

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

TECO Guatemala Holdings, LLC
(Claimant)

v.

Republic of Guatemala
(Applicant)

(ICSID Case No. ARB/10/23)
Third Annulment Proceeding

PROCEDURAL ORDER NO. 5

Members of the Committee

Ms. Deva Villanúa, President of the *ad hoc* Committee
Prof. Lawrence Boo, Member of the *ad hoc* Committee
Prof. Doug Jones AO, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the ad hoc Committee

Mr. Felipe Aragón Barrero

March 1, 2022

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I. PROCEDURAL BACKGROUND

1. On February 12, 2021, the Republic of Guatemala [**“Applicant”** or **“Guatemala”**] filed with the International Centre for Settlement of Investment Disputes [**“ICSID”**] an Application for Annulment of the **Resubmission Award** rendered on May 13, 2020, and the appended Supplementary Decision dated October 16, 2020, in the **Resubmission Proceedings** in *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), [the **“Annulment Application”**]. The Annulment Application was filed pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [the **“ICSID Convention”**] and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings [the **“Arbitration Rules”**]. The Claimant in the Resubmission Proceedings is TECO Guatemala Holdings, LLC [**“Claimant”** or **“TECO”**]. The Applicant and Claimant will be jointly referred to as the **Parties**.
2. On February 22, 2021, the Secretary-General of ICSID registered the Annulment Application, and notified the Parties of the provisional stay of enforcement of the Award.
3. On March 31, 2021, the Secretary-General of ICSID notified the Parties of the constitution of the *ad hoc* Committee [the **“Committee”**] in accordance with Article 52(3) of the ICSID Convention.
4. On May 17, 2021, the Committee issued Procedural Order No. 1 [**“PO 1”**], following consultation with the Parties.
5. On August 23, 2021, the Committee informed the Parties of its summary decision granting Guatemala’s request to submit new evidence with its Memorial, which was followed by a fully motivated decision issued on September 1, 2021, recorded in Procedural Order No. 2 [**“PO 2”**].
6. On December 8, 2021, the Committee informed the Parties of its summary decision partially granting TECO’s request to submit new evidence with its Counter-Memorial, which was followed by a fully motivated decision issued on December 15, 2021, recorded in Procedural Order No. 3 [**“PO 3”**].
7. On February 11, 2022, the Committee issued Procedural Order No. 4 [**“PO 4”**] addressing Guatemala’s request to exclude certain evidence produced by TECO with its Counter-Memorial.
8. On February 16, 2022, Guatemala requested authorization to present new evidence and an extension of the deadline to file its Reply.
9. On February 18, 2022, TECO presented its Response asking the Committee to dismiss Applicant’s requests.

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II. THE REQUEST

10. Applicant seeks permission to introduce 13 documents [the “**New Documents**”]¹ into the record. Guatemala divides the New Documents into three categories of issues addressed by TECO and on which Applicant wishes to reply:
- **Category A:** these are three pleadings by the Government of Pakistan submitted in the *TCC v. Pakistan*, ICSID Case No. ARB/12/21 [the “**Pakistan Pleadings**”], two press articles reporting on the *TCC v. Pakistan* case and the ICSID case details of this arbitration that are displayed on ICSID’s official website;
 - **Category B:** these are four documents from the docket of the U.S. Enforcement Proceeding of the Original Award [the “**Enforcement Proceeding Documents**”] and two press articles reporting on that proceeding;
 - **Category C:** this is a single press article documenting a recent challenge against Dr. Stanimir Alexandrov.
11. Guatemala also requests an extension of five business days to file its Reply, *i.e.*, until March 7, 2022.
12. On 22 February 2022 the Committee advised the Parties of its decision as follows:

“The Committee acknowledges (i) Guatemala’s request of February 16, 2022, asking the Committee to admit new evidence into the record and an extension of time to file its Reply on Annulment (the “Request”); and (ii) TECO’s communication of February 18, 2022, opposing the Request (the “Response”).

The Committee has carefully considered the Parties’ positions on the matter, as stated in the Request and the Response.

In such regard, after due deliberation, the Committee has unanimously decided to issue the following:

Summary Decision:

- 1. The Committee admits all the documents of Categories A to C, detailed in the Request;*
- 2. Guatemala is allowed to use the admitted documents in its Reply;*
- 3. Guatemala may file its Reply on Annulment by March 7, 2022;*
- 4. TECO may file its Rejoinder on Annulment by June 6, 2022;*

A reasoned decision will follow in due course.”

¹ See Annex I.

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The following is the Committee’s reasoned decision.

III. PARTIES’ POSITIONS

1. GUATEMALA’S POSITION

13. Applicant argues that the New Documents are relevant for the purposes of rebutting evidence and allegations that TECO presented with its Counter-Memorial on Annulment²:
- **Category A:** these documents would serve to respond to TECO’s “mischaracterization” of the **Three Challenge Decisions**³ in *TCC v. Pakistan*; and, overall, to provide a “full picture” of that case⁴.
 - **Category B:** these documents respond to TECO’s arguments that Guatemala obstructed the enforcement stage⁵.
 - **Category C:** this press article would be relevant to Guatemala’s argument that the arbitrator continues to face challenges similar to those he has faced in the past⁶.
14. Applicant argues that the additional time requested to file its Reply is warranted because:
15. *First*, given that in PO 3 the Committee had rejected Claimant’s application to introduce certain enforcement-related press articles, Guatemala had good reasons to believe it would not have to respond to TECO’s arguments relating to the U.S. enforcement proceeding of the Original Award. However, in PO 4 the Committee decided to keep certain documents of the enforcement proceeding in the record, thus forcing Guatemala to respond to those arguments, which will require it to review materials spanning two years to properly prepare its position⁷.
16. *Second*, Applicant needs to secure authorization from Pakistan to release the Pakistan Pleadings for its use in this annulment proceeding⁸.

² See Annex I.

³ As defined in PO 4.

⁴ Guatemala’s Request, pp. 2 and 3.

⁵ Guatemala’s Request, p. 3.

⁶ Guatemala’s Request, p. 4.

⁷ Guatemala’s Request, pp. 4 and 5.

⁸ Guatemala’s Request, p. 5.

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17. *Third*, counsel for Guatemala is currently preparing an upcoming hearing, starting on February 28, 2022 (the current date when the Reply is due) through March 11, 2022, in the case *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43 [“*Kappes*”]. Counsel for TECO also represents the claimant in that case⁹.
18. Guatemala adds that it accepts that the same five-day extension be granted to TECO for its Rejoinder. It also confirms that these modifications to the calendar would not disrupt the hearing dates scheduled on July 27-29, 2022¹⁰.

2. TECO’S ANSWER

19. Claimant asks the Committee to deny Applicant’s requests to introduce the New Documents:
- **Category A:** TECO opposes the admission of the Pakistan Pleadings of the *TCC v. Pakistan* case, *first*, because in PO 4 the Committee already rejected Guatemala’s attempt to introduce these documents into the record¹¹; and *second*, because these documents are a hand-picked selection of non-public pleadings from Pakistan and, thus, would not provide a “full picture of the *TCC* case” as Guatemala alleges¹². With respect to the two press articles on the *TCC v. Pakistan* case and the case details listed on the ICSID website, Guatemala has failed to demonstrate that these materials address the content of the Three Challenge Decisions¹³ or are otherwise *prima facie* relevant to this case¹⁴.
 - **Category B:** Guatemala has not established why the Enforcement Proceeding Documents that it seeks to introduce are *prima facie* relevant to the legal arguments it has presented¹⁵. Furthermore, in PO 3 the Committee already rejected TECO’s similar application to introduce press articles reporting on those proceedings and Guatemala has offered no compelling reason why the Committee should revisit such determination¹⁶.
 - **Category C:** lastly, TECO also objects to the introduction of an additional press article concerning a new challenge against Dr. Alexandrov. TECO highlights that the grounds for this new challenge are undisclosed and bear

⁹ Guatemala’s Request, p. 5.

¹⁰ Guatemala’s Request, p. 5.

¹¹ TECO’s Response, p. 2.

¹² TECO’s Response, pp. 2 and 3.

