
NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the District of Columbia Circuit

No. 2019-7153

TECO GUATEMALA HOLDINGS, LLC,

Petitioner-Appellee,

– v. –

REPUBLIC OF GUATEMALA,

Respondent-Appellant.

*On Appeal from the United States District Court for the
District of Columbia in No. 1:17-cv-00102-RDM
(Hon. Randolph D. Moss, U.S. District Judge)*

MOTION TO STAY JUDGMENT PENDING APPEAL

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The Appellant the Republic of Guatemala (the “Republic”) moves for a stay of the enforcement of the District Court Judgment (*TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23*) for money damages without the requirement of a supersedeas bond and in support of its motion stated as follows.

Pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure, the Republic brings this motion. The Republic brought a motion to stay before the District Court, which was denied. Thus, the Republic request that this Court grant the motion to stay.

A motion to stay is “an exercise of judicial discretion,” and “[t]he propriety of its issue is dependent upon the circumstances of the particular case.” *Virginian R. Co. v. United States*, 272 U.S. 658, 672–673, 47 S.Ct. 222, 71 L.Ed. 463 (1926); see *Hilton v. Braunskill*, 481 U.S. 770, 777, 107 S.Ct. 2113, 95 L.Ed.2d 724. (“[T]he traditional stay factors contemplate individualized judgments in each case”).

The fact that the issuance of a stay is left to the court's discretion “does not mean that no legal standard governs that discretion ‘[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.’ ” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (*quoting United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)).

The legal principles governing a stay include four factors: “(1) whether the

stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton, supra*, at 776, 107 S.Ct. 2113.

As discussed below, the D.C. Circuit allows for a slightly different test with respect to the likelihood of prevailing in the dispute, replacing that prong with an analysis as to whether the appeal raises a serious question. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Thus, in this case, the issue of whether this appeal raises a serious question is also discussed. That is, based on *Washington Metropolitan Area Transit Commission*, the Republic maintains that this Court does not seem to examine the likelihood of prevailing element but instead should examine whether this appeal raises a serious question.

In making determinations on motions to stay, courts “exercise [] judgment” and “weigh competing interests.” *U.S. ex rel. Vermont Nat'l Tel. Co. v. Northstar Wireless, L.L.C.*, 288 F. Supp. 3d 28, 31 (D.D.C. 2017) (Kollar-Kotelly, J.) (*quoting Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998)).

This is an important consideration in this case. Here, the Court is faced with

a situation in which there is no harm to TECO Guatemala Holdings (“TECO”) by the Court granting the stay whereas the Republic would suffer harm if the stay is denied. In addition, this Court is faced with a unique situation in which a sovereign is subject to enforcement of an ICSID award while the arbitration is ongoing. This case requires the Court to use judgment with regard to the international nature of the issues here and the unique legal issues in consideration. Lastly, the Republic asks that this Court take into account the current international crisis with respect to Coronavirus, which provide an additional basis of harm to the Republic should the District Court’s Judgment be enforced at this time.

This Dispute Raises A Serious Issue That Has Never Been Heard Before By The D.C. Circuit Or Any Circuit Court

In *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), this Circuit found that the “serious legal question” standard may replace the “likelihood of success on the merits” standard.

The D.C. Circuit stated that:

We believe this approach is entirely consistent with the purpose of granting interim injunctive relief, whether by preliminary injunction or by stay pending appeal. Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial

protection, whether or not movant has shown a mathematical probability of success.

The issues in this appeal are both serious and novel issues. The enforcement in this case is sought pursuant to a treaty – the ICSID Convention (the “Treaty”). In that Treaty, like all treaties, countries give up some up their sovereignty in exchange for an application of the treaty. In addition, the U.S. as a party to that same Treaty could face enforcement actions in foreign courts. And the U.S. would be entitled to raise such defenses as the Treaty allows and to seek a stay while the arbitration is ongoing. Thus, these issues are both serious as a question of law as they relate to U.S. relations with other countries, as well as being serious in that other countries could use U.S. court findings with respect to these issues to govern claims against the U.S. under the principles of reciprocity and a comity.

