INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S REPLY ON COSTS

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7 August 2013

CLAIMANT'S REPLY ON COSTS

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CLAIMANT'S REPLY ON COSTS

I. INTRODUCTION

1. In accordance with the Tribunal's letter dated 22 March 2013, Claimant hereby submits its Reply on Costs.

II. RESPONDENT SHOULD BEAR ALL OF THE COSTS OF THIS PROCEEDING

2. There is no dispute that the Tribunal has discretion under the DR-CAFTA, the ICSID Convention, and the ICSID Arbitration Rules to decide whether and in what amount to award costs.[1] In its Submission on Costs, Claimant demonstrated that Respondent should bear all costs incurred by Claimant in connection with this arbitration, including the fees of its counsel, the fees of its expert witnesses, translation costs, travel and other costs associated with the hearings, the fees and expenses of the members of the Tribunal, and the charges for using the facilities of the Centre, plus interest as of the date of the Award, because (1) Respondent breached its obligations under Article 10.5 of the DR-CAFTA,[2] and (2) Respondent engaged in procedural misconduct throughout the course of this proceeding, unfairly prejudicing Claimant and increasing unnecessarily Claimant's costs.[3]

3. In its Submission on Costs, Respondent argues that, if it prevails in the arbitration, Claimant should be ordered to pay costs to Respondent, because Claimant allegedly has sought through this arbitration "double recovery,"[4] and because Claimant's claim allegedly arises out of a purely regulatory dispute under Guatemalan law, which, according to Respondent, "should never have been initiated."[5] Respondent further argues that its costs in this arbitration reflect the fact that Claimant has "presented a large number (nine) of witnesses and experts" in this case.[6] Respondent's arguments do not withstand scrutiny.

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[1] Claimant's Submission on Costs dated 24 July 2013 ("Claimant's Submission on Costs") ¶ 2; Respondent's Submission on Costs dated 24 July 2013 ("Respondent's Submission on Costs") ¶ 2.

[2] Claimant's Submission on Costs ¶¶ 3-4.

[3] *Id.* ¶¶ 5-21.

[4] Respondent's Submission on Costs ¶ 6 (emphasis omitted).

[5] *Id.* ¶ 10.

[6] *Id.* ¶ 13.

4. *First*, and as previously explained,[7] by initiating this arbitration under the DR-CAFTA before Claimant sold its indirect interest in EEGSA to EPM in October 2010, Claimant has not sought double recovery.[8] The sale was a direct result of the CNEE's unlawful, arbitrary, and bad faith actions during EEGSA's 2008-2013 tariff review, culminating in the CNEE's unilateral imposition of the Sigla VAD and tariffs on EEGSA in August 2008, which decreased EEGSA's VAD by approximately 45 percent and led to the downgrading of EEGSA by the preeminent rating agencies.[9] As the record reflects, between August 2008 (when the CNEE unilaterally imposed the Sigla VAD and tariffs) and October 2010 (when Claimant sold its indirect interest in EEGSA), Claimant earned substantially less from its investment than it would have had Guatemala acted in accordance with its Treaty obligations.[10] Claimant then sold its indirect interest in EEGSA in October 2010 for much less than it would have been worth, if the CNEE had acted in accordance with its international obligations to accord Claimant's investment in EEGSA fair and equitable treatment.[11] Claimant thus has sought in this arbitration recovery of its portion of EEGSA's lost cash flow from August 2008 until October 2010, as well as its share of the lost value from EEGSA's sale in October 2010;[12] this does not amount to "double recovery," and, indeed, it is significant that Respondent's own experts have refused to endorse Respondent's blatantly erroneous suggestion to the contrary.

5. *Second*, Claimant has not submitted a frivolous or speculative claim arising out of a purely regulatory dispute that already has been rejected by the Guatemalan courts, nor has Claimant in any way "disguised" its claim in order to bring it before this Tribunal, as Respondent contends.[13] As Claimant has shown, Claimant's claim arises out of Guatemala's deliberate and bad faith actions designed to prevent EEGSA from having its VNR and VAD calculated based upon the new replacement value of a model efficient network in accordance with the legal

[7] *See* Tr. (21 Jan. 2013) 339:15-341:3 (Claimant's Rebuttal); Claimant's Post-Hearing Reply ¶ 124 fn. 610; Claimant's Post-Hearing Brief ¶¶ 56-59.

