

# Tribunal Split in Guatemala Case: Uncertain Recidivism or Present Breach?

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US energy company TECO Guatemala Holdings, LLC (“TECO”) was awarded additional damages in a resubmitted ICSID claim against the Republic of Guatemala under the *Dominican Republic-Central America-United States Free Trade Agreement* (“DR-CAFTA”).<sup>[fn]</sup> TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23), Award, 13 May 2020.<sup>[/fn]</sup> On 13 May 2020, the resubmission Tribunal composed of Prof. Vaughan Lowe, Dr. Stanimir Alexandrov and Prof. Brigitte Stern awarded TECO US\$26.8 million for loss of value and US\$0.8 million for pre-sale interest on historical damages, rejecting the rest of TECO’s claims originally set at US\$380 million. TECO argued that Guatemala’s 2008 breach had caused it to sell its interest in EEGSA (Guatemala’s largest electricity distribution company) at a depressed price in 2010. The Tribunal split regarding the loss of value claim. The majority focused on future uncertain scenarios, while the minority looked into the effects that Guatemala’s breach had in the 2010 sale. Below we discuss the contrast between both legal positions and the soundness of the minority’s view.

## Background

In 1998, TECO invested in EEGSA through a joint venture (DECA I, which later became DECA II). Guatemala's energy regulator, the CNEE, had a limited role in calculating the electricity tariffs every five years.

The dispute arose in relation to the 2008-2013 tariffs. As prescribed by law, EEGSA provided the CNEE with an independent assessment of tariffs entrusted to an engineering firm prequalified by the CNEE. The CNEE disagreed with the assessment, and the issue was submitted to an Expert Commission. The Expert Commission's comments were later incorporated by EEGSA into a revised report. However, the CNEE rejected the report, commissioned its own consultants, and ended up applying lower tariffs than those under EEGSA's engineering firm's report.

TECO filed a Request for Arbitration in 20 October 2010 to recover historical losses and the loss of value of its investment plus interests. The next day, DECA II sold its shares in EEGSA to Empresas Públicas de Medellín E.S.P. ("EPM").

In December 2013, the original tribunal held that Guatemala breached its fair and equitable treatment obligation on the basis that the CNEE applied an arbitrary tariff review process in breach of due process. The original tribunal awarded TECO damages for its historical losses and denied those arising out of loss of value. Both parties requested the annulment of the award. An ICSID *ad hoc* Committee annulled the original ruling regarding the loss of value and TECO resubmitted this claim (among others) to arbitration.

### **Majority Focused on the Future: Recidivism Is Not to Be Presumed**

According to TECO, the sale value of its EEGSA shares would have been higher *but for* Respondent's breaches of the DR-CAFTA, estimating a loss of value of approximately US\$222.5 million. Guatemala argued that TECO had not met its burden of proof in relation to the existence and extent of damages, and in any event, TECO's calculations were incorrect.

The Tribunal analyzed two different periods, viz. 2010-2013 (the remainder of the five-year period) and 2013-2018, and arrived at two different conclusions. For the 2010-2013 period, the Tribunal recognized that the shortfall in EEGSA's cash flow caused by the Respondent's breach was certain to continue until the next tariff

review in 2013 and that any rational buyer would have considered this shortfall and deducted it from EEGSA's sale price. The Tribunal thus granted TECO approximately US\$26.8 million in damages.

In contrast, for the 2013-2018 period, the majority considered that Respondent's breach was not the tariff itself but the procedural deficiencies that led up to the adoption of the tariff. Thus, the impact of the breach upon EEGSA's sale price would depend on the expectation of a recurrence of the procedural breach.

The majority held that “[r]ecidivism is not to be presumed by investment tribunals” and tribunals may not assume that buyers will presume that a Government — whose actions have already been ruled as unlawful — will continue acting in disregard of its legal obligations. Furthermore, even if Guatemala was to breach the DR-CAFTA again in 2013, EEGSA's loss of value would have been caused by the second breach, which creates a gap of causation between the 2008 breach and Claimant's alleged loss of value.

### **The Loud Voice of the Minority**

An undisclosed arbitrator (the minority opinion) held that the commercially sensible approach was to recognize that any reasonable buyer in EPM's position would have considered the 2008 review process and depressed tariff when valuing EEGSA, as the evidence showed. Thus, causation would not relate to uncertain recidivism but to a proximate reality: EPM determined the value of EEGSA in 2010 under lower tariffs imposed in breach of the BIT. Therefore, the loss of value was a direct result of Respondent's breach. Additionally, the arbitrator stated that the 2008 breach would have increased risks that the Government would act wrongly in the future, lowering EEGSA's market value in 2010.

*But for the 2008 tariff review process, TECO's shares in EEGSA had a market value of x. When TECO sold its shares in 2010, such shares had a market value of (x - y), y being the effects of the depressed tariffs. The minority held that this is nothing but “the undeniable fact that the tariffs operative at that time had been set a lower level, that causes the reduction in the value of EEGSA: the lower valuation, based on the lower tariffs imposed in breach of the BIT, is thus a direct result of that breach of the BIT.”*

The minority's thought-provoking reasons contrast strongly with the mere two paragraphs dedicated to them in the award.

### ▪ **The apparent causation issue**

To assess TECO's loss of value claim one must differentiate among EEGSA's potential valuations at different times: the value of EEGSA *but for* the 2008 review process; the 2010 sale value; and any possible future value after 2013. We then ask: what is the relevance of these different valuations to TECO's damages claim? The majority focused on two scenarios: Guatemala's recurring breach in the 2013 tariff review process or a fix in tariffs that would be in full compliance with its international obligations. Under both scenarios, the majority considered that either a decrease or an increase in EEGSA's value could ensue, and if a decrease were to occur, damage would be caused by the 2013 review process instead of the 2008 breach.

However, it is difficult to identify how those scenarios are related to Claimant's burden of proof on causation. Arguably, a breach on the 2013 review process resulting in depressed tariffs would entitle EPM to pursue a claim against Respondent, which is unrelated to TECO's loss of value derived from the 2010 sale. Similarly, a tariff increase in 2013 would benefit EPM and would not bear on the fact that TECO sold what were considered "*damaged goods*."

The majority examined what appears to be another, indirect, layer of causation. When stating that the minority's view "*builds upon an implicit presupposition of the continuation and repetition of a breach of the BIT (...)*," the majority does not deny that EPM bought TECO's shares of EEGSA at a lower value than *but for* the 2008 review process. The shares' value from October 2010 onward was irrelevant for TECO.

### ▪ **The rational buyer's analysis**

For the 2010-2013 period, the Tribunal unanimously considered that any rational buyer in 2010 would have taken the impending 2010-2013 cash flow shortfall into account. However, only the minority recognized that the same rational buyer in

2010 “had no alternative but to base its estimate of the value of EEGSA on the assumption that such tariffs would continue in future.” It was established that EPM considered this breach when valuing EEGSA. As EPM’s CEO stated “We bought on the basis that the current tariff model and layout is the one that exists. Clearly it has an impact on the final valuation and we had no expectation that it would be modified or changed.” Thus, the record shows that EPM’s final – and diminished – valuation of EEGSA was a direct result of Respondent’s present breach of its DR-CAFTA obligations and was not based on an uncertain futuristic assessment.

### **Will this Minority Voice Resonate in the Future?**

Investment arbitration cases present complex issues to arbitrators with different backgrounds in law and evidence. Often inevitable, divergent views among tribunal members emerge, and decisions have to be taken by majority. Despite the limited (if any) effect that minority opinions might have on the actual dispute at issue, these opinions contribute to the development of law, provoking new discussions and even guiding arbitrators facing similar issues in future cases. In *TECO*, the minority disagreed with the other arbitrators in a key issue that would have changed the outcome of the arbitration. Even if not decisive for *TECO*, the loudness of the minority’s voice remains to be heard in future cases.