

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between
TECO GUATEMALA HOLDINGS, LLC
Claimant

and

REPUBLIC OF GUATEMALA
Respondent

ICSID Case No. ARB/10/23
Supplementary Decision Proceeding

DECISION ON THE CLAIMANT’S REQUEST FOR A SUPPLEMENTARY DECISION

Members of the Tribunal

Prof. Vaughan Lowe, Q.C., President of the Tribunal
Dr. Stanimir Alexandrov, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Mrs. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: October 16, 2020

REPRESENTATION OF THE PARTIES

Representing TECO Guatemala Holdings, LLC:

Ms. Andrea Menaker
White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
and
Mr. Petr Polášek
Ms. Kristen M. Young
White & Case LLP
701 Thirteenth Street NW
Washington, D.C. 20005
United States of America
and
Mr. David Nicholson
Mr. Javier Cuebas
TECO Energy, Inc.
702 North Franklin Street
Tampa, FL 33602-4429
United States of America

Representing the Republic of Guatemala:

Mr. Jorge Luis Donado Vivar
Procurador General de la Nación
Lcda. Ana Luisa Gatica Palacios
Lc. Julio Eduardo Santiz
Lc. Mario René Mérida Pichardo
Procuraduría General de la Nación - PGN
15 av. 9-69 Zona 13
Ciudad de Guatemala
República de Guatemala
and
Mr. Roberto Antonio Malouf Morales
Ministro de Economía
Lcda. Alba Edith Flores de Molina
Lc. Alexander Cutz
Ministerio de Economía -MINECO
8 av. 10-43 Zona 1
Ciudad de Guatemala
República de Guatemala

TABLE OF CONTENTS

I.	PARTIES	1
II.	PROCEDURAL HISTORY.....	1
III.	PARTIES' POSITIONS.....	2
	(1) Claimant's Position.....	2
	(2) Respondent's Position.....	3
IV.	ANALYSIS.....	5
V.	COSTS	7
VI.	DECISION.....	8

I. PARTIES

1. The claimant is TECO Guatemala Holdings, LLC (“**TECO**” or the “**Claimant**”), a limited liability company established in 2005 under the laws of the state of Delaware in the United States of America. TECO is a subsidiary entirely owned by TECO Energy Inc. (“**TECO ENERGY**”), a parent company established under the laws of the state of Florida, United States of America.
2. The respondent is the Republic of Guatemala (“**Guatemala**” or the “**Respondent**”).
3. The Claimant and the Respondent are collectively referred to as the “**Parties**”. The Parties’ representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

4. On 9 June 2020, Claimant filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”) a Request of the same date for a Supplementary Decision in respect of the Award rendered on 13 May 2020 in the resubmission proceeding of *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) (the “**Resubmission Award**”) (the “**Request**”) by the Tribunal comprising Prof. Vaughan Lowe, Q.C. (British), President, appointed by the Secretary-General pursuant to DR-CAFTA Article 10.19.3 and Article 37(2)(a) of the ICSID Convention; Dr. Stanimir Alexandrov (Bulgarian), appointed by Claimant; and Prof. Brigitte Stern (French), appointed by Respondent.
5. On 11 June 2020, the Secretary-General of ICSID registered the Request in accordance with Rule 49(1)(a) of the ICSID Arbitration Rules and transmitted the same to the Members of the Tribunal and the Parties.
6. On 15 June 2020, the Tribunal fixed a timetable for the Parties’ submissions on the Request.

7. On 29 June 2020, Respondent submitted observations on the Request.
8. On 2 July 2020, Claimant advised that it did not intend to avail itself of the opportunity to file a response to Respondent’s observations of 29 June 2020.