¹³ The claimant’s pleading in the *TCC v. Pakistan* case that TECO submitted with its Counter-Memorial.

¹⁴ TECO’s Response, p. 3.

¹⁵ TECO’s Response, p. 4.

¹⁶ TECO’s Response, pp. 4 and 5.

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no relevance to the issue of whether the Resubmission Tribunal was properly constituted¹⁷.

20. Claimant also asks the Committee to reject Guatemala's petition to extend the deadline for its Reply:
21. *First*, Guatemala was aware of TECO's arguments and reliance on the U.S. enforcement proceeding documents since the filing of the Counter-Memorial. Guatemala waited two months to file its application seeking that this section of the Counter-Memorial be stricken from the record, and it failed. Its belated and unsuccessful attempt to remove from the file portions of the Counter-Memorial should not be rewarded with an extension¹⁸.
22. *Second*, the fact that counsel for Guatemala need time to review the materials of the U.S. enforcement proceeding is not a valid reason to grant the extension. Guatemala is fully aware of the enforcement record; in any case, TECO should not be penalized for Guatemala's choice of counsel¹⁹.
23. *Third*, when in May 2021 Guatemala agreed to the calendar of this annulment proceeding, the hearing dates in *Kappes* had already been established for a year. Guatemala accepted the deadline for its Reply notwithstanding its concurrence with the first day of the *Kappes* hearing, and thus, this is not an acceptable excuse for an extension²⁰.
24. *Finally*, if the Committee decides to grant Guatemala an extension of five days to file the Reply, it should grant TECO ten days (and not five, as Guatemala offers), to accord both Parties the same time period to file their pleadings²¹.

IV. THE COMMITTEE'S DECISION

1. THE APPLICABLE LAW

25. These annulment proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006²². Pursuant to ICSID Arbitration Rule 53, the ICSID Arbitration Rules apply *mutatis mutandis* to annulment proceedings.

¹⁷ TECO's Response, p. 5.

¹⁸ TECO's Response, pp. 5 and 6.

¹⁹ TECO's Response, p. 6.

²⁰ TECO's Response, p. 6.

²¹ TECO's Response, pp. 6 and 7.

²² Except to the extent modified and/or supplemented by the Dominican Republic-Central America Free Trade Agreement ("DR-CAFTA" or the "Treaty"), in force for the United States since March 1, 2006, and for Guatemala since July 1, 2006. See PO No. 1, para. 1.1.

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26. ICSID Arbitration Rule 34 sets forth that:
- “The [Committee] shall be the judge of the admissibility of any evidence adduced and of its probative value”.
27. Further, in consultation with the Parties, the Committee established certain rules concerning the marshalling of evidence in Sections 16.4 and 16.5 of PO 1:
- “16.4. Given the nature of an annulment proceeding, the Committee expects that the Parties will primarily refer to the evidentiary record of the arbitration proceeding and it does not expect to receive new witness statements or expert reports.
- 16.5. In principle, no new evidence shall be admitted in this proceeding. Should either Party wish to introduce new documents or other evidence (other than legal authorities) – including factual evidence, witness statements, or expert reports - that Party shall file a request to the Committee to that effect. A Party may not annex the evidence it seeks to file to its request. The Committee will promptly decide on the admissibility of these new documents and/or evidence, after hearing from the other Party”.
28. Finally, and without prejudice to the above rules, pursuant to Section 24 of PO 1,
- “[...] the Committee may take into consideration the International Bar Association Rules for the Taking of Evidence in International Arbitration (2010) [...]”.

2. DISCUSSION

29. PO 2 and 3 provided that new evidence may be introduced into the record if it is *prima facie* relevant to the adjudication of the case and the circumstances justify its admission²³.
30. In the following sections the Committee will address the Parties’ arguments on the *prima facie* relevance and the circumstances underlying Guatemala’s plea to introduce the New Documents (A. to C.); and then it will address Guatemala’s request for extension (D.).
- A. Category A: New Documents concerning the TCC v. Pakistan case**
31. This category can be broken down in two sub-categories: the Pakistan Pleadings (a.) and press articles and other public information (b.).
- a. Pakistan’s Pleadings**
32. In its Counter-Memorial, TECO relied on the claimant’s pleading in the annulment proceeding of the *TCC v. Pakistan* case (Exhibit CLAA-060), because it is the only

²³ PO 2, para. 27; PO 3, para. 21.

