



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date:

TECO Guatemala Holdings LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23) –
Annulment Proceedings - 5 April 2016

Case Report by:

Rajat Rana**, editor Ignacio Torterola***

Summary:

In the Decision on Annulment rendered on April 5, 2016, on Claimant's application for the partial annulment of the award and Respondent's application for the annulment of the award, the Ad Hoc Committee annulled the award: (1) on damages for the loss of value claim under Article 52(1)(e); (2) on interest on historical damages for the period August 1, 2009 through October 21, 2010, under Article 52(1)(d); and (3) on costs. The Committee dismissed other grounds of objections to the Award.

The Committee further decided that: (1) each party shall bear its own legal costs and expenses in connection with Claimant's application for the partial annulment of the Award; (2) Respondent shall reimburse Claimant half of ICSID's administrative fees and expenses in connection with Claimant's application for the partial annulment of the Award; (3) Respondent shall bear the full costs and expenses incurred in connection with Respondent's application for the annulment of the award; and (4) Respondent shall reimburse Claimant USD 273,652.39, representing 60% of the total USD 456,087.33 of Claimant's legal costs and expenses incurred in connection with Respondent's application for the annulment of the Award.

Main Issues:

Annulment proceeding under the ICSID Convention; manifest excess of powers; serious departure from a fundamental rule of procedure; failure to state reasons

Ad Hoc Committee:

Prof. Bernard Hanotiau (President) – Ms. Tinuade Oyekunle – Prof. Klaus Sachs

Claimants’ Counsel: Ms. Andrea Menaker, Mr. Petr Polasek, Ms. Kristen Young (White & Case LLP, Washington, D.C., USA), and Mr. Javier Cuebas (TECO Energy, Inc., Tampa, Florida, USA).

Respondent’s Counsel: Mr. Nigel Blackaby, Ms. Noiana Marigo, Mr. Lluís Paradell, Mr. Jean Paul Dechamps, Ms. Lauren Friedman, Ms. Olga Puigdemont Sola, Ms. Eva Treves (Freshfields Bruckhaus Deringer US LLP) Mr. Alejandro Arenales, Mr. Alfredo Skinner-Klee, Mr. Rodolfo Salazar (Arenales & Skinner—Klee, Guatemala). Lic. Sergio de la Torre, Ministro de Economía, Guatemala, and Dra. María Eugenia Villagran de Leon, Guatemala

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Digest:

1. Relevant Facts and Procedural Dates

On December 19, 2013, an ICSID Tribunal rendered its decision on jurisdiction and merits in a dispute arising out of the alleged violation by the Comisión Nacional de Energía Eléctrica (“CNEE”) of the Guatemalan regulatory framework for establishing energy distribution tariffs for an electricity company, EEGSA. The Claimant, TECO, had an indirect share in EEGSA. The Tribunal held that it had jurisdiction to hear the dispute because: (i) TECO’s allegations, if proved, would establish that Guatemala breached its obligations under the minimum standard of treatment fair and equitable treatment under Article 10.5 of the CAFTA-DR (¶ 56); and (ii) the dispute was not a regulatory dispute under Guatemalan law, but an international dispute calling for the application of international law to determine whether Guatemala breached its obligations under CAFTA-DR’s minimum standard of treatment (¶ 57). Consequently, the Tribunal rendered an award holding that the CNEE acted arbitrarily and violated fundamental principles of due process in regulatory matters and of the minimum standard of treatment in international law by disregarding the Expert Commission’s report without any reason (¶¶ 61, 63). The Tribunal awarded TECO USD 21.1 million but rejected TECO’s claim for future losses (¶¶ 67-69). Additionally, the Tribunal ordered Guatemala to reimburse 75% of TECO’s cost, *i.e.*, USD 7.5 million.

