INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S MEMORIAL ON PARTIAL ANNULMENT OF THE AWARD

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CLAIMANT'S MEMORIAL ON PARTIAL ANNULMENT OF THE AWARD

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CLAIMANT'S MEMORIAL ON PARTIAL ANNULMENT OF THE AWARD

I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 dated 1 August 2014, TECO Guatemala Holdings, LLC ("TECO" or "Claimant") hereby submits this Memorial on Partial Annulment of the Award rendered on 19 December 2013 (the "Award") in the matter *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23.[1]

2. As set forth in TECO's Application for Partial Annulment of the Award dated 18 April 2014 ("Partial Annulment Application"),[2] the Tribunal correctly and properly found that the Republic of Guatemala ("Guatemala" or "Respondent") breached its obligation under Article 10.5 of the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA" or the "Treaty") to accord TECO's investment fair and equitable treatment, and awarded TECO damages for the period from the date of Guatemala's breach until the date on which TECO sold its investment as a direct consequence of Guatemala's breach.

3. The Tribunal, however, improperly denied TECO's claim for damages suffered as a result of the impaired value at which TECO sold its investment, as well as TECO's claim for interest for the period until the sale and pre-award interest at the agreed rate. As set forth in TECO's Partial Annulment Application, TECO seeks annulment of these portions of the Award on the grounds set forth in Article 52(1), subparagraphs (b), (d), and (e) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), respectively: (i) that the Tribunal manifestly exceeded its powers; (ii) that the Tribunal seriously departed from a fundamental rule of procedure; and (iii) that the Tribunal failed to state the reasons on which the Award was based.

4. As elaborated below, with respect to the damages that TECO suffered as a result of the impaired value at which TECO sold its investment as a direct consequence of Guatemala's

[1] In accordance with Item 14.2.3 of Procedural Order No. 1, which requires that the parties clearly indicate new legal authorities that were not before the Tribunal in the arbitration, TECO uses the prefix "CL-N-" for new legal authorities submitted in this proceeding, while it continues to use the prefix "CL-" for legal authorities previously submitted in the arbitration.

[2] TECO's Application for Partial Annulment of the Award dated 18 Apr. 2014.

breach of the Treaty, the Award is subject to partial annulment for several reasons. *First*, while the Tribunal properly ruled that the tariff revenues of TECO's investment would have been significantly higher absent Guatemala's breach, and thus awarded TECO the full amount of damages claimed as from the beginning of the 2008-2013 tariff period until the sale of TECO's investment in October 2010, the Tribunal nonetheless held, contradictorily, that it was not proven that those higher revenues would have increased the value of TECO's investment when it was sold. *Second*, in denying TECO's claim for damages suffered as a result of the impaired value at which TECO sold its investment, the Tribunal failed to state any reasons why an isolated, out-of-context comment in a press interview given by the Chief Executive Officer of the purchaser of TECO's investment, Empresas Públicas de Medellín E.S.P. ("EPM"), just one day after the purchase, should prevail over the extensive documentary and expert evidence adduced by the parties or, indeed, over other parts of the very same interview, which is fully consistent with the conclusion that, had Guatemala not breached its Treaty obligations, TECO's investment would have sold for a higher purchase price. *Third*, although the Tribunal found that the sale of TECO's investment was caused by Guatemala's breach, the Tribunal unjustifiably penalized TECO (and rewarded Guatemala) for the purported evidentiary difficulties arising from the sale, and imposed an impossible evidentiary burden upon TECO by demanding evidence from the third-party purchaser of TECO's investment in order to determine the value of that investment absent Guatemala's breach, contrary to the fundamental principles of due process, equality of the parties, and the right to be heard. *Fourth*, the Tribunal failed to inform the parties of the central importance that it intended to attach to the interview in lieu of the parties' comprehensive expert evidence, and failed to give the parties an adequate opportunity to address this issue. *Fifth*, the Tribunal overstepped the scope of the parties' dispute by not awarding TECO any damages for loss of value arising from the sale of EEGSA despite the fact that the expert valuations submitted by both parties in the arbitration produced a positive value (*i.e.*, damages) for the period after the sale of TECO's investment.

5. With respect to TECO's claim for interest until the sale of its investment and the pre-award interest rate, the Tribunal similarly overstepped the scope of the dispute submitted by the parties, by failing to award TECO interest until the sale of its investment and by failing to apply the agreed pre-award interest rate, and failed to give the parties an opportunity to address

the specific grounds upon which it denied TECO's claim for interest until it sold its investment, when neither party had argued that interest should not accrue until the sale.

6. Finally, with respect to the provisional stay of enforcement of the Award, the Committee should either terminate the provisional stay, or condition the continuation of the stay upon Guatemala posting a bond in the full amount of the Award plus interest.

II. SUMMARY OF THE DISPUTE AND THE AWARD

A. Factual Background

1. To Attract Foreign Investment In Its Failing Electricity Sector, Guatemala Adopted A New Legal And Regulatory Framework, Which Guaranteed Both A Depoliticized Tariff Review Process and Fair Returns For Electricity Distributors

7. In the early 1990s, Guatemala faced a serious crisis in its electricity sector, arising in part from the dual role played by the *Instituto Nacional de Electrificación* ("INDE"), which, at that time, was the entity primarily responsible for the generation, transmission, and distribution of electricity throughout Guatemala.[3] As both the regulator and the regulated entity, INDE had no incentive to operate efficiently, and failed to generate an electricity supply that sufficiently met demand.[4] In order to address this crisis and to improve the operating standards of its electricity sector, Guatemala decided to privatize certain assets in that sector, including its largest electricity distribution company, Empresa Eléctrica de Guatemala S.A. ("EEGSA").[5]

8. In 1990, the then President of Guatemala Jorge Serrano thus requested, through the U.S. Agency for International Development ("USAID"), a study of privatization options for EEGSA, which was issued by Price Waterhouse in January 1991.[6] As that study concluded, it was too early for Guatemala to privatize EEGSA at that time due to four main factors: (i) EEGSA's continued dependence on State subsidies; (ii) the lack of adequate regulatory mechanisms for the electricity sector; (iii) the low privatization price that EEGSA would attract

[3] Award ¶¶ 80-82.

[4] *Id.* ¶ 82; *see also* TECO's Memorial dated 23 Sept. 2011 ("Memorial") ¶ 12.

[5] Award ¶ 83; *see also* Memorial ¶¶ 11, 14-15.

[6] Award ