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School of International Arbitration, Queen Mary, University of London
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) – Award – 13 May 2020

Case Report by: Vassiliki Marazopoulou**, Editor Diego Luis Alonso Massa***

Summary: These proceedings constitute Resubmission Proceedings in sequence to a partial Annulment of an Original Award. By virtue of the Original Arbitral Award it had been ruled that Guatemala (Respondent) had violated its obligation to accord Claimant fair and equitable treatment under Article 10.5 of the DR-CAFTA. This Arbitral Tribunal, after having established issues qualifying as res judicata proceeded to award Claimant damages due to cash flow shortfall until the date Claimant sold its share to the investment ('loss of value claim'), while it also upheld pre-sale interest to the damages awarded to the Claimant. The Arbitral Tribunal decided to apply the same interest of US Prime rate plus 2% in both pre- and post-Award damages. Finally, the Arbitral Tribunal proceeded with an allocation of costs between the Parties based mainly on the costs follow the event principle.

Main Issues: Res judicata in case of resubmission arbitration proceedings; award of 'loss-of-value' damages caused due to the downgrading of the investment's value; determination of applicable interest rates on pre-sales damages, as well as pre-Award and post-Award damages.

Tribunal: Prof. Vaughan Lowe, Q.C., (President), Dr. Stanimir Alexandrov (Arbitrator), Prof. Brigitte Stern (Arbitrator)

Claimant's Counsel: Ms. Andrea Menaker (White & Case LLP London), Mr. Petr Polášek, Ms. Kristen M. Young, (White & Case LLP Washington, D.C.), Mr. David Nicholson, Mr. Javier Cuevas, (TECO Energy, Inc., USA)

Respondent's Counsel: Mr. Nigel Blackaby (Freshfields Bruckhaus Deringer US LLP Washington, DC, United States of America), Mr. Lluis Paradell (Freshfields Bruckhaus Deringer LLP Roma, Italy), Ms. Francesca Loreto, Mr. Alexandre Alonso (Freshfields Bruckhaus Deringer US LLP, New York, United States of America), Mr. Jean-Paul Dechamps, (Dechamps International Law, London), Mr. Roberto Antonio Malouf Morales Ministro de Economía, República de Guatemala, Lic. Jorge Luis Donado Vivar (Procurador General de la Nación), República de Guatemala.

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Digest:

1. Factual Background

TECO Guatemala Holdings (hereinafter referred to as 'TECO' or 'Claimant') is a company incorporated under the Laws of the state of Delaware, United States of America. Through a joint venture with Iberdrola Energía, S.A. (Iberdrola) and Electricidade de Portugal, S.A. ('EDP') Claimant indirectly held a 24% ownership interest in Empresa Eléctrica de Guatemala, S.A. ('EEGSA'), Guatemala's largest electricity distribution company (¶¶1-3). The underlying dispute arose out of the alleged violation by the National Electric Energy Commission (hereinafter: 'CNEE') of the applicable regulatory framework for setting tariffs for distribution of energy by EEGSA (¶9). Respondent is the Republic of Guatemala ('Guatemala' or 'Respondent') (¶7).

The dispute originated by the adoption of the new General Electricity Law ('LGE') and Regulations relating to the LGE ('RLGE') in 1996 in Guatemala, introducing a new tariff review system, as well as establishing a new regulatory body, namely, the 'National Electric Energy Commission' ('CNEE'). In this new tariff review system, the 'Value Added for Distribution' ('VAD'), a component in the calculation of the tariff was to be henceforth calculated not by reference to the actual costs incurred by the distributor, but by the costs of a hypothetical benchmark efficient company. Distributors, including EEGSA, recalculated their own VAD 'through a study entrusted to an engineering firm prequalified by the [CNEE]'. The distributor had to choose the firm from a list drawn up by the CNEE and the CNEE was then to review the VAD calculation and put forward 'corrections' to it. Such corrections would either be accepted or, if contested by the distributor, referred to a neutral three-person Expert Commission for decision. Only in two circumstances was the CNEE entitled to make its own calculation of the VAD; if (i) the distributor did not deliver its own study, or (ii) the distributor did not correct its study according to the LGE and RLGE (¶¶44-46).