On April 18, 2014, Guatemala filed an application for the annulment of the Award, including a request for a stay of enforcement of the Award under Article 52(5) of the ICSID Convention and Rule 54(1) of the Arbitration Rules (¶¶ 1-3). On the same day, TECO filed an application for the partial annulment of the Award (¶ 1). Both applications were registered on April 22, 2014 and the enforcement of the Award was provisionally stayed under Arbitration Rule 54(2) (¶ 5). On May 29, 2014, the Committee was constituted (¶ 7). Subsequently, the Committee issued Procedural Order No. 1 on August 1, 2014 (¶ 10). On October 17, 2014, in accordance with Procedural Order No. 1, Guatemala filed its Memorial

on Annulment, and reiterated its request for the stay of enforcement of the Award, and TECO filed its Memorial on Partial Annulment (¶ 11). On February 10, 2015, the Committee decided that they stay of enforcement of the Award should continue to be in effect for the duration of the annulment proceedings (¶ 16). The hearing on annulment was held from October 13-15, 2015 (¶ 26). On November 4, 2015, TECO and Guatemala submitted their respective Costs Submissions, and the proceedings were declared closed on March 16, 2016 (¶ 27).

Analysis of Legal Issues by the Committee

Analysis of TECO's First Argument: The Tribunal Failed to State Reasons Because its reasoning for denying TECO damages for loss of value cannot be reconciled with its other findings under Article 52(1)(e) of the Convention.

TECO argued that an award may be annulled for failure to state reasons if a reader of the award is unable to understand how the tribunal arrived at its conclusions (¶ 92). TECO relied on the *Soufraki v. U.A.E.* annulment decision to argue that even short of a total failure to state reasons, some defects in the statement of reasons could give rise to annulment and that insufficient or inadequate reasons as well as contradictory reasons, which cancel each other, are also valid ground for annulment (¶ 92). TECO contended that the Tribunal's finding that EEGSA's tariffs and revenues would have been higher had it not been for Guatemala's breach necessarily implies that, if TECO had not sold its interest in EEGSA in October 2010, it would have been entitled to its share of the resulting additional profits (¶ 95).

Guatemala argued that the standard for annulment for contradictory reasons is high (¶ 98). Guatemala argued that there were no contradictions in the Award – up until October 2010, TECO claimed losses based on lost tariff revenues, whereas the losses claimed between 2010 and 2013 and from 2013 onwards were based on an alleged diminished value at which TECO sold its participation in EEGSA. Thus, Guatemala argued that the Tribunal was justified in treating these claims differently (¶ 99).

The Committee held that there were no genuine contradictions within the Tribunal's analysis of the loss of value claim (¶ 103). According to the Committee, the Tribunal never found that an increase in revenues due to higher tariffs would not have resulted in an increase in the transaction price. In fact, the Tribunal dismissed the loss of value claim on evidentiary grounds as there was no evidence on how the transaction price was determined and it was not certain how that an increase in revenues would have been reflected in the purchase price (¶ 106). Likewise, the Committee found no contradiction between, on the one hand, the Tribunal's decision awarding TECO historical damages, and on the other hand, the Tribunal holding that it could not award future losses because it had not been presented with sufficient evidence to determine whether TECO had suffered a loss of value and its amount (¶ 107).

Analysis of TECO's Second Argument: The Tribunal failed to state reasons because it disregarded the extensive documentary and expert evidence on loss of value under Article 52(1)(e)

TECO argued that in dismissing its claim for loss of value on the grounds of insufficient evidence, the Tribunal ignored the extensive expert and documentary evidence (¶¶ 109-116). According to TECO, the Tribunal failed to address its explanation that its loss of value claim did not depend upon knowing what would happen to the tariffs in the future, but only on a

showing that, as of October 2010, a purchaser of EEGSA would project lower future revenues and would pay less for the company (¶ 116).

Guatemala relied on *Rumeli v. Kazakhstan*, to argue that a tribunal is under no obligation to refer to all the pieces of evidence on the record or to provide reasons for relying on one piece of evidence rather than another (¶ 117). According to Guatemala, the Tribunal's reasons for rejecting the loss of value claim were correct, but even if they were not, the Award provided reasons: the lack of evidence on damages and should suffice to satisfy the requirements of the ICSID Convention (¶ 118).