[8] Respondent's Submission on Costs ¶ 6.

[9] Claimant's Post-Hearing Reply ¶ 153; Claimant's Post-Hearing Brief ¶¶ 79, 186; Reply ¶¶ 9, 219-222; Callahan II ¶ 3 **(CWS-8)**.

[10] Reply ¶ 221; Callahan II ¶ 2 **(CWS-8)**.

[11] Reply ¶ 221; Callahan II ¶ 3 **(CWS-8)**; Memorial ¶¶ 227, 298.

[12] Reply ¶ 288; Memorial ¶¶ 284-286.

[13] Respondent's Submission on Costs ¶¶ 7-11.

framework, and thus to ensure a substantial decrease in EEGSA's 2008-2013 VAD and tariffs, in breach of its obligations under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment.[14] In addition, the claim presented to this Tribunal and the claims that were filed in the Guatemalan courts are not only entirely different, but also were brought by different parties.[15] As the record reflects, after challenging the CNEE's actions administratively through the MEM, EEGSA—not Claimant—submitted *amparo* petitions to the Guatemalan courts under Guatemalan law challenging the CNEE's Resolutions.[16] By contrast, TECO has filed this claim in arbitration challenging Guatemala's actions under international law. Furthermore, and as already explained at length, the fact that the Guatemalan Constitutional Court ultimately validated the CNEE's actions under Guatemalan law—on the basis of an amended regulation that contravened the specific representations made to Claimant regarding the manner in which EEGSA's VAD would be calculated—does not in any way preclude liability under the DR-CAFTA, nor does it render Claimant's claim in this arbitration frivolous or speculative, as Respondent would have this Tribunal believe.[17] Not only is it well established that a State cannot use its own judicial system to insulate itself from a violation of an international law obligation,[18] but the Guatemalan Constitutional Court did not consider whether, in unilaterally imposing the Sigla VAD and tariffs on EEGSA—after EEGSA had fully participated in the tariff review process—Guatemala acted contrary to its prior specific representations, whether the 2007 amendment to RLGE Article 98 upon which the Court relied fundamentally altered the preexisting regulatory framework that had been adopted to attract and to induce foreign investment in EEGSA, or whether the CNEE had conducted EEGSA's tariff review in an arbitrary and unfair manner.[19]

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[14] Claimant's Post-Hearing Reply ¶¶ 63-123; Claimant's Post-Hearing Brief ¶¶ 117-164; Rejoinder on Jurisdiction ¶¶ 14-24.

[15] Claimant's Post-Hearing Reply ¶¶ 16-17; Claimant's Post-Hearing Brief ¶¶ 47-54; Rejoinder on Jurisdiction ¶ 49.

[16] Claimant's Post-Hearing Reply ¶ 16; Claimant's Post-Hearing Brief ¶ 53; Reply ¶¶ 208-216; Memorial ¶ 204.

[17] Respondent's Submission on Costs ¶¶ 7-11.

[18] Claimant's Post-Hearing Reply ¶ 19; Claimant's Post-Hearing Brief ¶ 9; Reply ¶ 282.

[19] Claimant's Post-Hearing Reply ¶ 16; Claimant's Post-Hearing Brief ¶¶ 105, 111-116; Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 13-15 **(C-331)**; Resolution of the Constitutional Court regarding Amparo 37-2008 dated 24 Feb. 2010, at 17 **(C-345)**.

6. In addition, the tribunal's decision in the *Iberdrola v. Guatemala* arbitration with respect to costs is irrelevant to this arbitration.[20] As Claimant has explained, the tribunal's decision in *Iberdrola* that Iberdrola's claims were purely regulatory and thus outside the jurisdiction of the tribunal, with the exception of its denial of justice claim, is inapposite.[21] Unlike in *Iberdrola*, Claimant, throughout its written and oral submissions in this case, has demonstrated by reference to investment treaty jurisprudence and to other sources of international law that, if its allegations are proven to be correct, "the consequence would be that the Respondent violated the treaty or international law."[22] In addition, Claimant has expressly asked this Tribunal to review Guatemala's actions not in light of Guatemalan law, but in light of Guatemala's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment.[23] Unlike what was found to be the case in *Iberdrola*, Claimant thus has not submitted to arbitration a dispute under Guatemalan law.[24]

