TECO Guatemala Holdings, LLC v. Republic of Guatemala

ICSID Case No. ARB/10/23

Minutes of the First Session
Washington, D.C., May 23, 2011

The first session of the Arbitral Tribunal was held on May 23, 2011, from 10:30 a.m. to 12:00 p.m., by telephone conference.

Present at the session were:

Members of the Tribunal

Mr. Alexis Mourre, President of the Tribunal
Prof. William W. Park, Arbitrator
Dr. Claus von Wobeser, Arbitrator

ICSID Secretariat

Ms. Anneliese Fleckenstein, Secretary of the Tribunal

Assistant to the Tribunal

Mr. Bingen Amezaga

Representing the Claimants

Andrea Menaker, White & Case LLP
Stephanie Early, White & Case LLP
Chuck Attal, TECO Energy Inc., Senior Vice President & Chief Legal Officer
David Nicholson, TECO Energy Inc., Associate General Counsel
Javier Cuebas, TECO Energy Inc., Corporate Counsel

Representing the Respondent

Nigel Blackaby, Freshfields Bruckhaus Deringer US LLP
Noiana Marigo, Freshfields Bruckhaus Deringer US LLP
Jean Paul Dechamps, Freshfields Bruckhaus Deringer US LLP
Alejandro Arenales, Arenales & Skinner Klée
Rodolfo Salazar, Arenales & Skinner Klée

1. ***Applicable Arbitration Rules*** **(ICSID Convention Article 44)**

• The parties agree that the ICSID Arbitration Rules in force on the date the Notice of Arbitration was filed (October 20, 2010) apply (*i.e.*, the Rules as revised as of April 10, 2006), except to the extent modified by the DR-CAFTA. *See* DR-CAFTA Article 10.16.5.

2. ***Constitution of the Tribunal and Tribunal Members' Declarations*** **(ICSID Arbitration Rules ("Rule") 6; DR-CAFTA Article 10.19)**

• The parties agree that the Tribunal has been properly constituted and that they have no objection to the appointment of any of its members.

3. ***Fees and Expenses of the Tribunal Members*** **(ICSID Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees)**

• The parties agree that the fees and expenses of Tribunal members should be governed by ICSID Convention Article 60, Administrative and Financial Regulation 14 and the current ICSID Schedule of Fees (effective as of January 2008), providing that the daily fee for the arbitrators should be $3,000, plus a per diem, where appropriate, and expenses.

4. ***Presence and Quorum*** **(Arbitration Rules 14(2) and 20(1)(a))**

• The parties agree that all three members of the Tribunal should be required to constitute a quorum. Thus, all members of the Tribunal must be present at hearings. When exigency so requires, however, the President of the Tribunal may make procedural decisions, such as ruling on requests for extensions of time, on his own.

5. ***Decisions of the Tribunal by Correspondence*** **(Arbitration Rule 16(2))**

• The parties agree to the application of Rule 16(2), which provides that "[e]xcept as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal."

6. ***Delegation of Power to Fix Time Limits*** **(Arbitration Rule 26(1))**

• The parties request the Tribunal to fix time limits in consultation with the parties. As agreed by the parties under Item 4 above, when exigency so requires, the President of the Tribunal may make procedural decisions, such as ruling on requests for extensions of time, on his own.

7. ***Representation of the Parties*** **(Arbitration Rule 18)**

• Claimant is represented by:

- White & Case LLP

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- TECO Guatemala Holdings, LLC

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• Respondent is represented by:

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8. ***Apportionment of Costs and Advance Payments to ICSID*** **(ICSID Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28)**

• The parties agree that advance payments to the Centre should be made in equal portions by the parties, without prejudice to the final decision of the Tribunal as to the allocation of costs.

• For budgetary reasons, Respondent requests that any advance payment be requested by no later than October of the previous calendar year for which the payment is to be applied.

9. ***Place of Proceeding*** **(ICSID Convention Articles 62, 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3))**

• The parties agree that hearings should take place at ICSID's seat in Washington, DC. The Tribunal may hold meetings of its members without the parties, at any place it deems appropriate.

10. ***Procedural Language*** **(Arbitration Rules 20(1)(b), 22)**

• The parties agree that the procedural languages of the arbitration should be English and Spanish.

• The parties agree that they will file all submissions, including witness statements and expert reports, in their respective official languages together with simultaneous translations into the other procedural language. In case of discrepancy, the written document in its original language will prevail.

• For factual exhibits and legal authorities, including ICSID decisions, presented with submissions, the parties will translate into the other procedural language an appropriate excerpt that is relied upon by the party making the submission.