The Committee agreed with TECO and annulled the award because the Tribunal's award did not meet the standards set out by Article 52(1)(e) of the ICSID Convention (¶127). According to the Committee, the Tribunal failed to address in any way the parties' expert reports on the loss of value claim despite the parties' strong emphasis on expert evidence, and ignored the existence of the relevant evidence in the record (¶ 138). Specifically, the Committee reasoned that the "Tribunal did not specify why it found the four expert reports submitted by the parties, which amounted to about 1,200 pages of analysis, and why the calculations put forward by the parties, which were in dispute, were deemed unsatisfactory and amounted to no sufficient evidence" (¶ 130).

Analysis of TECO's Third Argument: The Tribunal's decision on interest was manifest excess of powers and serious departure from a fundamental rule of procedure under Articles 52(1)(b) and 52(1)(d) of the Convention.

TECO argued that there was no dispute between the parties that, if the sale of EEGSA had been caused by Guatemala's treaty breach: (i) interest was application from August 1, 2009, through October 21, 2010, with respect to historical damages; and (ii) on the rate of interest that would apply. However, in deciding these issues, TECO argued that the Tribunal manifestly exceeded its powers (¶ 169). TECO further contended that based on the parties' agreement, they had no reason to address or anticipate the question of whether an award of interest would constitute unjust enrichment (¶ 170). Thus, according to TECO, the Tribunal never gave the parties the opportunity to address this issue either during the hearing or in its subsequent list of questions for the parties' post hearing submissions (¶ 170). This departure was serious because it deprived TECO of the protection the rule was intended to provide and resulted in its under-compensation in the range of USD 1 million (¶ 170).

Guatemala responded by arguing that the Tribunal did not manifestly exceed its powers because the parties had never agreed on the date from which interest would start accruing or on the applicable interest rate (¶ 172). Moreover, Guatemala argued that the Tribunal did not depart from a fundamental rule of procedure when it denied TECO's claim for interest for the period before the sale of EEGSA on the grounds that it would constitute unjust enrichment because there is no rule requiring a tribunal to "communicate, consult or check with the parties regarding its analysis or the conclusions reached during deliberations" (¶ 173).

The Committee held that the Tribunal did not manifestly exceed its powers when it decided the issue of pre-Award interest rate (¶ 176). According to the Committee, TECO did not point to any pleading by Guatemala in which the latter purportedly agreed with its position on the question of interest (¶ 178). Thus, the Tribunal was within its powers to appreciate that interest was disputed and to decide the starting date and which interest rate to apply (¶ 178). Moreover, the Committee held that TECO's argument that the Tribunal misrepresented

TECO's request for relief by not correlating TECO's pleadings with the testimony of its witness, is not immediately apparent or obvious. As a result, TECO's request for relief does not meet the requirement under Article 52(1)(b) which only permits annulment of excesses of power that are manifest, meaning evident, obvious or clear (¶ 181).

However, the Committee held that the Tribunal seriously departed from a fundamental rule of procedure when it denied TECO's claim for interest on historical damages for the period before EEGSA's sale on account of unjust enrichment (¶ 183). According to the Committee, while a tribunal is not required to communicate, consult or check with the parties with respect to its analysis or conclusions reached during deliberations, it is not without exceptions (¶ 184). One such exception is "when a tribunal effectively surprises the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings" (¶ 184). The Committee reasoned that the notion of unjust enrichment did not form part of the legal framework established by the parties and was never raised by the Tribunal (¶ 190), and the concept of unjust enrichment was not something that the parties could reasonably have anticipated, as there was nothing to suggest that the Tribunal was concerned with it (¶ 190). Accordingly, the Committee held that the parties' right to be heard on the issue of unjust enrichment was breached. As a result, the Committee annulled the Tribunal's decision on interest on historical damages for the period before EEGSA's sale (¶ 198).