The under discussion dispute arose more in particular from the setting of the VAD for the Third Tariff Period, i.e. 2008–2013. EEGSA delivered its VAD study, commissioned from the CNEE-approved consultants Bates White. The CNEE indicated that certain corrections should be made. Bates White amended the study in May 2008, but the CNEE considered that not all of the necessary amendments had been made. EEGSA disagreed and the matter was

considered by the Expert Commission which, on 25 July 2008, ruled against the CNEE on several key points, while ruling in favour of the CNEE on many other points. On 28 July 2008, Bates White submitted a revised report incorporating most but not all of the Expert Commission rulings. The CNEE considered the revised Bates White study to be unreliable, rejected it and proceeded on 29 July 2008 to set tariffs on the basis of VAD calculations made by the CNEE's own consultants, Sigla. Those tariffs were lower than the tariffs that would have resulted from the Bates White calculations' application (amended in accordance with part of the Expert Commission's determinations). Claimant considered that this was because Respondent did not want to raise electricity prices but rather wanted to decrease them significantly for political reasons (¶ 49).

TECO argued that the CNEE had no right to disregard the Bates White VAD study and apply its own unilateral VAD study. Respondent on the other hand took the position that it was entitled to insist on all of the corrections to the Bates White study that the CNEE had indicated being applied to EEGSA's VAD study (¶ 50).

TECO had initially filed a Request for Arbitration under the auspices of ICSID dated 20 October 2010, claiming that Respondent had breached its obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment and requesting compensation for damages arising from such breach, as well as interest of the amount requested and the payment of its legal fees and costs. An Original Award ('the Original Award') was issued on 19 December 2013. In the meantime, in October 21st, 2010, DECA II sold its shares in EEGSA to the Colombian company, Empresas Pùblicas de Medellín E.S.P. ("EPM") for US\$ 605 million (¶ 51).

2. Procedural History

These proceedings are Annulment Proceedings in sequence to an Original Arbitration out of which the Original Award was rendered on 19 December 2013. The Original Award found: (i) that the (Original) Tribunal had jurisdiction to decide on TECO's claims under the DR-CAFTA; (ii) that Guatemala had violated its obligation to accord TECO's investment in the Guatemalan electricity distribution company EEGSA fair and equitable treatment under Article 10.5 of the DR-CAFTA; (iii) that Guatemala should pay US\$21,100,552 to TECO as compensation for damages for the period from the date of Guatemala's breach (1 August 2008, when the CNEE imposed its tariffs) until 21 October 2010 when TECO sold its ownership interest in EEGSA ("historical damages"); (iv) that such amount would bear interest at the US Prime rate plus a 2 percent premium as from 21 October 2010 until the date of full payment; (v) that interest should be compounded on an annual basis; and (vi) that Guatemala should support the entirety of its costs and expenses and pay US\$7,520,695.39 to TECO on account of 75 percent of the costs and fees incurred by TECO in the arbitration. The (Original) Tribunal, however, denied TECO's claim for damages suffered as a result of the impaired value at which TECO sold its ownership interest in EEGSA ('loss of value damages'). The Tribunal had also denied TECO's claim for interest for the period preceding the sale (¶ 10).

Both Parties submitted applications for annulment. By virtue of the Decision on Annulment dated 5 April 2016, the *ad hoc* ICSID Committee partly granted TECO's application and the matter was further referred to this Tribunal in accordance with the applicable ICSID provisions. More in particular:

Claimant filed a Request for Arbitration in resubmission proceedings dated 23 September 2016, which was registered by ICSID at the same date (¶¶ 12-13).