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publicly available document on that case that makes references to the Three Challenge Decisions.

33. Guatemala now wishes to submit Pakistan’s Pleadings in the *TCC v. Pakistan* annulment, to “respond to TECO’s mischaracterization” of the Three Challenge Decisions.
34. TECO does not contest the *prima facie* relevance of the Pakistan Pleadings that Guatemala seeks to produce. Instead, it presents two objections, which the Committee will dismiss:
 35. *First*, TECO says that PO 4 already ruled on the admissibility of the Pakistan Pleadings. This is not true. PO 4 exclusively referred to Guatemala’s petition to strike Exhibit CLAA-060 from the record, including its alternative petition to permit Exhibit CLAA-060 to remain only if Guatemala was allowed to present the Pakistan Pleadings. The Committee rejected Guatemala’s request in its entirety and ordered that Exhibit CLAA-060 should stand; but it did not preempt Guatemala’s right to now seek permission to present these documents.
 36. *Second*, TECO says that Guatemala is cherry-picking the confidential documents of the *TCC v. Pakistan* case that it wishes to present.
 37. The Committee agrees that, in order to guarantee a level playing field, in principle, it is preferable that Parties only avail themselves of documents that are in the public domain.
 38. Here, however, only some documents of the *TCC v. Pakistan* case are public: claimant’s pleadings are public, while the Pakistan Pleadings are not. And, since claimant’s pleadings are already in this file, Guatemala wishes the Committee to also see the Pakistan Pleadings, to avoid having a one-sided record of the pleadings in the *TCC v. Pakistan* annulment.
 39. The Committee must strike a balance between competing procedural principles and finds that, in view of the present circumstances, the adversarial principle outweighs other considerations. Guatemala is, thus, allowed to produce the Pakistan Pleadings.
 40. The Committee notes that the parties’ pleadings in the *TCC v. Pakistan* case are presented as a secondary source for the content of the Three Challenge Decisions. If at a later stage, either Party secures authorization from the parties in *TCC v. Pakistan*, to disclose the Three Challenge Decisions, the Committee will – at either Party’s request – make its best efforts to accommodate a procedural stage for the Parties to produce those documents and if necessary, make brief submissions.

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b. The press articles and ICSID case details of the *TCC v. Pakistan* case

41. TECO says that the press articles and ICSID case details of the *TCC v. Pakistan* case are not *prima facie* relevant because Guatemala has failed to demonstrate that these documents address the Three Challenge Decisions.
42. The Committee does not agree.
43. In POs 2²⁴ and 3²⁵ the Committee accepted both Parties' request to introduce into the record news articles commenting on the *TCC v. Pakistan* case. The Committee admitted these documents because they seemed *prima facie* relevant to Guatemala's pleaded grounds of annulment and the Parties' discussions concerning prior challenges against Dr. Alexandrov²⁶. The Committee sees no reasons to now deviate from its earlier ruling. Thus, Guatemala is allowed to produce the press articles and ICSID details of the *TCC v. Pakistan* case.

B. Category B: New Documents concerning the enforcement stage

44. This category is again, subdivided in two: the Enforcement Proceeding Documents (a.) and the U.S. enforcement stage press articles (b.).

a. Enforcement Proceeding Documents

45. Guatemala says it requires these documents to counter TECO's factual and legal allegations concerning Guatemala's conduct during the enforcement stage. TECO responds that the Enforcement Proceeding Documents are not *prima facie* relevant because they do not relate to "any legal argument advanced by Guatemala".
46. The Committee finds that Guatemala has established the *prima facie* relevance of the Enforcement Proceeding Documents: they are required to rebut allegations made by TECO in its Counter-Memorial, which is the primary purpose of a second-round written submission. Thus, Guatemala is allowed to produce the Enforcement Proceeding Documents.

b. U.S. enforcement stage press articles

47. The Committee has already determined that documents regarding the enforcement stage are *prima facie* relevant for the purposes of rebutting TECO's Counter-Memorial. TECO, however, finds that press articles should not be allowed into the record because in PO 3 the Committee rejected the introduction of similar documents.