7. *Third*, Respondent's complaint that it should be entitled to costs, because Claimant has "presented a large number (nine) of witnesses and experts" in this arbitration is ironic.[25] Both Claimant and Respondent have presented the same number of expert witnesses in this case (three; one on issues of Guatemalan law, one on industry-specific issues, and one on valuation). In fact, Claimant did not even present an industry expert on electricity regulation with its Memorial, but engaged Dr. Barrera for its Reply submission in order to rebut Mr. Damonte's expert report submitted by Respondent. This further highlights Respondent's bad faith in repeatedly arguing that (1) the Tribunal lacks jurisdiction, because this is a so-called "technical" dispute, when Respondent itself was the party which introduced the technical arguments, to which Claimant was compelled to respond, and (2) it is entitled to costs, because it

[20] Respondent's Submission on Costs ¶¶ 9-10.

[21] Claimant's Post-Hearing Reply ¶ 20; Claimant's Post-Hearing Brief ¶¶ 47-48; Rejoinder on Jurisdiction ¶¶ 25-30.

[22] *Iberdrola v. Guatemala* ¶ 357 **(RL-32)**.

[23] Claimant's Post-Hearing Reply ¶ 21; Claimant's Post-Hearing Brief ¶¶ 25-54; Rejoinder on Jurisdiction ¶¶ 14-24.

[24] Claimant's Post-Hearing Reply ¶¶ 20-22; Claimant's Post-Hearing Brief ¶¶ 25-54; Rejoinder on Jurisdiction ¶¶ 43-48.

[25] Respondent's Submission on Costs ¶ 13.

had to undertake "the analysis of highly complex technical regulatory issues,"[26] when Claimant repeatedly has argued that it is not the role of this Tribunal, but was the role of the Expert Commission, to decide these issues. In addition, with respect to fact witnesses, Claimant presented six fact witnesses, each of whom has personal knowledge of the events at issue in this case, while Respondent chose to present only two fact witnesses, Messrs. Moller and Colom, and to conceal from this Tribunal the individuals with actual, first-hand knowledge of the events at issue, many of whom continue to work for the CNEE, including Mr. Quijivix, and many of whom were engaged by Respondent as consultants, including Mr. Riubrugent, other consultants from Mercados Energéticos, and consultants from Sigla.[27] This allowed Respondent to prop up its *post-hoc* arguments in this arbitration with uncorroborated and inaccurate hearsay testimony, further evidencing Respondent's bad faith conduct in this proceeding.

8. *Finally*, Respondent's costs highlight the reasonableness of Claimant's own costs. Unlike Respondent's counsel and the majority of its experts, Claimant's counsel and experts were not involved in the *Iberdrola* arbitration and thus did not have the benefit of prior familiarity with the issues in dispute. As Claimant noted in its Submission on Costs, Claimant's costs in this arbitration are reasonable in view of the length of the proceedings, the two merits hearings, and the issues in dispute in this case.[28]

9. For all of the reasons set forth above, Claimant thus respectfully requests that the Tribunal order Respondent to bear all of Claimant's costs incurred in this proceeding to date, plus interest from the date of the Award, as set forth in the chart below.

[26] *Id.*

[27] Claimant's Post-Hearing Brief ¶ 6.

[28] Claimant's Submission on Costs ¶ 22.

	INCURRED COSTS (US$)
WHITE & CASE LEGAL FEES & EXPENSES	
WHITE & CASE LLP FEES	**US$ 5,883,811.65**
WHITE & CASE LLP COSTS (NOT INCLUDING TRANSLATION COSTS)	**US$ 217,867.86**
WHITE & CASE LLP TRANSLATION COSTS	**US$ 226,223.78**
TOTAL WHITE & CASE FEES & EXPENSES	**US$ 6,327,903.29**
EXPERT & CONSULTANT FEES & EXPENSES	**US$ 2,932,603.33**
TECO ARBITRATION EXPENSES	**US$ 17,087.24**
ICSID COSTS	**US$ 750,000**
TOTAL INCURRED COSTS	**US$ 10,027,593.86**

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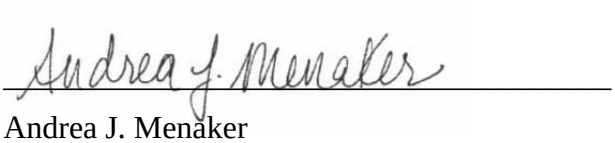
Respectfully submitted,



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