• Documents produced in response to requests or orders for production may be submitted in their original language with the corresponding translation of the document or appropriate excerpt translated into the procedural languages of the arbitration. These translations will be filed simultaneously with the factual exhibit, legal authority, or document produced to which they relate.

• Witnesses and experts may testify in their native language and simultaneous interpretation into English or Spanish should be provided at hearings.

• The parties propose that brief communications that are not substantive applications or submissions, and routine correspondence from the parties or the Tribunal be made only in English.

• Awards and any other substantive decisions of the Tribunal shall be rendered in both procedural languages. Procedural orders and routine correspondence shall be rendered in English only.

11. ***Means of Communication and Copies of Instruments*** **(Arbitration Rules 20(1)(d) and 23; Administrative and Financial Regulations 24 and 30)**

• The parties propose sending all correspondence and submissions electronically to the other party's representatives (as set forth below), the ICSID Secretary and the Tribunal. Witness statements and expert reports also should be filed electronically along with the corresponding submission. In the event of simultaneous submissions, these will be sent electronically to the Tribunal and the ICSID Secretary, who will forward the submission to the other party once both submissions have been received. Both parties' submissions shall be filed in word format and PDF searchable documents.

• The parties shall send directly to the Tribunal Members one hard copy of their full submissions in A/4 or 8-1/2 by 11 formats, double sided. These copies should be sent by overnight courier on the next business day following the electronic filing.

• The parties propose filing two hard copies of submissions, along with accompanying witness statements, expert reports, factual exhibits, and legal authorities with the ICSID Secretary. This copy should be sent by overnight courier on the day the submission is filed electronically or by hand courier on the next business day following the electronic filing.

• Within three business days of the filing of any submission, each party will provide to the other party and to ICSID a CD or USB thumb drive containing the submission, along with the accompanying witness statements, expert reports, factual exhibits, and legal authorities.

• For purposes of DR-CAFTA 10.21.4, Claimant will provide Respondent with a redacted version of any submissions containing confidential business information within one week of the filing.

• The parties will present copies of factual exhibits filed. If one of the parties challenges a document, the Tribunal will decide whether the original or a certified copy of the document needs to be submitted. Each party will number the accompanying documentation consecutively throughout the whole proceeding. To this effect, Claimant will use the format C-1, C-2, C-3, etc. and Respondent will use R-1, R-2, R-3, etc. For Legal Authorities, they will use CL-1, CL-2, CL-3, etc. and RL-1, RL- 2, RL-3, etc.

• Witness statements and expert reports will have their own numbering. To this effect Claimant will use CWS-1, CER-1, etc, and Respondent will use RWS-1, RER-1, etc.

•All numbering will be consecutive whether in merits or jurisdiction stages.

•The parties will provide the Tribunal, with each of their submissions, a consolidated list of exhibits as well as a chronological list of their fact exhibits.

•The parties will clearly identify in their submissions when they are referring to an exhibit and authority in a way that they are easier to identify.

• The parties propose that brief communications that are not substantive applications or submissions and other routine correspondence only be sent electronically to the other parties' representatives (as set forth below), the ICSID Secretary and the Tribunal.

• Correspondence and submissions filed electronically shall be sent to:

For Claimant:

amenaker@whitecase.com
clamm@whitecase.com
asmutny@whitecase.com
jcrowe@whitecase.com
jcolivares@whitecase.com
jcuebas@tecoenergy.com

For Respondent:

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alejandro@arenales.com.gt

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rtrejo@mineco.gob.gt

12. ***Written and Oral Procedures*** **(Arbitration Rules 20(1)(c) and 31)**

• The parties agree that the proceeding should comprise written and oral phases.

13. ***Schedule of Written Pleadings*** **(Arbitration Rules 20(1)(c) and 31)**

• The parties agree that there should be two exchanges (*i.e.*, Memorial, Counter-Memorial, Reply, Rejoinder) for the merits phase. Submissions should be accompanied by all documentary evidence, witness statements, and expert reports. If there is a jurisdictional phase, the parties agree that there should be only one exchange of written pleadings (*i.e.*, Memorial, Counter-Memorial).

• The parties agree that submissions should be consecutive.

• The parties agree that first submissions should be comprehensive and that second round submissions (*i.e.*, Reply, Rejoinder) should be responsive and only include additional written witness testimony, expert opinion, or documentary or other evidence responding to or rebutting the matters raised by the other party's written submission.

• Timetable (see below)

• In accordance with Item 11 above, the parties propose to provide the Tribunal with electronic copies of submissions (in word and PDF searchable format) by email and by either CD or USB thumb drive.

