

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
ICSID CASE NO. ARB/10/23**

TECO GUATEMALA HOLDINGS, LLC

CLAIMANT

REPUBLIC OF GUATEMALA

RESPONDENT

RESPONDENT'S REQUEST FOR COSTS

24 JULY 2013

I. INTRODUCTION

1. Pursuant to the instructions set forth in the Tribunal's note to the Parties dated 22 March 2013,¹ the Republic of Guatemala (the *Respondent* or *Guatemala*) hereby submits a summary of the costs² that it has incurred in this arbitration. Guatemala respectfully asks the Tribunal to order Teco Guatemala Holdings, LLC (the *Claimant* or *TGH*) to bear these costs in their entirety, plus interest assessed at a reasonable commercial rate applicable from the date of the award to the date of payment of such costs.³ This Request for Costs has been written in Spanish and translated into English. Therefore, in the event of any discrepancy or ambiguity, Guatemala requests that TGH and the Tribunal refer to the original Spanish version.

II. THIS TRIBUNAL HAS AUTHORITY TO DETERMINE ARBITRATION COSTS AND ITS APPORTIONMENT BETWEEN THE PARTIES

2. Article 61(2) of the ICSID Convention grants the Tribunal authority to determine arbitration costs and how to apportion such costs between the parties, as follows:

In the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

3. It is a generally accepted principle in international arbitration that the term "expenses" should be construed broadly so as to include: (i) fees, allowances and any other expense incurred by attorneys and experts; and (ii) all allowances and costs incurred by witnesses, counsel and representatives of the parties.⁴
4. Furthermore, international arbitration practice has also accepted the principle that "the

¹ Also see e-mail of the Parties of 25 June 2013, which shows the Parties' agreement to postpone the submission of petitions for costs until 24 July 2013.

² In this petition, the terms "cost" or "expense" are used interchangeably.

³ *Cementownia "Nowa Huta" S. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2), Award, 17 September 2009, **RL-42**, para. 179(3); *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, 13 August 2009, **RL-41**, p. 33(4).

⁴ Schreuer, *The ICSID Convention: A commentary* (Second Edition, 2009), Chapter VI, Article 61, **RL-40**, para. 15.

successful party should be paid its reasonable legal costs by the unsuccessful party”⁵ or, if the outcome is not clear, costs must be apportioned in view of the relative success of each party’s claims.⁶ The case law of international arbitral tribunals also holds that a decision on costs may take into consideration the particular circumstances of the case.⁷ In this regard, the decision of the ICSID tribunal in *Libananco v. Turkey*, in which the tribunal admitted that the apportionment of costs may also be used to discourage over-litigation, should be recalled:

The present Tribunal is of the view that a rule under which costs follow the event serves the purposes of compensating the successful party for its necessary legal fees and expenses, of discouraging unmeritorious actions and also of providing a disincentive to over-litigation.⁸

5. As explained below, based on the criteria established by the aforementioned case law, the lack of any jurisdictional basis or any merit in the claim that TGH has filed with this Tribunal should lead this Tribunal to order TGH to pay all of the costs incurred by Guatemala in its defence.

III. TGH MUST BEAR THE COSTS OF ITS OPPORTUNISTIC AND UNFOUNDED CLAIM

6. The claim that TGH submitted to this Tribunal revealed its serious shortcomings from the start. Indeed, as Guatemala has mentioned in its presentations, only a day after having initiated this arbitration, the Claimant announced the sale of its shares in EEGSA for several hundred millions.⁹ That is to say, TGH’s objective of obtaining *double recovery* of its investment in EEGSA was clear from the beginning.
7. TGH’s opportunism is even more evident when one notes that, when it initiated this claim, TGH had already pursued it locally in Guatemala (through EEGSA) up to the highest

⁵ *Methanex Corporation v. United States of America*, Final award of 3 August 2005 (UNCITRAL Arbitration), **RL-39**, part V, para. 10. Also see, for example: *Burimi SRL and Eagle Games S.H.A v. Republic of Albania* (ICSID Case No. ARB/11/18), Award, 29 May 2013, Chapters V and VI.