²⁴ PO 2, Annex I, Documents 5 and 6, submitted by Guatemala with its Memorial on Annulment as exhibits REA-65 and REA-68.

²⁵ PO 3, Annex I, Category (v), Document 2, submitted by TECO with its Counter-Memorial on Annulment as exhibit CEA-033.

²⁶ PO 2, para. 40; PO No.3, paras. 30 and 31.

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48. The Committee does not agree with TECO and decides to admit the U.S. enforcement stage press articles:
49. Prior to the submission of its Counter-Memorial, TECO sought the introduction of news articles documenting the U.S. enforcement proceeding on the grounds that they would “provide the Committee with the full context and procedural history of the dispute between the parties”. In PO 3 the Committee stated that it was unpersuaded of the relevance of said documents to the annulment allegations raised by Guatemala²⁷.
50. In the Counter-Memorial TECO argued that Guatemala’s conduct during the U.S. enforcement proceeding proved one of the annulment grounds to be meritless and submitted documents in support thereof. In PO 4 the Committee accepted those documents because they then seemed *prima facie* relevant for TECO’s case.
51. The Committee sees no contradiction in its previous rulings: the Committee accepts the U.S. enforcement stage press articles that Guatemala seeks to submit, not because they are necessary “to provide a full context and procedural history of the dispute”, but because they are *prima facie* relevant to the arguments that TECO raised concerning Guatemala’s behavior in that proceeding and the annulment ground pertaining to the decision on interest.

C. Category C: the press article on a new challenge of Dr. Alexandrov

52. Claimant finally rejects Guatemala’s petition to introduce a press article dated January 28, 2022, that reports on a new disqualification proposal against Dr. Alexandrov, in an ongoing arbitration. Claimant says that the grounds for the challenge remain undisclosed, and therefore, the information in said article is of no assistance in the present case.
53. The Committee finds that any information regarding a purported disqualification of Dr. Alexandrov may be *prima facie* relevant to these annulment proceedings; hence, the document is admitted into the record. If in the future further details regarding such challenge is made public, the Parties are welcome to seek leave from this Committee for their introduction.

* * *

54. For avoidance of doubt the Committee confirms that it has formed no conclusive view on the relevance or weight (if any) of the New Documents admitted to Guatemala’s Annulment Application or TECO’s response.

²⁷ PO 3, para. 38.

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D. Guatemala’s request for an extension

55. Guatemala requests an extension of five business days to file its Reply, to which TECO objects.
56. The Committee notes that the extension sought is brief, and that a proportionate extension may be granted to TECO without impacting the procedural calendar; thus, the Committee decides to extend the deadline for the filing of the Reply as requested, and also of the Rejoinder in a proportionate amount of time, so that both Parties have the same period of time to file their second-round submissions.

3. DECISION

57. In light of the above, pursuant to Rule 34 of the ICSID Arbitration Rules, the Committee admits the New Documents.
58. Further, in line with Rule 26 of the ICSID Arbitration Rules, the Committee sets the following new deadlines:
- Guatemala may file its Reply by March 7, 2022;
 - TECO may file its Rejoinder by June 6, 2022.
59. All other dates of the procedural calendar established in Annex A to PO 1 remain unaltered.

[signed]