A first session was held by means of a telephone conference on 3 April 2017 (¶ 19).

The Tribunal issued its Procedural Order No. 1 on 4 April 2017 including the Parties' agreement on procedural matters and its Procedural Order No. 2 on confidentiality of documents, while on 22 May 2017 its Procedural Order No. 3 amending Procedural Order No 1 (¶ 20, 23).

Claimant filed a Memorial on the Merits on 1 September 2017 and Respondent filed its respective Counter-Memorial on the merits on 2 February 2018. On 30 May 2018 the Claimant filed its Reply on the Merits and on 26 September 2018 the Respondent filed its Rejoinder on the Merits (¶¶ 20-27).

Further, on 3 December 2018, Claimant called for cross-examination of Respondent's Quantum Expert. On 4 December 2018 Respondent designated its witness Mr. Miguel Antonio Santizo Pacheco to testify at the hearing, while on 13 December 2018, the Claimant filed a request seeking leave from the Tribunal to submit an Opinion issued by the U.S. District Court for the District of Columbia on 20 September 2018 denying Guatemala's motion to dismiss TECO's petition to confirm the Award (¶¶ 28-30).

On 23 January 2019, the Respondent filed observations on the Claimant's request of 13 December 2018 and sought leave from the Tribunal to complete the record with the relevant VAD studies and the corresponding CNEE Resolutions. On 24 January 2019, at the Tribunal's invitation, each Party filed a letter regarding their disputed items to be addressed during the Pre-Hearing Organizational Meeting. On 25 January 2019 the Tribunal (i) granted Claimant's request to submit the Opinion to the Tribunal, and (ii) decided to address Respondent's request of 23 January 2019 to submit as new evidence certain documents which appear not to exist as yet. On 8 February 2019, Respondent noted its belief that Mr. Santizo's testimony was crucial to the issues in dispute and reserved its right to rely on his written statements during the hearing. On 11 February 2019 a Pre-Hearing Organizational Meeting was held by means of teleconference. On 14 February 2019 the Tribunal issued Procedural Order No. 4 concerning the organization of the hearing. A hearing on the merits was held from 11 March to 14 March 2019 at the seat of the ICSID Centre in Washington D.C. (¶¶31-40).

3. Claimant's Positions

*3.1 Claimant's Position on *res judicata* and particularly on whether the 'loss of claim' qualifies as such*

Claimant took a broad view as to *res judicata* arising from the Original Award, by alleging that any findings of the Original Tribunal which were integral to the decision and were not annulled stand with the status of *res judicata*. Claimant more in particular submitted that the findings of the Original Tribunal with regard to the 'loss of value' claim qualified as *res judicata* and that henceforth all that was left to the Arbitral Tribunal was to calculate the respective damages in a straightforward arithmetical calculation of the 'But-for' value of EEGSA (¶¶ 75-76).

Claimant further contended that the Original Tribunal's determinations on three key factors-inputs for the purpose of calculation of damages, i.e. the Replacement Value of the Assets ('VNR'), the proper Capital Recovery Factor ('FRC') and the level of capital expenditures of the Actual Company which would affect the cash flows of the company also qualify as *res judicata* (¶77).

3.2 Claimant's Position on claim for damages for loss of value

The claim for 'loss of value' damages is based on the proposition that Guatemala's unlawful acts had a significant financial impact on the value of TECO's investment in EEGSA, causing TECO to sell its interest in EEGSA at a depressed price to EPM on 21 October 2010 (¶88). To prove the loss of value claim, Claimant contended that EPM was in effect buying 'damaged goods' when buying EEGSA, which was *inter alia* downgraded by major rating agencies (¶89).

3.3 Claimant's Position on the interest rates applicable

Claimant argued that this Tribunal cannot revisit the finding of the Original Tribunal that the interest rate that reflects the loss to Claimant is US Prime + 2%, which finding it says was affirmed by the *ad hoc* Committee in the annulment proceedings (¶128).

