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By email

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Re: TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23)

Dear Mesdames and Sirs,

I write to you as instructed by the President of the Tribunal to convey to you the following message:

“Party Representatives,

The Arbitral Tribunal has carefully considered Claimant’s request, dated 12 October 2012 (the Request), as well as Respondent’s reply (the Reply), dated 19 October 2012, relating to the exclusion of certain exhibits from the record.

The Request is to the effect that Exhibits R-189, R-191, R-193, R-194, R-195, R-197, R-200 and R-202, along with all references to or reliance upon those Exhibits in Respondent’s rejoinder and experts reports, be excluded from the record, and that the Respondent be directed to re-file those documents without any reference to the stricken material.

In addressing this matter, the Arbitral Tribunal will be consistent with the two general principles established in its 10 February 2012 decision, namely (i) that the present arbitration is distinct from the Iberdrola arbitration and that, as a general matter, the Arbitral Tribunal does not believe necessary to refer to the evidence produced in a separate arbitration to decide this case, and (ii) the parties' right to properly cross-examine the witnesses presented by the other party, which right supposes that each party has the possibility to produce, in advance of the hearing, documents that may be necessary in order to assess the credibility of such witnesses.

Based on such principles, the Arbitral Tribunal will deal with each of the categories of exhibits referred to in the Request.

a) Exhibits R-189, R-191, R-193, R-195, R-197 and R-200:

Such exhibits refer to the reports of certain experts presented by Iberdrola in the Iberdrola arbitration (namely the Brattle Group, Juan Carlos Estanga and José Luis Suarez, Alexander Galetovic and Pedro Rosenfeld). It is undisputed that such experts do not appear as experts in the present arbitration. As a consequence, the production of such evidence drawn from the Iberdrola arbitration cannot serve the purpose of allowing the Respondent to test the credibility of the experts presented by other party in the present arbitration.

Respondent first draws the Arbitral Tribunal's attention to the fact that Claimant itself has submitted certain exhibits referencing statements of witnesses, reports of experts and transcripts of testimonies from the Iberdrola arbitration, as well as factual exhibits which it believes could only have been obtained from Iberdrola. Such objection is irrelevant since Respondent has not objected to the production of those exhibits. If any such objection is made, the Arbitral Tribunal will apply, in comparable circumstances, the same principles as those applied in its decisions relating to the Respondent's exhibits.

Respondent also submits that "Claimant has full access to the record in the Iberdrola case" and that "any risk of an 'imbalance in favor of the Respondent' or of 'not being in a position to defend against out of context usage of the evidence' is clearly inexistent". The Arbitral Tribunal disagrees. It would be unfair to the Claimant to admit in the record as written evidence what is in fact the opinion of experts that the Claimant does not have an opportunity to cross-examine. The Arbitral Tribunal also disagrees with Respondent's submission that exclusion of the evidence in dispute will create an unfair imbalance in favor of Claimant, for the same principles apply and will continue to apply to both parties with respect to the taking of evidence.

As a consequence of the foregoing, Exhibits R-189, R-191, R-193, R-195, R-197 and R-200 are excluded from the record.

b) Exhibit R-194:

The Arbitral Tribunal holds that admitting Exhibit R-194 would be contrary to its decision that the present arbitration is distinct from the Iberdrola arbitration. As a consequence, the Arbitral Tribunal will not make reference to the parties' pleadings in the Iberdrola case to resolve the present dispute. In addition, it is impossible to assess the relevance of the dispositive section of a memorial without considering the full pleadings of the parties. As a consequence, Exhibit R-194 is also excluded from the record.

c) Exhibit R-202:

Exhibit R-202 is the full transcription of the Iberdrola evidentiary hearings. For the reasons expressed above, the Arbitral Tribunal accepts Claimant's argument that this exhibit should not be admitted in the record. It would in fact be unfair to the Claimant to accept in the record what is evidence given by

witnesses or experts that it did not have an opportunity to cross-examine. The only exception to that principle should be the portions of R-202 relating to the evidence of experts and witnesses presented by the Claimant whom the Respondent would have decided to cross-examine. In such a scenario, it would not be improper for the Respondent, if and to the extent such witnesses are to appear at the hearing for cross-examination, to test their testimony by pointing out possible inconsistencies with their earlier testimony in the Iberdrola arbitration.

As a consequence, save for the portions of such documents that contain evidence of any of the Claimant's witnesses or experts who are called for cross-examination in the present case, Exhibit R-202 is excluded from the record.

The Respondent is directed to re-file those documents without any reference to the stricken material. The parties are directed to consult and agree on the time of such re-filing."

Yours sincerely,

A handwritten signature in black ink, appearing to read "Anneliese Fleckenstein", written over a horizontal line that extends to the right.

Anneliese Fleckenstein
Secretary of the Tribunal

cc: Members of the Tribunal