⁶ Schreuer, *The ICSID Convention: A commentary* (Second Edition, 2009), Chapter VI, Article 61, **RL-40**, paras. 19-21. Also see Petrochilos, *Procedural Law in International Arbitration* (2004), **RL-38**, para. 5.125(8).

⁷ *Cementownia “Nowa Huta” S. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2), Award, 17 September 2009, **RL-42**, para. 177; and *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Award, 2 September 2011, **RL-43**, para. 562.

⁸ *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Award, 2 September 2011, **RL-43**, para. 563.

⁹ Respondent’s Post-Hearing Brief, para. 9.

domestic judicial body in the country: the Constitutional Court.¹⁰ And it had done so because back then it correctly understood that this was (and continues to be) a purely regulatory dispute. However, dissatisfied with the Constitutional Court’s decision, TGH tried to disguise its claim in order to bring it to a new forum for review: this Tribunal.

8. And if the decision of the local courts did not sufficiently indicate to TGH that its claim lacked any merit, the *Iberdrola* award, based on the same facts as this claim, should have done so. In *Iberdrola*, the tribunal confirmed that this case did not fall within the scope of an international tribunal, deciding that its jurisdiction was restricted solely to disputes or differences “related to violations of the substantive provisions of the treaty itself.”¹¹ In that case, the tribunal denied that the claim was “a genuine claim” that Guatemala violated the applicable treaty.¹² This is precisely the case here. With respect to the only claim that the tribunal in *Iberdrola* agreed to hear (denial of justice, which TGH has not alleged), the tribunal found that there had been no breach by Guatemala.
9. In rejecting the claim of the investor, the tribunal in *Iberdrola* correctly ordered that it should bear the procedural costs incurred by Guatemala in its defence— a total of US\$ 5,312,107.00. Among the grounds outlined for ordering the claimant to pay such costs, the tribunal in *Iberdrola* considered that:
 - “[t]he objection to jurisdiction filed by the Respondent was successful against the main claims of the Claimant”;¹³
 - “[t]he only substantive claim that the Tribunal could find [i.e. denial of justice] was dismissed”;¹⁴
 - “[t]he Tribunal could not confirm the Claimant’s allegation that the Guatemalan authorities did not act in good faith.”¹⁵
10. In summary, in *Iberdrola* the tribunal concluded that that claim should never have been initiated and that, therefore, it was not appropriate for Guatemala to bear the costs of having to defend itself. The same principles that the tribunal mentioned in *Iberdrola* are applicable to

¹⁰ Counter-memorial, Section II.B; Rejoinder, Section III.C.

¹¹ *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 306.

¹² *Ibid.*, para. 368.

¹³ *Ibid.*, para. 516.

¹⁴ *Ibid.*, para. 516.

¹⁵ *Ibid.*, para. 517.

this case. Indeed, the above considerations with respect to TGH's decision to initiate and then pursue its claim reveal the frivolity of this claim. Furthermore, TGH's claim has even less merit than Iberdrola's claim given the more restrictive protection offered by the minimum standard of treatment of customary international law of the DR-CAFTA, compared to the autonomous standard of fair and equitable treatment applicable in the *Iberdrola* case.¹⁶

11. It is particularly unfair for Guatemala to have to bear the costs of defending itself from a claim that should never have been filed. It is not right for a developing country such as Guatemala, which faces huge challenges because of its limited financial resources, to be forced to pay the costs of defending itself in a claim as speculative as this one. As the above-mentioned *Libananco* award explains, future claimants must be dissuaded from pursuing this type of frivolous claim through the imposition of the requirement to pay the respondent's costs.¹⁷

IV. COSTS OF THE REPUBLIC OF GUATEMALA IN THIS CASE

12. Pursuant to Rule 28(2) of the Arbitration Rules and Article 61(2) of the ICSID Convention, the Respondent hereby requests reimbursement for the costs it has incurred in this arbitration in the total amount of US\$ 5,000,047.43. The costs in question include: (i) advances of fees and expenses of the members of the Tribunal and ICSID's administrative fees (see Section i, *infra*); (ii) Allowances and other reasonable costs of the witnesses and representatives of the Government of Guatemala (see Section ii, *infra*); and (iii) costs of legal and expert representation and assistance incurred by Guatemala (see Section iii, *infra*).
13. A summary of all expenses and costs appears at Annex I. In this respect, Guatemala notes that the expenses and costs claimed reflect, among others, expenses related to: (i) the preparation of answers to TGH's voluminous presentations (with its corresponding translations), including the analysis of highly complex technical regulatory issues; and (ii) the work required in connection with TGH having presented a large number (nine) of witnesses and experts. In view of the complexity of this case, the Tribunal must conclude that these costs are reasonable and, therefore, must be paid in their entirety, plus interest at a reasonable commercial rate applicable from the date that the award is issued to the date that they are

¹⁶ Respondent's Post-Hearing Brief, paras. 247-291.