It is also mentionable that Claimant argued that the interest rate applicable to the pre-sale lost cash flows was a rate of 8.8% derived from EEGSA WACC, a view also shared by the Respondent (¶134).

3.4. Claimant's Position on the allocation of costs

Claimant requested for Respondent to bear the total arbitration costs, alleging that Respondent engaged in procedural misconduct in the initial proceedings as well and that Claimant largely succeeded in its claims and that this should be reflected in the costs order (¶145).

In its Memorial, Claimant submitted a claim for a total of legal and other costs arising to US\$ 4,079,892.49 (¶147).

4. Respondent's positions

4.1 Respondent's Position on res judicata and particularly on whether the 'loss of claim' qualifies as such

Respondent alleged that only the un-annulled part of the *dispositif* and the reasoning necessary for that part of the *dispositif* has the status of *res judicata*. Therefore, pursuant to Respondent's argumentation, there was no *res judicata* in relation to the 'loss of value' claim. It stated that, first of all, it would not be possible for *res judicata* to arise, because the claim for loss of value damages was dismissed by the Original Tribunal. Subsidiarily, Respondent argued that in any event the Original Arbitral Tribunal had not been presented with sufficient evidence to determine whether Claimant had suffered a loss of value in this amount. In the same context Respondent reiterated that the historic damages claim and the loss-of-value claim are distinguishable exercises (¶ 78).

4.2 Respondent's Position on claim for damages for 'loss of value'

Respondent's primary argument is that the loss of value claim is unfounded, because neither the existence nor the extent of any damage under this heading, caused by Respondent's breach of the DR-CAFTA has been established by Claimant, who bears the burden of proof. Alternatively, Respondent argued that Claimant's damages' calculations are in any event incorrect (¶ 92).

4.3 Respondent's Position on the interest rates applicable

With respect to the rate applicable after the date of the sale, Respondent argued that a risk-free rate is applicable, because TECO was not exposed to any commercial operating risk after the sale of its interest in DECA II/EEGSA. To this end, Respondent also contended that the Original Tribunal had explicitly upheld its view on the said point, despite having subsequently erroneously proceeded to apply a rate of US Prime + 2%, i.e. a commercial rate (¶ 128).

It should also be underscored that Respondent agreed with Claimant that the interest rate applicable to the pre-sale lost cash flows was a rate of 8.8% derived from EEGSA WACC (¶134).

4.4. Respondent's Position on the allocation of costs

In the Respondent's view the Tribunal, in allocating costs, should consider that the Original Tribunal rejected more than 90% of the claim for damages submitted by Claimant. Further, Respondent denied Claimant's allegation that it engaged in misconduct in the initial proceedings. In the alternative, Respondent submitted that Claimant's costs were in any event excessively high and requested for the Tribunal to apply a 50% reduction to the amount of the costs claimed by Claimant and to order Respondent to pay no more than 10% of such costs (¶ 148).

Respondent also submitted a claim for a total of legal and other costs totaling US\$ 4,782,415.49, as stated in the Award as well (¶ 150).

5. Tribunal's analysis

5.1. On res judicata

The Tribunal began its analysis by addressing the *res judicata* issue with respect to the rulings of the Original Arbitration Proceedings. This Tribunal distinguished between the 'historical damages' claim and the 'loss of value' claim; it held that the original tribunal's 'historical damages' were not annulled hence the respective reasoning undoubtedly qualified as *res judicata*. On the contrary, the 'loss of value' claim did not qualify as *res judicata* (¶¶ 71, 72, 80).

5.2 Tribunal's analysis on claim for damages for loss of value

In order to determine the amount of the 'loss of value' damage caused to Claimant by the breach of the DR-CAFTA by Respondent, the Tribunal stated that it would be necessary to

establish the value EEGSA at the point of its sale to EPM, the ‘But-for’ value of EEGSA and the causal link between any loss of value and the breach of the DR-CAFTA (¶ 93).