III. PARTIES’ POSITIONS

(1) Claimant’s Position

9. In accordance with Article 49(2) of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules, Claimant requests the Tribunal to supplement the Resubmission Award “by awarding Claimant interest on 75 percent of Claimant’s costs incurred in the Original Arbitration (equal to US\$ 7,520,695.39) running from 19 December 2013, i.e., the date of the Original Award.”¹
10. Claimant submits that the Tribunal omitted to decide in the Resubmission Award the question concerning the interest to be awarded to Claimant upon the costs it incurred in the original arbitration (the “**Original Arbitration**”), running from the date of the original award rendered on 19 December 2013 (the “**Original Award**”).²
11. Claimant relies on *Pac Rim*³ as support for the Request on the basis that the tribunal in that case acknowledged that it had “inadvertently overlooked” a claim for post-award interest, and summarily awarded that interest by way of a supplementary decision.⁴
12. Claimant points out that it expressly requested the Tribunal to award such interest both in its resubmission Memorial and in its resubmission Reply.⁵
13. Claimant recalls that the Tribunal decided in the Resubmission Award that “Respondent shall bear its own costs and *reimburse 75% of Claimant’s costs*, including its contribution

¹ Request, ¶9.

² Request, ¶¶ 1-4.

³ *Pac Rim Cayman, LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Request for a Supplementary Decision, 28 Mar. 2017 ¶¶1.15-1.16.

⁴ Request, ¶ 3.

⁵ Request, ¶ 4, referring to Resubmission Memorial, ¶ 268 and Resubmission Reply, ¶ 246.

to the costs and expenses incurred by ICSID, arising in the proceedings before the Original Tribunal.”⁶

14. According to Claimant, the omission is material as it would imply that instead of receiving the 75 % of its costs that Claimant was awarded (i.e., US\$ 7,520,695.39), it would in fact only receive 50 %.⁷
15. Claimant contends that in line with the Tribunal’s reasoning in the Award, the applicable interest rate here should also be of US Prime plus 2 %, ⁸ which, when applied to the above-indicated 75 % of Claimant’s incurred costs, would amount to US\$ 3,454,058.70 in interest as of 31 May 2020.⁹

(2) Respondent’s Position

16. Respondent submits that Claimant’s request is unfounded, an attempt in bad faith and greed by Claimant to obtain a higher compensation than awarded, and should be dismissed in its entirety.¹⁰
17. Respondent explains that Claimant “did not address, did not justify and did not specifically request in the submission section of its memorials, as well as during the hearing its alleged claim for interest on the costs of the Original Arbitration”, and that, therefore, the Tribunal did not have to decide on a claim that did not exist. In support, Respondent cites the *Genin*¹¹ tribunal’s holding where in similar circumstances it rejected the supplementary request.¹²
18. Nonetheless, should the Tribunal find that Claimant did submit the claim, the Respondent asserts that the Tribunal, in the exercise of its discretion under Article 61(2) of the ICSID

⁶ Request, ¶ 5, quoting Resubmission Award, ¶ 155 (emphasis added).

⁷ Request, ¶ 7.

⁸ Request, ¶ 8. *See* Resubmission Award, ¶ 135.

⁹ Request, ¶ 6.

¹⁰ Respondent’s Observations, ¶2.

¹¹ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants’ Request for supplementary Decisions and Rectification, 10 April 2002.

¹² Respondent’s Observations, ¶¶ 3-5.

Convention, did not have to address, specifically and in detail in the Resubmission Award, a claim that was barely outlined during the arbitration.¹³