Ms. Deva Villanúa
President of the Committee
Date: March 1, 2022

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ANNEX I

New Evidence		
No.	Description of the evidence	Purpose of the evidence
A. Documents responsive to the arguments related to the TCC Case		
1.	Letter dated June 2, 2017, submitted by <i>Allen & Overy</i> on behalf of Pakistan. This letter was the first to raise concerns about the relationship between Dr. Alexandrov and TCC’s damages expert, Professor Graham Davis, and the latter’s firm, the Brattle Group.	<p>These documents are Pakistan’s submissions in the TCC Case. These documents are being introduced to prove, as Guatemala has alleged, that Dr. Alexandrov’s counsel-expert relationships have caused justifiable doubts as to his impartiality and independence. Moreover, these documents and the allegations therein respond to Teco’s mischaracterization that “<i>three different well-respected authorities over the course of the dispute in TCC v. Pakistan found no merit whatsoever in similar challenges to Dr. Alexandrov’s independence and impartiality.</i>”⁴</p> <p>Further, these documents provide a full picture of the TCC Case, without which this Committee would have a lopsided understanding of the TCC Case based solely on the TCC Counter-Memorial. The Committee itself has recognized that the TCC</p>
2.	Memorial on Annulment submitted by <i>GST LLP</i> on behalf of Pakistan due to, among other grounds, the improper constitution of the tribunal considering Dr. Alexandrov’s relationship with TCC’s damages expert, dated July 31, 2020.	
3.	Reply Memorial on Annulment submitted by both <i>Linklaters LLP</i> and <i>GST LLP</i> on behalf of Pakistan, dated January 15, 2021.	
		Counter-Memorial is a “ <i>one-sided memorial.</i> ” ⁵
4.	GAR, <i>Pakistan seeks annulment of US\$6 billion award</i> (November 19, 2019).	<p>These documents are being introduced to shed more light on the circumstances, the parties, the procedural history of the TCC Case, as well as of</p>
5.	GAR, <i>Pakistan applies to revise Tethyan award</i> (March 18, 2021).	

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6.	<i>Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/12/1, ICSID Case Details.	the challenge against Dr. Alexandrov, responsive to Teco’s myopic presentation of the challenge against him. ⁶
B. Documents responsive to the arguments related to the U.S. Enforcement Proceedings of the Original Award		
7.	Guatemala’s Brief in support of its Motion for Summary Judgment, Motion for Limited Discovery, and Motion for a Stay of the Proceedings, and Opposition to both Teco’s Motion for Judgment on the Pleadings and Teco’s Motion for Summary Judgment, and Exhibits , submitted before the U.S. District Court for the District of Columbia and dated December 24, 2018.	These documents are being introduced to respond to Teco’s malicious accusation that Guatemala has obstructed the enforcement of the unannulled portions of the Original Award, ⁷ correct Teco’s mischaracterizations of Guatemala’s conduct in these proceedings, and shed light on Teco’s own actions in and related to the U.S. enforcement proceedings. Teco introduced Document Nos. 7, 10, and 12 as Exhibits CLAA-005, 117, and 118, respectively. Teco, however, did not attach the exhibits and legal authorities supporting those documents. Guatemala, thus, seeks introduction of the complete record to provide the Committee a full picture of Guatemala’s submissions.
8.	Guatemala’s Memorandum of points and authorities in support of Guatemala’s Reply to its Motion for Summary Judgment, Motion for Limited Discovery, and Motion for a Stay of the Proceedings, and Exhibits, submitted before the U.S. District Court for the District of Columbia and dated February 25, 2019.	
9.	Law360, <i>Guatemala says Teco can’t Target NY funds for \$35M Award</i> (November 16, 2020).	
10.	Guatemala’s Memorandum in support of its Emergency Motion to vacate Restraining Notice, and Exhibits , and Exhibits, submitted before the U.S. District Court for the Southern District of New York and dated November 13, 2020.	
11.	Law360, <i>Guatemala pays Teco \$37M in long-running power tariff suit</i> (November 25, 2020).	
12.	Joint Stipulation of Withdrawal of Restraining Notice and Motion to vacate Restraining Order, and Exhibits , before the U.S. District Court for the Southern District of New York and dated November 24, 2020.	
C. Documents responsive to Teco’s response to the arguments related of a pattern of conduct of Dr. Alexandrov		
13.	GAR, <i>Ukraine seeks to unseat Alexandrov</i> (January 28, 2022)	This document is being introduced to show that Dr.

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		<p>Alexandrov continues to face challenges to his appointment as an arbitrator consistent with or in addition to past challenges made against him. In the same vein, this document further supports Guatemala's argument with regard to Dr. Alexandrov's pattern of conduct, which has been rejected by Teco.⁸</p>
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