As the Committee already determined that the Tribunal's decision on loss of value claim did not meet the requirements of Article 52(1)(e) of the Convention, the Committee declined to decide TECO's other arguments.

Analysis of Guatemala's Arguments

Analysis of Guatemala's First Argument: The Tribunal's assertion of jurisdiction over a mere regulatory dispute under local law was a manifest excess of powers under Article 52(1)(b) of the Convention.

Guatemala relied on *Soufraki v. U.A.E.*, *MCI v. Ecuador*, *CDC v. Seychelles*, *Klockner I*, and *Tza Yap Shum v. Peru*, to argue that a tribunal manifestly exceeds its power when it acts in contravention of the parties' consent and exceeds its jurisdiction (¶ 200). According to Guatemala, the Tribunal committed a manifest excess of powers because it exercised jurisdiction over what was a simple regulatory dispute under Guatemalan law, which had already been litigated in the Guatemalan courts (¶ 201). Guatemala argued that Article 10.16.1(a)(i)(A) of the CAFTA-DR, which includes the consent to arbitration, does not encompass disputes based on local law (¶ 201). Guatemala then relied on the facts of the case in the *Iberdrola v. Guatemala* arbitration, where the tribunal upheld the principle that mere regulatory law disputes are not investment treaty disputes and dismissed jurisdiction on the grounds that the claimant's claim was a domestic regulatory dispute (¶ 204).

TECO responded by arguing that: (i) the language of Article 52(1)(b) of the ICSID Convention does not provide for a heightened level of scrutiny or for a wider latitude to annul awards in respect of matters of jurisdiction, and does not dispense with the requirement that an excess of powers must be manifest in order to warrant annulment (¶ 207); (ii) there was no dispute between the parties that TECO had invoked Article 10.16.1(a)(i) of the CAFTA-DR and the Tribunal was not required to determine whether the allegations advanced by TECO were supported by the facts (¶ 208); (iii) there is no inherent incompatibility between a

dispute having arisen in a regulatory context and an international arbitral tribunal then being called to assess the conduct of regulatory or administrative authorities under international law (¶ 211); and (iv) Guatemala's reliance on the Iberdrola award is misplaced because the tribunal's decision in that case was not grounded on the principle that mere domestic regulatory disputes fall outside the jurisdiction of an ICSID tribunal (¶ 213).

The Committee rejected Guatemala's argument and held that: (i) the interpretation propounded by Guatemala would necessarily imply that an annulment committee has the authority to conduct a de novo review of a tribunal's decision on jurisdiction which would effectively transform annulment into an appeal in violation of the explicit terms of Article 53 of the ICSID Convention (¶ 216); (ii) the Tribunal manifestly did address Guatemala's jurisdictional objection (¶ 226); (iii) there was no need for the Tribunal to engage in an analysis of Article 10.16.1(a)(i)(A) of the CAFTA-DR as it would have added nothing and would have changed nothing in the Tribunal's reasoning (¶ 227); (iv) the Tribunal's prima facie analysis was tenable and evidences no manifest excess of powers (¶ 231); (v) the Tribunal's decision on jurisdiction was tenable as a matter of law (¶¶ 233-236) as there is no inherent incompatibility between a regulatory dispute having arisen at the domestic law level and an arbitration tribunal being subsequently called to assess the conduct of the State under international law (¶ 236); and (vi) the Tribunal's decision not to follow the Iberdrola tribunal's decision was tenable because there is no doctrine of stare decisis under international law (¶ 237).

Analysis of Guatemala's Second Argument: The Tribunal's failure to state reasons for the decision on jurisdiction under Article 52(1)(e)

Guatemala argued that both the total lack of reasons, as well as insufficient, inadequate or contradictory reasons may warrant annulment (¶ 239). According to Guatemala, the Tribunal failed to examine the relevant provisions of the CAFTA-DR and failed to apply the required prima facie test (¶¶ 240-242). TECO responded by arguing that the Tribunal addressed Guatemala's jurisdictional objections in full (¶¶ 243-245).