The Republic’s Appeal Has Merit

The questions at issue here are novel and serious ones, as stated below. Although the District Court rejected some of the Republic’s argument and, accordingly, its requested relief, this does not mean that the appeal does not have merit (indeed, in order to even be discussing the possibility of a stay pending appeal, the district court must have rejected some aspect of the appellant’s request). District courts are routinely asked to decide issues of stays on judgments the court just entered. Thus, this provision cannot mean that the moving party has to show to the judge who just decided the issue that he or she was wrong.

Here, as set out fully in the Republic's appellate brief, the Republic should prevail in this appeal. The Republic is engaged in an ongoing arbitration with the appellee, TECO Guatemala Holdings that has the same facts, the same parties, and even the same case number. Allowing the enforcement of an arbitration award for damages while the arbitration continues violates the complete arbitration rule. In addition, as ICSID awards are to be treated as final judgments, ICSID awards should be subject to defenses of final awards, such as Rule 60(b) of the Federal Rules of Civil Procedure. It cannot be the case that an ICSID award does not have defenses whereas a final award of this Court is subject to such a defense.

In short, the Republic's appeal is not frivolous or without merit. The issues to be decided (given the unique facts here with the ICSID process and the ongoing arbitration) are ones which no other court has decided. Although we respectfully disagree with the District Court's decision, it cannot be said that this Court would not take exception to the decision and, at a minimum, remand the case back to the District Court.

As stated above, TECO argued in the District Court that no defenses exist with regard to ICSID awards. But such defenses must exist *mutatis matandis* with final judgments. The scope and depth of those defenses, such as whether the defenses under Rule 60 of the F.R.C.P. are available, will be decided by this Court. But TECO's argument that such defenses are not available at all is not sustainable and

demonstrates the merits of the Republic's appeal.

The Republic Would Be Harmed By The Court Refusing The Stay

Before examining the traditional factors below, the Republic notes that the effects of the Coronavirus continue to unfold and manifest. The Republic, like many nations, is struggling to deal with the Coronavirus. Most government officials cannot come to work and quarantines are in effect. In addition, the Republic is taking extraordinary measures to prevent the spread of coronavirus and to provide medical treatment for those infected. And the Republic, of course, does not have the financial ability and facilities that other states, such as the U.S. have. The long-term effect of this issue is uncertain, but it is certain that allowing this judgment to be enforced at the present time (while the appeal is pending) will have negative effects in Guatemala during this crisis and could lead directly to persons' lives and health being affected. The crisis from the Coronavirus and technical issues have also made it extremely difficult for counsel to communicate with the key and relevant officials of the Republic regarding this matter. As this enforcement situation is foreign to the Republic, the advice and assistance from counsel regarding enforcement is necessary. Yet, at the present time, it is extraordinarily difficult for counsel to advise the several officials of the Republic necessary to carry out the enforcement of the District Court Judgment.

In addition to the Coronavirus pandemic, the Republic would in fact be

harmful by the Court refusing to grant a stay. As a state, the Republic has a system of budgeting and paying for outlays, which almost exclusively involve sovereign functions. A payment that is later reversed leaves the Republic in a vulnerable position, as described below.

First, requiring the Republic to pay right now would affect significantly its Congressional ordered budget that is predetermined to fulfill its obligations, such as public food services, health, safety, infrastructure, communications, the administration of justice, among others. The foregoing expenditures are vital to the welfare of society and could have irreparable consequences if such services are disrupted. The Republic should be allowed to make a programmed payment if its appeal to this Court is not successful.

Second, although the Republic will continue to exist and have revenue, which is the same for any stable country, the Republic does not have expenses that it incurs and requirements for spending. Thus, there is not a “magic pot” of money from which judgments are paid. Rather, under Guatemalan law and procedure, Guatemala must request such an expense in its national budget, which requires corresponding legal procedures. Seeking to require a payment outside of that process is extremely disruptive and can affect real people’s lives.