19. According to Respondent, because the Tribunal held in the Resubmission Award that Guatemala shall pay 75% of the costs incurred by the Claimant in the Original Arbitration, and nothing more, the Tribunal “rejected, explicitly and implicitly, the claim that motivates the Request.”¹⁴
20. Respondent, recalling Prof. Schreuer’s interpretation that the supplementary decision under Art. 49(2) of the ICSID Convention “is not designed to afford a substantive review or reconsideration of the decision”,¹⁵ and along the same lines also relying on *LG&E*,¹⁶ argues that Claimant’s Request is “unacceptable and exceeds the scope of a supplementary decision, as the claim on the Request has been decided and rejected by the Arbitral Tribunal.”¹⁷
21. Should the Tribunal find that the Request is acceptable – argues Respondent – the Tribunal should not award interest on the costs of the Original Arbitration, because “the Claimant has been completely repaired in this arbitration proceedings.”¹⁸
22. Finally, as relief, Respondent requests that the Tribunal:
 - (i) *“Deny the Claimant’s Request of Supplementary Decision in its entirety.*
 - (ii) *If par impossible, the Tribunal considers the Claimant has a right to claim interest derived from the costs of the Original Arbitration, order must be calculated from the Award’s issuance on 13 May 2020, the date of its actual awarding.*
 - (iii) *Order the Claimant to entirely reimburse Guatemala, the costs incurred on its defense in connection to this supplementary decision proceeding.*

¹³ Respondent’s Observations, ¶¶ 7-9.

¹⁴ Respondent’s Observations, ¶¶ 10-12.

¹⁵ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (2009), page 849, ¶ 28.

¹⁶ *LG&E Energy Corp., et al v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimants’ Request for Supplementary Decision, 8 July 2008, ¶ 16.

¹⁷ Respondent’s Observations, ¶¶ 13-15.

¹⁸ Respondent’s Observations, ¶¶ 16-18.

*(iv) Order any further relief to Guatemala that the Tribunal may deem appropriate.”*¹⁹

IV. ANALYSIS

23. Article 49(2) of the ICSID Convention provides:

“The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award”

24. The Tribunal acknowledges that Claimant had requested in its resubmission Memorial that the Tribunal “order Respondent to bear all of Claimant’s costs incurred in the Original Arbitration, or, at a minimum, 75 percent of Claimant’s costs incurred in the Original Arbitration, as set forth in the chart below, plus interest from the date of the Award in the Original Arbitration.”²⁰

25. The Tribunal further considers that Claimant’s current application clearly falls within the scope of ICSID Article 49(2), and that the Tribunal has the power and the duty to respond to that application.

26. It was noted in the Resubmission Award that the “the Parties are broadly agreed that costs awards should reflect the extent to which each party in an arbitration was successful.”²¹ It was on that basis that the Tribunal decided in the Resubmission Award as follows:

“155.E. On the matter of costs:

- i. Respondent shall bear its own costs and reimburse 75% of Claimant’s costs, including its contribution to the costs and expenses incurred by ICSID, arising in the proceedings before the Original Tribunal;
- ii. Each Party shall pay the costs and expenses relating to the Annulment proceedings as determined in paragraph 382 of the Annulment Decision;

¹⁹ Respondent’s Observations, ¶ 23.

²⁰ Resubmission Memorial, ¶ 268 (emphasis omitted).

²¹ Resubmission Award, ¶ 153.

- iii. Each Party shall bear its own costs and one half of the costs and expenses incurred by ICSID in the proceedings before this Tribunal.”²²
27. The Tribunal also decided in the Resubmission Award that “[t]he US Prime rate of interest plus 2%, payable both pre- and post-Award until the date of payment, is the rate of interest applicable to the sums owing as of 21 October 2010.”²³
28. Under the rules applicable to this arbitration, it is for the Tribunal to “decide how and by whom those expenses [incurred by the parties in connection with the proceedings], the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre [i.e., ICSID] shall be paid.”²⁴ Thus, as the Tribunal noted in paragraph 151 of the Resubmission Award, the ICSID Convention “gives the Tribunal discretion to allocate all costs of the arbitration, including attorney’s fees and other costs, between the Parties as it deems appropriate.” The obvious corollary is that a claim for costs is not necessarily subject to the same principles as govern reparation for losses sustained as a result of an unlawful act, although a tribunal may decide in the exercise of its discretion to apply the same principles in both circumstances.
29. The Tribunal does not consider that entitlements to sums awarded to a party by way of costs in an arbitral award can generally be said to be owing prior to the date of the award. In the present case, however, the Tribunal distinguished between the costs arising in (i) the proceedings before the Original Tribunal, (ii) the Annulment proceedings, and (iii) the Resubmission proceedings.
30. The decision of the Original Tribunal, set out in its Award dated 19 December 2013, in relation to the costs arising in the original proceedings, was annulled by the *ad hoc* Committee in light of its partial annulment of the Original Award. The present Tribunal’s decision in paragraph 155.E of the Resubmission Award is thus a retrospective