• Timetable:

1. Claimant's **memorial on the merits** is due on **September 23, 2011 (4 months from the date of the first session).**

2. Respondent's **notice** that it will or will not raise objections to jurisdiction is due on **October 24, 2011** (1 month after Claimant's memorial on the merits).

3. If Respondent does **not** raise objections to jurisdiction:

    a. Respondent's **counter-memorial on the merits** is due on **January 24, 2012** (4 months from Claimant's memorial on the merits).

    b. Claimant's **reply on the merits** is due on **May 24, 2012** (4 months from Respondent's counter-memorial on the merits).

    c. Respondent's **rejoinder on the merits** is due on **September 24, 2012** (4 months from Claimant's reply on the merits).

4. If Respondent **does** raise objections to jurisdiction:

    a. Respondent's **memorial on jurisdiction** is due on November 30, **2011** (2 months and 1 week from Claimant's memorial on the merits).

b. Claimant's **counter-memorial on jurisdiction** is due on **February 6, 2012** (2 months and 1 week from Respondent's memorial on jurisdiction).

c. Non-disputing party submissions and *amicus curiae* submissions, if any, are due on **February 20, 2012** (2 weeks after Claimant's counter-memorial on jurisdiction).

14. ***Document Production*** **(ICSID Convention Article 43(a); Arbitration Rule 34)**

• The parties agree to consecutive requests for production.

• The parties anticipate one round of document discovery in the merits phase. If documents are requested by any party during any jurisdictional phase, requests will be limited to issues raised during that phase. The parties agree to apply the timetable set forth below to any document discovery during any jurisdictional phase, except that Respondent would make its requests prior to filing its Memorial on Jurisdiction and Claimant would make its requests prior to filing its Counter-Memorial on Jurisdiction.

• The parties agree that where circumstances warrant, a party may request additional opportunities for document discovery and the Tribunal may grant such a request when it considers the request to be justified.

• The parties agree to use Redfern Schedules.

• All submissions concerning production of documents shall be filed simultaneously with its corresponding courtesy translations.

• The parties agree that the IBA Rules on the Taking of Evidence in International Arbitration may be referenced as a guide by the Tribunal in assessing requests for and objections to document discovery, but such Rules are not binding.

• Timetable

1. If there are **no** objections to jurisdiction:

a. Respondent will submit its document request to Claimant on **October 24, 2011.**

b. If there are any disagreements, an application to the Tribunal in the form of a Redfern Schedule will be submitted on **November 7, 2011** (2 weeks after the Respondent's application).

c. Claimant will submit its comments on **November 14, 2011** (1 week from the application to the Tribunal).

d. Respondent will submit its observations on **November 17, 2011** (3 days after Claimant's comments).

e. The Arbitral Tribunal will make its order on or around 25 November, 2011.

f. Claimant will submit its document request to Respondent on February 14, **2012** (3 weeks from Respondent's counter-memorial on the merits).

g. If there are any disagreements, an application to the Tribunal in the form of a Redfern Schedule will be submitted on February, 21 **2012** (1 week after the Claimant's application).

h. Respondent will submit its comments on February 28, **2012** (1 week from the application to the Tribunal).

i. Claimant will submit its observations on March 2, **2012** (3 days after Claimant's comments).

j. The Arbitral Tribunal will make its order in or around March 12, 2012.

2. If there **are** objections to jurisdiction:

a. Respondent will submit its document request to the Tribunal in the form of a Redfern Schedules on **October 24, 2011.**

b. Claimant will submit its comments on **October 31, 2011** (1 week from Respondent's application).

c. Respondent will submit its observations on November 3, **2011** .

d. The Arbitral Tribunal will make its order in or around 8 November, 2011.

e. Claimant will submit its document request to the Tribunal in the form of a Redfern Schedules on December 21, **2011** (3 weeks after Respondent's Memorial on jurisdiction).

f. Respondent will submit its comments on January 2, **2012.**

g. Claimant will submit its observations on January 5, **2012.**

h. The Arbitral Tribunal will make its order in or around January 13, 2012.

• There will be no requests for production of documents during the second round of submissions.

• On October 24, 2011, if there are objections to jurisdiction, Respondent will briefly inform the Tribunal and the Claimant of the basis of the objection without limiting Respondent's submissions on jurisdiction.

15. ***Evidence: Witnesses and Experts; Written Statements and Reports, Supporting Documentation*** **(Arbitration Rules 35 and 36)**

• Timetable for production of written statements and reports

☐ The parties agree that written statements and reports should be produced along with the Memorial or Counter-Memorial, respectively.

