *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Argentina’s Request for Stay of Enforcement of the Award, 14 November 2012, **Exhibit RL-105**, para. 56.

is desirable as a means of deterring frivolous or dilatory annulment applications, given that any such general requirement would penalise all applications, whether frivolous or dilatory or not.<sup>45</sup>

The hardship to an award debtor of providing security, either because of the cost of obtaining a bank guarantee or the consequences of freezing the amount due for the duration of the annulment proceedings, is a further reason why security should not be ordered as a matter of course.<sup>46</sup> (Emphasis added.)

36. Further, the obligation to provide security is contrary to the legitimate exercise of a right of defense which is inherent in the ICSID annulment mechanism. As expressed by the annulment committee in the *Mitchell* case, “the posting of a guarantee, which is always a burden, penalizes in fact the party that applies for annulment” and “a party must remain free to file such an application for annulment.”<sup>47</sup> The committee added:

Moreover, there is no doubt that in the absence of the annulment procedure, the States would not have ratified the ICSID Convention. And, on this point, the Committee is of the opinion that the DRC’s argument about the “deterrent effect” of the posting of a guarantee on the submission by developing countries of applications for annulment made in good faith, has a certain value.<sup>48</sup> (Emphasis added.)

## **IX. REQUEST FOR RELIEF**

37. In light of the above, the Republic of Guatemala respectfully requests the Annulment Committee to:

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<sup>45</sup> *Enron Corporation Poderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Stay of Enforcement of the Award, 7 October 2008, **Exhibit RL-89**, paras. 45.

<sup>46</sup> *Ibid.*, para. 51.

<sup>47</sup> *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, 30 November 2004, **Exhibit RL-92**, para. 40.

<sup>48</sup> *Ibid.*

- (a) Order the continuation of the stay of enforcement of the Award until a decision on annulment is rendered in these proceedings in accordance with Article 10.26.6 of the CAFTA-DR, without imposing any condition on Guatemala, particularly the provision of security or a bond; and
- (b) Order TGH to pay all of Guatemala's costs in defending its request for the continuation of the stay of enforcement of the Award.

Respectfully submitted,



Nigel Blackaby



Alejandro Arenales



Alfredo Skinner Klée



Rodolfo Salazar