The Committee rejected Guatemala's argument and held that "insufficiency of reasons can lead to annulment only when a tribunal did provide some explanation for its decision, but these are insufficient from a logical point of view to justify the tribunal's conclusion" (¶ 249). According to the Committee, insufficiency of reasons is not a ground for annulment "where a tribunal did not explain why it rejected arguments, evidence, or authorities that were not relevant or necessary for its analysis" (¶ 249). Thus, the Committee held that it is "obvious on a simple reading of the Award that the Tribunal provided reasons for its decision on jurisdiction, eight pages of reasons," and there is "no basis to Guatemala's argument that the Tribunal dismissed its objection to jurisdiction without reasoning" (¶¶ 253-259). The Committee further noted that the "Tribunal set out the logical steps in its analysis, while the reasoning is clear and can be followed with ease from beginning to end. The fact that the Tribunal's analysis may not have been as elaborate as Guatemala would have wished does not change this conclusion" (¶257).

Analysis of Guatemala's Third Argument: The Tribunal reviewed and de facto reversed the Constitutional Court decision in manifest excess of powers and failure to state reasons under Articles 52(1)(b) and 52(1)(e) of the ICSID Convention.

Guatemala argued that an investment treaty tribunal cannot review decisions by national courts on local law matters except in cases of denial of justice (¶260). Specifically, Guatemala contended that the Tribunal’s decision that Guatemala breached the international minimum standard was based on Resolution 144-2008 and its alleged unlawfulness under the Guatemalan regulatory framework. However, the Constitutional Court decided against the argument that the Resolution was arbitration and breached the regulatory framework (¶ 262). Thus, in reaching the opposite conclusion – that Resolution 144-2008 breached the regulatory framework and was arbitrary, the Award reversed the decision of the Constitutional Court (¶ 262).

TECO responded by arguing that: (i) the Tribunal did not find a breach of Guatemalan law, but a breach of international law and the legality of a State’s acts under national law does not determine their lawfulness under international law (¶268); (ii) the Tribunal found its claim to be an international dispute distinct from the disputes before the Guatemalan courts and, as a result, the Constitutional Court’s decision has no res judicata effects in the arbitration (¶ 269); (iii) the Tribunal did not reverse the findings of the Constitutional Court, but in fact incorporated them in its Award (¶ 270); and (iv) the Tribunal did not find Resolution 144-2008 unlawful as a matter of Guatemalan law and its findings had not been the subject of proceedings before the Constitutional Court (¶ 272).

The Committee rejected Guatemala’s argument by holding that the Tribunal did not fail to state reasons and did not manifestly exceed its powers when it considered the Constitutional Court decisions (¶ 274). The Committee reasoned that an alleged contradiction between an award and elements extraneous to the tribunal’s reasoning (such as evidence in the record) is not a ground for annulment, but a criticism purporting to show that the tribunal incorrectly assessed the record and an attempt to reverse the award on the merits (¶ 278). As a result, the Award’s finding that Resolution 144-2008 did not comply with Guatemalan law is at odds with an alleged finding to the contrary made by the Guatemalan Constitutional Court, was not a valid ground for annulment (¶ 279). Specifically, the Committee stated that there was no contradiction because before making the finding that Resolution 144-2008 did not comply with the regulatory framework, the Tribunal interpreted the decisions of the Constitutional Court and held that the Guatemalan judiciary had not made any ruling with respect to the legality of the 2008-2013 tariff or of the process leading to its establishment (¶ 280).

