
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 RESPONSE TO GUATEMALA'S REQUEST FOR THE
CONTINUATION OF THE STAY OF ENFORCEMENT OF THE AWARD**

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CLAIMANT’S RESPONSE TO GUATEMALA’S REQUEST FOR THE CONTINUATION OF THE STAY OF ENFORCEMENT OF THE AWARD

I. INTRODUCTION

1. Pursuant to the instructions of the Committee dated 25 November 2014 and the procedural schedule agreed by the parties and approved by the Committee on 4 December 2014, TECO Guatemala Holdings, LLC (“TECO” or “Claimant”) hereby submits this Response to Guatemala’s Request dated 19 December 2014 for the Continuation of the Stay of Enforcement (“Request for the Continuation of the Stay of Enforcement”) of the Award rendered on 19 December 2013 (the “Award”) in *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23.

2. As explained below, Guatemala is wrong to suggest that, by opposing Guatemala’s request in its Memorial on Partial Annulment, TECO is responsible for this phase of the proceeding. Rather, this phase of the proceeding was triggered by Guatemala’s requests. In any event, in light of the assurances provided by Guatemala in its Request for the Continuation of the Stay of Enforcement that Guatemala would comply with the Award if it is not annulled, TECO does not oppose the stay of enforcement of the Award in the absence of Guatemala posting a bond, should the Committee consider such a stay to be appropriate in the circumstances. Accordingly, in Claimant’s view, further submissions on the stay of enforcement requested by Guatemala are unnecessary. There is no basis, however, for the Committee to order Claimant to pay Respondent’s costs in defending its request for the continuation of the stay of enforcement of the Award, as elaborated below.

II. THE PROCEDURE CONCERNING THE STAY OF ENFORCEMENT

3. Article 53(1) of the ICSID Convention provides that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention,” and that “[e]ach party shall abide by and comply with the terms of the award *except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*”¹ It follows that, absent a stay of enforcement established

¹ ICSID Convention, Art. 53(1) (emphasis added).

pursuant to the provisions of the ICSID Convention, once an award under the ICSID Convention has been rendered, the award debtor is under an immediately binding international obligation to satisfy the award in full.² Where the award directs the award debtor to pay without providing a grace period for payment, such as here,³ compliance with the award means payment in full, without delay. The obligation to abide by and comply with the terms of the award is unconditional, and does not depend upon any further steps or formalities.⁴

4. Guatemala argued for the very first time in its Request for the Continuation of the Stay of Enforcement that, pursuant to Article 10.26.6 of the DR-CAFTA, “[a] disputing party may not seek enforcement of a final award until . . . annulment proceedings have been completed,”⁵ which, according to Guatemala, means that “that is the end of the question,”⁶ and that the “analysis could end here.”⁷ Guatemala also argues that Article 10.26.6 of the DR-CAFTA “supplements the ICSID Convention and Rules.”⁸ Putting aside the fact that Guatemala previously relied upon the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules,⁹ rather than Article 10.26.6 of the DR-CAFTA, in seeking a stay of

² See CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2d ed., Cambridge University Press, 2009) Art. 53, p. 1111 ¶ 50 (stating that “[u]nder the terms of the Convention, the obligation to comply with the award arises when the award is rendered, that is on the date on which the certified copies are dispatched This means that the parties must take all steps to give effect to it promptly.”) (CL-N-152); *id.*, pp. 1109-1110 ¶¶ 47-48 (explaining that during the drafting of the ICSID Convention, there was considerable debate as to the exact time when the parties to the dispute must comply with an award and that the drafters decided not to incorporate into the ICSID Convention a general grace period for compliance with an award).

³ See Award ¶ 780(C) (“The Arbitral Tribunal decides . . . [t]hat Guatemala shall pay US\$21,100,552 to Teco as damages”); *id.* ¶ 780(F) (holding that “Guatemala shall . . . pay US\$ [sic] US\$7,520,695.39 to Teco on account of its legal costs and expenses”).

⁴ See ICSID Convention, Art. 53(1) (not conditioning the requirement of compliance with an award upon any further steps or formalities). According to Guatemala, “TGH has not yet sent any letter of demand to Guatemala requesting payment.” Guatemala’s Request for the Continuation of the Stay of Enforcement ¶ 28. That, however, does not absolve Guatemala from its obligation to comply with the Award under Article 53(1) of the ICSID Convention.