The Tribunal noted that the conclusions of the expert evidence of each side are not radically different and rather based its analysis on the question of whether Claimant has demonstrated that that figure would have been higher ‘But for’ Respondent’s breach of its obligations under DR-CAFTA, and if so, by how much. The Tribunal therefore articulated the crucial relevant question before it on whether Claimant has demonstrated that the breach by Respondent of its obligations under the DR-CAFTA caused a loss of value of EEGSA when it was sold (¶ 97).

To rule on this, the Tribunal distinguished between the two periods; the first period up to 31 July 2013, when the Third Tariff Period ended and the second period from 1 August 2013 onwards (¶ 103).

With respect to the first period the Tribunal decided that Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 tariff round on 31 July 2013, discounted to its value at 21 October 2010 (¶ 106).

With respect to the second period the Tribunal decided that Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 tariff round on 31 July 2013, discounted to its value at 21 October 2010, but it dismissed the claim for damages in respect of a loss of value of EEGSA allegedly realized upon its sale on 21 October 2010 (¶ 123).

5.3. Tribunal’s analysis on interest rates applicable

It is noted that the Original Tribunal had awarded TECO historical lost cash flow damages of US\$ 21,100,552, plus interest from the date of the sale of TECO’s interest in DECA II to EPM (21 October 2010) until payment, at the US Prime Rate plus 2%; it had however denied the claim for interest on historical lost cash flows from 1 August 2009 until 21 October 2009 (the ‘pre-sale interest’). The Original Tribunal’s decision on pre-sale interest was annulled on the ground that the Parties had not been given an opportunity to be heard on the ‘unjust enrichment’ point (¶¶ 124-125).

Based on the consideration that Claimant’s right to be made whole in respect of losses sustained as a result of Respondent’s breach of its obligations under DR-CAFTA necessarily implies that Claimant should be awarded interest on sums that should have been available to it, calculated from the dates when it should have received those sums (¶ 126), this Tribunal made an award in respect of the ‘pre-sale interest’ on the damages due to it up to the date of the sale, in the sum of US\$ 838,784, as at 21 October 2010 (¶ 127).

As to the interest rate applicable, the Arbitral Tribunal concluded unanimously, although by different reasoning of its Members, that it is not bound to apply the interest rate set in paragraph 767 of the Original Award (¶ 131).

The Tribunal then decided that the US Prime rate of interest plus 2%, payable both pre- and post-Award until the date of payment is an appropriate rate of interest applicable to the sums owing as of 21 October 2010, i.e. the date TECO sold EEGSA (¶ 135).

5.4 Tribunal's analysis on the allocation of costs

In allocating the costs of the proceedings the Arbitral Tribunal followed the principle that costs awards should reflect the extent to which each party in arbitration was successful, a principle with which the Parties also agreed throughout the proceedings. The Tribunal also considered the Parties' conduct during the resubmitted proceedings in a cooperative manner, with professional efficiency (¶153).

Taking into consideration the above, the Arbitral Tribunal decided that Respondent shall bear its own costs plus reimburse 75% of Claimant's costs, including its contribution to the costs and expenses incurred by ICSID. The Tribunal further decided that each party shall bear the costs and expenses related to the annulment proceedings and those incurred by ICSID in the proceedings before the Tribunal (¶154).

6. Tribunal's Decision

For the reasons set forth above, the Tribunal, by a majority, decides as follows:

- A. Claimant is entitled by way of damages to recover the cash flow shortfall between the 21 October 2010 sale date and the end of the 2008–2013 Tariff Period on 31 July 2013, i.e., the sum of US\$ 26,793,001, calculated as at 21 October 2010;
- B. Claimant is entitled by way of damages to recover 'pre-sale interest' up to the date of the sale on 21 October 2010, in the sum of US\$ 838,784, calculated as at 21 October 2010;
- C. The 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;
- D. All other claims are dismissed.