The Committee further held that there was no manifest excess of powers by the Tribunal because the Tribunal did not revise or reverse the Constitutional Court decisions (¶ 286). In fact, the Tribunal interpreted the Constitutional Court decisions in order to determine the scope of its findings and subsequently integrated the decisions within its analysis made under international law (¶¶ 286-296). Thus, the Committee found that the Tribunal’s interpretation of the Constitutional Court decisions was tenable and, as a result, it was not empowered by the ICSID Convention to decide which of the competing interpretations is correct (¶ 295).

Analysis of Guatemala’s Fourth Argument: The Tribunal Failed to Apply International Law and Equated a Breach of Domestic Law with a Breach of the CAFTA-DR in manifest excess of powers under Article 52(1)(b) of the Convention

Guatemala argued that the Tribunal: (i) failed to ‘delimit the international law concepts relevant to its analysis’ and, thus, failed to analyze the “international law applicable to the dispute,” and (ii) never showed how Guatemala’s alleged breach of the regulatory framework

also resulted in a breach of international law, but simply conflated the concepts of a domestic and an international law breach (¶¶ 302-303).

TECO responded by arguing that: (i) there was no need for the Tribunal to engage in an elaborate analysis of the case law or the parties' positions; (ii) the Tribunal not only defined the applicable legal standard under customary international law, but also reviewed the parties' positions and examined specifically how that standard would apply in the context of administrative proceedings, such as the tariff review process; and (iii) the Tribunal did not apply Guatemalan law, but international law to the facts and explained why the CNEE's conduct was arbitrary in connection with Article 10.5 of the CAFTA-DR (¶¶ 305-307).

The Committee rejected Guatemala's arguments and found that annulment of the Award on this ground was not warranted. The Committee reasoned that Article 52(1)(b) of the ICSID Convention does not allow the annulment of awards for failing to examine the applicable law in the level of detail desired by a party, and as long as a tribunal correctly identified the applicable law and endeavored to apply it to the facts of the case, annulment is not warranted (¶ 311). Specifically, the Committee held that the Tribunal: (i) correctly identified the applicable law by referring to the text of the Treaty, parties' submissions; five arbitral awards; and at least five doctrinal commentaries (¶ 313); (ii) did examine the relationship between the autonomous standard of fair and equitable treatment and that under customary international law (¶ 314); (iii) examined how the legal standard under customary international law would apply in the context of administrative proceedings (¶ 315); and (iv) found liability under international law on the basis of an international law analysis (¶¶ 319-323).

Analysis of Guatemala's Fifth Argument: The Tribunal failed to stated reasons for the test of applicable international law under Article 52(1)(e) of the Convention.

Guatemala argued that the Tribunal found that there was arbitrariness and lack of due process, without actually defining these concepts under international law because "all the Tribunal said was that the fair and equitable treatment standard 'is infringed by conduct [that] [. . .] is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety'" (¶ 325). TECO responded by arguing that the Tribunal did examine the concepts of both arbitrariness and due process (¶ 326).

The Committee rejected Guatemala's argument and held that the Award clearly indicated what the Tribunal understood by arbitrariness and lack of due process (¶ 328). The Committee reasoned that what "matters under Article 52(1)(e) of the ICSID Convention is whether a reader of the award can understand how a tribunal 'proceeded from Point A. to Point B. and eventually to its conclusion'" (¶ 329). The Tribunal's reasoning more than satisfied this requirement (¶ 329). Specifically, the Committee stated that the Tribunal grounded its finding of liability under Article 10.5 of the CAFTA-DR on: (i) the regulator's disregard for the fundamental principles underpinning the regulatory framework, as evidenced by Resolution 144-2008; (ii) the regulator's arbitrary conduct when it accepted to receive the Expert Commission's report in the week of July 24, 2008, only to then disregard it along with the Bates White Study on the basis that this did not leave enough time to publish the tariff by August 1, 2008; and (iii) the regulator's arbitrary preliminary review of the July 28 Bates White study, which underscored its desire to reject it for a more favorable study prepared by its own consultant (¶ 330).