⁵ Dominican Republic – Central America – United States Free Trade Agreement dated 5 Aug. 2004, Chapter Ten, Art. 10.26.6 (CL-1).

⁶ Guatemala’s Request for the Continuation of the Stay of Enforcement ¶ 6.

⁷ *Id.* ¶ 7.

⁸ *Id.* ¶ 8.

⁹ See Guatemala’s Application for Annulment dated 18 Apr. 2014 ¶ 5 (“In accordance with article 52(5) of the Convention and rule 54 of the Rules of Arbitration, Guatemala requests that enforcement of the Award should

enforcement of the Award, Guatemala’s argument ignores the fact that the provisions in the ICSID Convention regarding compliance with awards are absolute, and that Article 53(1) of the ICSID Convention links the suspension of the obligation to abide by and to comply with the terms of an award solely to a stay of enforcement issued “pursuant to the relevant provisions of this Convention,” not pursuant to the provisions of other agreements or treaties, such as the DR-CAFTA.¹⁰

5. Pursuant to the ICSID Convention and the ICSID Arbitration Rules, in the context of an annulment proceeding, a stay of enforcement may be put in place in two ways.

6. *First*, Article 52(5) of the ICSID Convention provides that, “[i]f the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.”¹¹ Pursuant to ICSID Arbitration Rule 54(2) (second sentence), such provisional stay “automatically . . . terminate[s]” if either party requests the Committee to rule on whether the provisional stay should be continued and the Committee does not make such ruling within thirty days of the request.¹² ICSID Arbitration Rule 54(4) requires the party requesting a stay of enforcement to “specify the circumstances that require the stay.”¹³

be stayed.”); *id.* ¶ 83 (“In accordance with article 52 (5) of the ICSID Convention and rule 54 of the Arbitration Rules, Guatemala requests a provisional stay of enforcement of the Award.”).

¹⁰ See ICSID Convention, Art. 53(1) (requiring parties to the dispute to “abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed *pursuant to the relevant provisions of this Convention*”) (emphasis added); see also *id.*, Art. 54(1) (providing that “[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”); Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 42 (“Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court.”).

¹¹ ICSID Convention, Art. 52(5).

¹² ICSID Arbitration Rule 54(2).

¹³ ICSID Arbitration Rule 54(4).

7. *Second*, Article 52(5) of the ICSID Convention provides that the “Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision” on the application for annulment.¹⁴ ICSID Arbitration Rule 54(1) provides further that “either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates.”¹⁵

8. In either case, a request by a party for a stay of enforcement “shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.”¹⁶

9. In the present case, Guatemala requested a provisional stay of enforcement of the Award in its Annulment Application dated 18 April 2014, without indicating or elaborating any circumstances that would require the requested stay.¹⁷ In its Memorial on Annulment dated 17 October 2014, Guatemala asserted incorrectly that, because Claimant until that time “has not raised any objection in this regard [to Guatemala’s request for a stay],” Claimant “has thus acquiesced to Guatemala’s request.”¹⁸ Guatemala nevertheless “reiterate[d] its request for a stay of enforcement of the Award pending the decision on annulment.”¹⁹ Claimant requested in its Memorial on Partial Annulment of the same date that the Committee rule that the “stay of enforcement of the Award . . . be lifted.”²⁰

¹⁴ ICSID Convention, Art. 52(5).

¹⁵ ICSID Arbitration Rule 54(1).

¹⁶ ICSID Arbitration Rule 54(4).

¹⁷ *See* Guatemala’s Application for Annulment dated 18 Apr. 2014 ¶ 5 (“In accordance with article 52(5) of the Convention and rule 54 of the Rules of Arbitration, Guatemala requests that enforcement of the Award should be stayed until the Annulment Committee appointed to decide on this annulment renders its final decision on the Application for Annulment (see Section IV below).”); *id.* ¶ 83 (“In accordance with article 52 (5) of the ICSID Convention and rule 54 of the Arbitration Rules, Guatemala requests a provisional stay of enforcement of the Award.”); *id.* ¶ 84 (“[A]s will be explained at the appropriate stage of the proceedings, there are reasons justifying an order to continue the provisional stay until the decision on annulment is issued. This request is legitimate and does not constitute a delaying tactic, and the stay of enforcement would not cause any hardship or irreparable harm to TGH that cannot be compensated by payment of interest.”).