²² Resubmission Award, ¶ 155.E.

²³ *Id.*, ¶¶ 155.C.

²⁴ ICSID Convention, Article 61(2).

determination of the amount of the costs awarded in the proceedings that ended with the Original Award of 19 December 2013.

31. Having considered the submissions of the Parties, the present Tribunal accordingly decides that the 75% of Claimant's costs, including its contribution to the costs and expenses incurred by ICSID, arising in the proceedings before the Original Tribunal, which Respondent was directed by paragraph 155.E of the Resubmission Award to pay to Claimant, is to be treated as if it were a sum owing as of 19 December 2013.
32. The Tribunal further decides that in order to avoid Respondent obtaining a significant benefit from the delay in payment, interest is payable on that sum running from 19 December 2013. The Tribunal, by a majority, considers that the costs of the ICSID procedures may be regarded as being something to which both sides contribute as a payment for the availability of a facility which ultimately benefits them both, rather than an additional element in the damages sustained by a successful claimant; and it considers further that the balance between the Parties will be restored if the interest reflects what Respondent would have been able to earn from the savings corresponding to the delayed payment due in respect of costs, rather than the cost to Claimant of borrowing that sum. Accordingly, it decides, by a majority, that the interest payable pursuant to the preceding paragraph is payable at a non-commercial rate: the US prime rate.

V. COSTS

33. Respondent requested that Claimant be ordered to reimburse Respondent's costs incurred in its defense in connection with this supplementary decision proceeding.²⁵ Claimant did not formally request an order in respect of these costs.
34. The Tribunal considers that neither Party should have to bear the whole cost of this Supplementary Decision, and that both Parties have the benefit of the system of checks and procedures provided by ICSID. Accordingly, it decides that each Party shall bear its own

²⁵ Respondent's Observations, ¶ 23(iii).

costs and one half of the costs and expenses incurred by ICSID in these supplementary proceedings before this Tribunal.

VI. DECISION

35. For the reasons set out above, the Tribunal decides as follows:

- (i) Claimant's Request for a Supplementary Decision is hereby granted.
- (ii) Respondent shall pay Claimant the sum of US\$ 7,520,695.39 in respect of its costs incurred in the Original Arbitration, plus interest compounded annually at the US Prime rate, running from 19 December 2013.
- (iii) The fees and expenses of the members of the Tribunal and the administrative expenses of ICSID incurred in connection with Claimant's Request for a Supplementary Decision shall be borne by in equal shares by the two Parties.
- (iv) Each Party shall bear its own legal and other expenses incurred in connection with Claimant's Request for a Supplementary Decision.

[signed]

Dr. Stanimir Alexandrov
Arbitrator

Date: **SEP 24 2020**

Prof. Brigitte Stern
Arbitrator

Date:

Prof. Vaughan Lowe, Q.C.
President of the Tribunal

Date:

[signed]

Dr. Stanimir Alexandrov
Arbitrator

Date:

Prof. Brigitte Stern
Arbitrator

Date: 25 August 2020

Prof. Vaughan Lowe, Q.C.
President of the Tribunal

Date:

Dr. Stanimir Alexandrov
Arbitrator

Date:

Prof. Brigitte Stern
Arbitrator

Date:

[signed]

Prof. Vaughan Lowe, Q.C.
President of the Tribunal

Date: **OCT 08 2020**