Analysis of Guatemala’s Sixth Argument: The Tribunal failed to stated reasons in light of the contradiction regarding the decision on damages for historical losses under Article 52(1)(e) of the Convention

Guatemala argued that the Award should be annulled because there was an inherent contradiction in the Tribunal’s finding, on the one hand, that the report of the Expert Commission was not binding and that the CNEE could depart from it and/or reject the Bates White study, and, on the other hand, calculating damages on the basis of the Bates White Study and the Expert Commission’s report (¶ 332). TECO responded by arguing that Guatemala mistakenly reads the Award’s finding on liability as being based solely on the CNEE’s failure to state reasons for its decision to disregard the Expert Commission’s rulings and the Bates White study (¶ 335). According to TECO, “the Tribunal found that the 28 July 2008 Bates White incorporated the Expert Commission’s rulings, which means that the Tribunal’s decision to quantify historical losses based upon these documents was consistent with its decision on liability” (¶ 336).

The Committee rejected Guatemala’s argument because the Tribunal did not find liability solely on the basis of the regulator failing to provide reasons for its decision to reject the Expert Commission (¶ 338-343). Rather, the Tribunal found liability because Guatemala had displayed an arbitrary conduct during the tariff review process (¶ 342).

Analysis of Guatemala’s Seventh Argument: The Tribunal Committed a serious departure from a fundamental rule of procedure when it ignored evidence submitted by Guatemala on historical losses under Article 52(1)(d) of the Convention.

Guatemala argued that the Tribunal committed a serious departure from a fundamental rule of procedure when it ignored evidence submitted by Guatemala on historical losses (¶ 345). TECO responded by arguing that this basis for annulment amounts to an impermissible attempt to have the Committee review on the merits of the Tribunal’s assessment of Guatemala’s documentary and testimonial evidence (¶ 346). The Committee rejected Guatemala’s argument holding that annulment is not a remedy designed to correct a tribunal’s assessment of the record before it or its appreciation of the facts (¶ 349). Thus, any error that the Tribunal may have committed in its understanding and assessment of Guatemala’s expert testimony does not justify annulment (¶ 348).

Analysis of Guatemala’s Eight Argument: The Tribunal’s failure to state reasons on the decision on costs under Article 52(1)(e) of the Convention.

Guatemala argued that the Tribunal’s decision on costs should be annulled for failure to state reasons because: (i) the Tribunal failed to provide any explanation for its holding that TECO’s costs of over USD 10 million were justified and appropriate; and (ii) there was a contradiction between, on the one hand, the Tribunal’s statement that it would apply the principle that costs follow the event with respect to costs, and, on the other hand, its decision to order Guatemala to pay 75 percent of TECO’s costs (¶¶ 353-354). TECO responded that the Tribunal’s decision on costs was within its discretion and cannot be annulled and, in any event, was supported by clear and internally consistent reasoning (¶ 356).

The Committee annulled the Tribunal’s decision on costs. The Committee relied on *MINE v. Guinea* to hold that the Tribunal’s decision on costs “cannot survive the annulment of that portion of the Award with which it is inextricably linked,” and thus, annulled the decision on

costs as a result of the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA (¶ 362).

Costs

The Committee held that each party should bear its own legal costs and expenses in connection with TECO's application for the partial annulment of the award, and Guatemala should reimburse TECO half of ICSID's administrative fees and expenses in connections with TECO's application for the partial annulment of the award, including the fees and expenses of the members of the Committee and its assistant. With respect to Guatemala's application for the annulment of award, the Committee held that Guatemala should bear the full costs and expenses incurred by ICSID. Moreover, the Committee held that Guatemala should bear the costs of the annulment proceedings and reimburse TECO for 60% of its legal costs and expenses, i.e., USD 273, 652.39.

Decision

The Committee annulled the Award's decision: (i) on damages for the loss of value claim under Article 52(1)(e) of the Convention; (ii) on interest on historical damages for the period August 1, 2009 until October 21, 2010; and (iii) the Tribunal's determination on costs.