Third, as previously stated, there is no indication that TECO continues to exist as anything other than a shell. Although the Republic will remain as an ongoing

entity with incoming revenues through taxes and otherwise, “TECO Holding” may not have any assets and such a payment to them may not be recoverable. This is a real concern that could be avoided by the Court granting the motion to stay pending the appeal. With respect to this issue it should be noted that the District Court denied discovery on this issue. The Republic sought to confirm that TECO Guatemala Holding would be unable or unwilling to return the Republic’s money should it prevail in the arbitration. Thus, the District Court prevented the Republic from fully arguing this issue.

TECO Guatemala Holdings Would Not Be Harmed By The Court Granting The Stay

TECO cannot argue that it would be harmed by the granting of this Motion. The judgment is for money damages with an interest amount that will continue to accrue, meaning that it will take into account any delay with respect to making TECO whole, should it prevail in the appeal. The Republic will, of course, continue to exist and have incoming revenue.

In addition, TECO as a holding company cannot evidence to show that it needs the money today versus later this year when the appeal is concluded. TECO cannot show that the delay of likely less than a year would harm the holding company. Even to the extent that TECO needs money to operate, which it has never asserted, nothing in the record suggests that TECO would be harmed by a delay in payment from the Republic.

It cannot be credibly argued that TECO would be harmed by a stay of the enforcement pending this appeal as the Republic is solvent and would be able to pay a judgment just as well in one year as it can today. Courts have recognized that sovereigns are distinct in that they are solvent and will continue to exist and have revenue. *See, e.g., Philipp v. Fed. Republic of Germany*, No. CV 15-00266 (CKK), 2020 WL 474447 (D.D.C. Jan. 29, 2020). *See also Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, No. CV 08-2054 (RMC), 2014 WL 12778302, at *1 (D.D.C. Oct. 1, 2014).

The cases in the district courts in this Circuit show that sovereigns are treated as solvent with respect to this analysis. *See, e.g., Getma Int'l v. Republic of Guinea*, 142 F.Supp.3d 110, 118 n.10 (D.D.C. 2015) and *DRC, Inc. v. Rep. of Honduras*, 774 F. Supp. 2d 66, 76 (D.D.C. 2011).

In *DRC, Inc. v. Rep. of Honduras*, the court specifically used noted in its holding that it would not require the Republic of Honduras to post a guaranty because it was “a sovereign state that presumably is solvent and will comply with legitimate orders issued by courts in this country or in Honduras” 774 F. Supp. 2d 66, 76 (D.D.C. 2011). Similarly, here, the Republic is solvent and would comply with the judgment after it has appealed the district court decision.

In *Getma Int'l v. Republic of Guinea*, 142 F.Supp.3d 110, 118 n.10 (D.D.C. 2015), the D.D.C. court following the reasoning and rationale of *DRC v. Honduras*.

The Getma court relatively recently “decline[d] to impose any security obligations on Guinea” since, “[a]s another Member of this Court has explained, a sovereign state . . . [is] presumably . . . solvent and will comply with legitimate orders issued by courts in this country or . . . [abroad].” *Id.* (*quoting DRC, Inc.*, 774 F.Supp.2d at 76) (internal quotation omitted, alterations in original). Again, the Republic is solvent and has complied with the orders of the Court. The Republic should be treated in the same manner as Honduras and Guinea and be granted a stay pending this appeal.

Courts in other circuits have found similarly. In *Nassau County Strip Search Cases*, 783 F.3d 414, at 417-18 (2015), the Second Circuit stayed a judgment without a bond or other security because Nassau County would be able to pay a judgment and that the plaintiff had not demonstrated otherwise. In addition, in *Cayuga Indian Nation v. Pataki*, 188 F. Supp. 2d at 223, at 255-56 (N.D.N.Y. 2002), the U.S. District Court for the Northern District of New York refused to require that the State of New York post a bond. The court held that, as a “sovereign taxing authority . . . the court is confident in the State’s ability to pay the judgment.” Again, here, the Republic as a sovereign is solvent and will remain solvent, and TECO has provided no evidence to the contrary.

It should further be noted that Guatemala is acting in the legitimate exercise of its rights in the U.S. legal system to seek an appeal as a matter of right. Indeed,

Courts have on several occasions allowed sovereigns to stay proceedings during an appeal when sovereigns were seeking to exercise those rights. *See, e.g., Philipp v. Fed. Republic of Germany*, No. CV 15-00266 (CKK), 2020 WL 474447 (D.D.C. Jan. 29, 2020). *See also Cruise Connections Charter Mgmt. I, LP v. Attorney Gen. of Canada*, No. CV 08-2054 (RMC), 2014 WL 12778302, at *1 (D.D.C. Oct. 1, 2014).

In addition to appeals of right, courts have granted stays of enforcement while states are seeking a petition of certiorari, which is rarely granted. In *Philipp v. Fed. Republic of Germany*, No. CV 15-00266 (CKK), 2020 WL 474447 (D.D.C. Jan. 29, 2020), the court granted a stay to Germany to allow Germany to seek certiorari before the U.S. Supreme Court. If such relief is available to Germany, it should be available to the Republic as well.

The Public Interest Is Furthered By Granting A Stay Here

The public has an interest in having the Court grant a stay here. As generally stated, the U.S. has an interest in not being subject to enforcement of judgments or awards in foreign countries where such relief is not timely or justified. *See, e.g., Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 314 F. Supp. 3d 95, 109 (D.D.C. 2018)).

The Republic's positions are important questions that the D.C. Circuit will need to consider. By forcing the Republic to pay the judgment before the most basic

step – meaning before the appeal by right is heard, courts considering judgments against the U.S. may take similar approaches. Even though the U.S. might believe that it has strong defenses, foreign courts may disagree and therefore deny a stay to the U.S.

Summary of Factors

The Court is not obligated to apply the factors equally. As this Court has stated in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977):

“An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.”

Here, considering the factors as a whole, and allowing for this Court to “exercise [] judgment” and “weigh competing interests,” the Republic respectfully requests that this Court order a stay of the appeal without a supersedeas bond pending appeal.

This is a serious issue. This is a matter of first impression (especially given the sui generis fact pattern) for this Court and any court of which we are aware. The decisions related to this case affect a sovereign and its people. In addition, these decisions are likely to affect how courts in other countries will act with respect to

claims against the U.S. in those countries' domestic courts. The issues here arises out of a treaty (CAFTA) that has lately been the subject of discussions both here in the U.S. and in the other treaty countries.

The Republic will be harmed should the Court not grant a short stay during this appeal. The Republic has an established budget that provides for expenditures of various legal duties, as discussed above. Requiring the Republic to pay the judgment now is disruptive to the budget of the Republic and, accordingly, its people. In addition, should the Republic be forced to pay the judgment now and then win its appeal, the Republic would have to seek to recover its payment from TECO. As a holding company, it is entirely uncertain as to whether this entity has any assets other than the money it would receive from the Republic under the judgment. A real possibility exists that the Republic would be unable to recover such money because, unlike the Republic, the holding company is not likely a going concern.

There is no prejudice to TECO for having to wait until the decision by this Court to collect on its judgment. The Republic is quite an ongoing concern. It will continue to have budgets passed by its Congress. It will continue to have tax revenue. There is no evidence or indication that it is sheltering or hiding assets. There is absolutely no reason for this Court to conclude that TECO will be in any worse position at the end of this year with regard to collection of its judgment. Lastly, on this issue, this appeal is well underway, with the Republic having filed its appellant

brief on March 16, 2020.

The public interest here weighs in favor of granting a stay during this appeal. If the U.S. was facing a claim or injunction in a foreign country and was appealing that decision, the U.S. would certainly want such relief stayed pending an appeal by right of the issue. The Court's decision here, especially given the considerations above and the short time period for which the stay would be in place, could affect how other courts view such a request by the U.S. Thus, the public has an interest in allowing for a stay here in these circumstances.

CONCLUSION

The Republic of Guatemala should be granted a stay of the enforcement of the judgment in the District Court without requiring Guatemala to post a supersedeas bond for the reasons stated above.

Dated April 10, 2020

Respectfully submitted,

/s/Edward Baldwin

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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REQUIREMENTS**

I hereby certify, on this 10th day of April 2020, that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) as it contains 3,458 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Dated: April 10, 2020

/s/ Edward Baldwin
Edward Baldwin

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(c), that on April 10, 2020, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: April 10, 2020

/s/ Edward Baldwin
Edward Baldwin