• Timetable for production of additional statements and reports

☐ The parties agree that additional statements and reports should be produced along with the Reply and Rejoinder, respectively.

☐ The parties agree that additional statements and reports (including those that may be from new witnesses or experts) must be responsive in nature.

• Examination-in-chief

☐ For factual witnesses, the parties agree that the examination-in-chief should be limited to having the witness introduce himself/herself and having him/her confirm the content of his/her statement(s) or offer any corrections that s/he deems necessary.

☐ For expert witnesses, the parties agree that a brief examination-in-chief is permissible in order to provide context for the expert's testimony.

• Scope of cross-examination

☐ The parties agree that the cross-examination of experts should be limited to the content of the expert's report, except for questions of credibility.

☐ The parties agree that a factual witness may be cross examined on the content of his/her witness statement(s). In addition, a witness may be cross examined on any question directly related to the dispute with which the witness had personal involvement, but only to the extent that evidence (contained in documents or witness statements) of such involvement is in the record.

• Presence of witnesses/experts whose cross-examination is not requested

☐ The parties agree that factual witnesses who are not called for cross-examination should not attend the hearing.

□ The parties agree that expert witnesses who are not called for cross-examination may attend the hearing.

□ The parties agree that the fact that a party does not call a witness or expert for cross-examination does not imply that the party accepts the substance of any statement or report by such witness or expert.

• Exclusion of written statements of witnesses/experts not present at the hearing

□ The parties agree that if a witness or expert called for cross-examination is not made available, the statement or report of that witness or expert may be disregarded, unless the party calling the individual for cross-examination has in any way interfered with such witness or expert or the party failing to produce such witness or expert demonstrates justifiable cause to the satisfaction of the Tribunal for the absence of the witness or expert.

□ The parties agree that they and the Tribunal should consider having witnesses or experts testify by video-conference where the witness/expert has demonstrated that it would present a hardship to travel to the hearing or where the parties agree that, because of the limited nature of the testimony, testifying via video-conference would be most efficient.

• The parties agree that they should notify one another of the other party's witnesses and experts that it intends to cross-examine 6 weeks before the hearing.

16. ***Hearings*** **(Arbitration Rule 13(2))**

• The parties agree that the hearing or hearings, as the case may be, should be held at the seat of the Centre in Washington, DC.

• The parties agree that if no jurisdictional objection is raised by Respondent, the dates for the hearing on the merits should be established as soon as possible after Respondent gives notification of its intention not to raise any such objection. The parties also agree that if Respondent raises a jurisdictional objection, the dates for a hearing on jurisdiction or the merits, as the case may be, should be established as soon as possible after the Tribunal issues its decision on whether to bifurcate the proceedings.

• After October 24, 2011, if there are no objections to jurisdiction the Tribunal will have a conference call with parties to set a date for the hearing on the merits.

17. ***Pre-Hearing Conference*** **(Arbitration Rule 21(1))**

• The parties agree that a pre-hearing conference (either by phone or in person, depending on the issues to be resolved) should be scheduled to take place at least 4-6 weeks in advance of the Hearing on Jurisdiction or the Merits, as the case may be, once the hearing date has been established.

18. ***Records of Hearings*** **(Arbitration Rule 20(1)(g))**

• The parties agree that there should be a written transcript of any substantive hearing using "Live Note" transcription.

- Transcripts should be made available in real time in electronic format and distributed to the parties at the end of each hearing day.

- The parties should be given the possibility of correcting the transcripts.

• The parties agree that the Tribunal's First Session or any procedural conferences (in person or by teleconference) may be audio recorded, but need not be transcribed. If the Secretary of the Tribunal prepares minutes of any procedural conference that is audio-recorded, but not transcribed, the parties should be given an opportunity to propose corrections to the minutes after reviewing the audio recording.

19. ***Publication of Decisions and Award*** **(Arbitration Rule 48(4))**

• The parties agree that in accordance with DR-CAFTA Art. 10.21, pleadings, memorials, and briefs submitted to the tribunal, minutes or transcripts of hearings of the tribunal , orders, decisions and awards of the Tribunal shall be made public.

20. ***Other Matters***

• The Claimant will consider whether it deems it necessary to propose to Respondent a confidentiality agreement or to request from the Tribunal a confidentiality order to protect confidential business information that may be contained in documents or submissions to be filed with the Tribunal.

Anneliese Fleckenstein
Secretary of the Tribunal

Mr. Alexis Mourre
President of the Tribunal