¹⁷ *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Award, 2 September 2011, **RL-43**, para. 563.

paid in full by TGH.

i. Advances of fees and expenses of Tribunal members and ICSID's administrative fees

14. To date, Guatemala has paid, by way of an advance, US\$ 475,000.00 in fees and expenses of the Tribunal members and ICSID's administrative fees.¹⁸ It therefore requests reimbursement from TGH for these amounts plus any additional amounts to be paid in the future in this regard.

ii. Allowances and other reasonable costs of the witnesses and representatives of the Government of Guatemala

15. Guatemala also requests reimbursement of costs incurred in relation to (i) the preparation of the statements of its witnesses and their participation in the Hearing, and (ii) consulting support provided by the CNEE¹⁹. The aggregate amount for such costs is US\$ 154,409.33.

iii. Costs of legal and expert representation and assistance incurred by Guatemala

16. Guatemala also demands reimbursement of the costs for legal and expert representation incurred during this arbitration, broken down as follows:

a) Fees and expenses of the team of international lawyers

17. Guatemala hereby requests reimbursement of fees and expenses incurred by the legal team from Freshfields Bruckhaus Deringer US LLP, totalling US\$ 2,961,396.18.

b) Fees and expenses of local lawyers

18. Guatemala hereby requests reimbursement of fees and expenses incurred by its local lawyers, Messrs. Alejandro Arenales, Alfredo Skinner Klée and Rodolfo Salazar, totalling US\$ 124,666.68.

c) Fees and expenses of Guatemala's experts

19. Guatemala hereby requests reimbursement of the fees and expenses of its experts, broken down as follows:

¹⁸ Letters from ICSID dated 31 March 2011 and 26 June 2012, acknowledging receipt of the advances for expenses paid by Guatemala.

¹⁹ Guatemala notes the reduced number of witnesses it presented in the arbitration compared to TGH.

- (a) Technical expert, Mr. Mario Damonte, totalling US\$ 424,700.24.
- (b) Financial experts, Messrs. Marcelo Schoeters and Manuel Abdala, totalling US\$ 774,375.00.
- (c) Legal expert, Dr. Juan Luis Aguilar, totalling US\$ 85,500.00.

20. Guatemala hereby offers to make available any additional information that the Tribunal may require in respect of the aforementioned costs.

Washington, D.C., 24 July 2013.



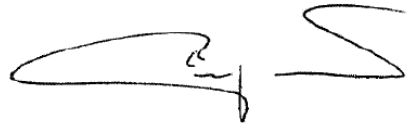
Nigel Blackaby



Alejandro Arenales



Alfredo Skinner Klée



Rodolfo Salazar

ANNEX I

SUMMARY OF EXPENSES AND COSTS REQUESTED BY THE RESPONDENT

| | |
|---|--------------------------|
| 1. Advances of fees and costs of the Tribunal and administrative fees of ICSID | |
| | US\$ 475,000.00 |
| 2. Allowances and costs of the witnesses and representatives of the Government | |
| | US\$ 154,409.33 |
| 3. Costs of legal and expert representation and assistance | |
| Freshfields Bruckhaus Deringer US LLP | US\$ 2,961,396.18. |
| Messrs. A. Arenales, A. Skinner Klée and R.Salazar | US\$ 124,666.68 |
| Dr. Mario C. Damonte | US\$ 424,700.24 |
| Mr. Marcelo Schoeters and Mr. Manuel Abdala | US\$ 774,375.00 |
| Dr. Juan Luis Aguilar | US\$ 85,500.00 |
| TOTAL | US\$ 5,000,047.43 |