¹⁸ Guatemala’s Memorial on Annulment ¶ 28.

¹⁹ *Id.* ¶ 243; *see also id.* ¶ 29 (stating that “Guatemala reiterates its stay request here”).

²⁰ Claimant’s Memorial on Partial Annulment § V.

10. The procedure set forth by ICSID Arbitration Rule 54(2) (second sentence) for the Committee's ruling on whether the provisional stay of enforcement should continue thus was triggered on 17 October 2014 by the request of Guatemala in its Annulment Memorial. As the Committee did not make a ruling on that request within 30 days, the provisional stay of enforcement terminated automatically pursuant to ICSID Arbitration Rule 54(2) (second sentence).

11. In the present case, because the provisional stay of enforcement has terminated automatically pursuant to ICSID Arbitration Rule 54(2), Guatemala's request made in its Request for the Continuation of the Stay of Enforcement falls under ICSID Arbitration Rule 54(1).²¹ In either case, Guatemala's requests have triggered the requirement in ICSID Arbitration Rule 54(4) that the Committee "give[] each party an opportunity of presenting its observations" before granting a stay of enforcement. Pursuant to ICSID Convention Article 52(5), following the parties' observations, the Committee has discretion to decide whether the enforcement of the Award should be stayed in the circumstances.

III. GUATEMALA'S ASSURANCES OF COMPLIANCE WITH THE AWARD

12. As explained in Claimant's Memorial on Partial Annulment, according to a press article which was published shortly after the Award was rendered and included an interview of Guatemala's President, Otto Pérez Molina, "[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.*"²² The article concludes that "[t]hese statements" by the President "were made upon having granted the safety bond in Sololá and, before, in Quetzaltenango."²³ Read in context, the article leaves the clear impression that the President of Guatemala stated that Guatemala lacks adequate funds to pay the Award.²⁴ Accordingly, contrary to Guatemala's

²¹ See Guatemala's Request for the Continuation of the Stay of Enforcement ¶ 37(a) (requesting that the Committee "[o]rder the continuation of the stay of enforcement of the Award until a decision on annulment is rendered").

²² See Claimant's Memorial on Partial Annulment of the Award ¶ 143 (citing *Prensa Libre, The State to Appeal ICSID Award of Millions*, 22 Dec. 2013 (C-N-637)) (emphasis added).

²³ See *Prensa Libre, The State to Appeal ICSID Award of Millions*, 22 Dec. 2013 (C-N-637).

²⁴ See *id.*

assertion that Claimant’s presentation of the press article was “highly misleading,”²⁵ the article provides a reasonable basis upon which to conclude that the President of the Republic of Guatemala publicly remarked that, if the Award were not annulled, Guatemala nevertheless would not make payment.²⁶

13. In its Request for the Continuation of the Stay of Enforcement, however, Guatemala distanced itself from the President’s apparent statement and provided assurances that, if the Award were not annulled, Guatemala would comply with the Award. Specifically, according to Guatemala:

- There is “simply no evidence” to conclude that Guatemala is a debtor that might “not comply with an award.”²⁷
- The statement in the press article that Guatemala “does not have the funds to pay that amount,”²⁸ *i.e.*, the amount awarded to Claimant in the Award, “is the mere opinion of a newspaper journalist, and not a statement of the Guatemalan President.”²⁹
- “Guatemala has no record of non-compliance with ICSID on any other arbitral awards,” “Guatemala has recently complied voluntarily with the one and only ICSID award made against it, and has reiterated its respect for the ICSID mechanism.”³⁰
- “Guatemala has incorporated the ICSID Convention into its own legal system, and thus compliance with an ICSID award is a legal requirement under its own law.”³¹
- There is no “evidence regarding Guatemala’s likely non-compliance with the Award,” rather, “[t]he evidence is to the contrary,” *i.e.*, that Guatemala would comply with the Award.³²

²⁵ Guatemala’s Request for the Continuation of the Stay of Enforcement ¶ 21.

²⁶ See Claimant’s Memorial on Partial Annulment ¶¶ 142-143.

²⁷ Guatemala’s Request for the Continuation of the Stay of Enforcement ¶ 2(d).

²⁸ *Prensa Libre, The State to Appeal ICSID Award of Millions*, 22 Dec. 2013 (C-N-637).

²⁹ Guatemala’s Request for the Continuation of the Stay of Enforcement ¶ 2(d).

³⁰ *Id.* (emphasis in original).

³¹ *Id.* ¶ 19 (internal citation omitted).

³² *Id.* ¶ 22.

- “[T]he current Government of Guatemala has publicly ratified its support for international dispute settlement and ICSID in particular.”³³ As examples, Guatemala states that prior to the issuance of the award in the *Iberdrola* ICSID arbitration,³⁴ the Office of the President stated that “the State of Guatemala ratifies its intention to protect foreign investment and its commitment to submit to the decision rendered by ICSID” and that the former Minister of Economy of Guatemala, referring to the outcomes of the *RDC* and *Iberdrola* arbitrations, stated that Guatemala “commits to respect the legal framework, the principles contained in agreements and the outcomes of arbitral awards.”³⁵
- Unlike in circumstances where a State denounces its obligations under the ICSID Convention or otherwise shows its intention not to comply with the award, in this case, there is no concern of such prejudice because “Guatemala has always shown respect for the ICSID system.”³⁶

14. In light of Guatemala’s foregoing assurances, Claimant does not oppose the stay of enforcement of the Award in the absence of Guatemala posting a bond, should the Committee consider that such a stay is appropriate in the circumstances.³⁷

IV. COSTS

15. As demonstrated above, the current procedure relating to the stay of enforcement was triggered automatically by Guatemala’s requests, and not by Claimant. As also demonstrated above, Claimant’s application that enforcement of the Award not be stayed (or be stayed only upon Guatemala posting a bond) was justified in the circumstances, namely, the press article purporting to relay the President of Guatemala’s statement that Guatemala would

³³ *Id.* ¶ 23.

³⁴ *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5.

³⁵ Guatemala’s Request for the Continuation of the Stay of Enforcement ¶ 23 (internal citations omitted).

³⁶ *Id.* ¶ 27.

³⁷ For the same reason, in the interest of procedural economy, Claimant does not provide herein a detailed response to Guatemala’s various arguments concerning the legal standards relating to a stay of enforcement under the ICSID Convention. This, however, should not be construed as acceptance by Claimant that Guatemala’s arguments are correct. As an example, Guatemala’s argument that requiring a State to provide security for a stay of enforcement would create an unjustified imbalance between the parties in that it would bypass the ICSID Convention’s provisions concerning immunity from execution (*see* Guatemala’s Request for the Continuation of the Stay of Enforcement § VIII) is based on the mistaken premise that it is acceptable for a State to fail to comply with its obligation under Article 53(1) of the ICSID Convention to “abide by and comply with the terms of the award,” thereby forcing the award creditor to resort to enforcement of the award.

not comply with the award if it were not annulled, because it lacked the funds to do so. Accordingly, Guatemala's request that the Committee "[o]rder TGH to pay all of Guatemala's costs in defending its request for the continuation of the stay of enforcement of the Award"³⁸ is baseless, and should be rejected.

* * *

V. CONCLUSION

16. In light of the foregoing, Claimant respectfully submits as follows:

- (i) In light of Guatemala's assurances in the Request for the Continuation of the Stay of Enforcement that Guatemala would comply with the Award, if it is not annulled, Claimant does not oppose the stay of enforcement of the Award without Guatemala's posting of a bond, should the Committee consider that such a stay is appropriate in the circumstances.
- (ii) Accordingly, Reply and Rejoinder submissions on the stay of enforcement are not necessary.
- (iii) Guatemala's request that Claimant be ordered to pay Guatemala's costs in defending its request for the continuation of the stay of enforcement of the Award should be rejected.

³⁸ Guatemala's Request for the Continuation of the Stay of Enforcement ¶ 37(b).

Respectfully submitted,



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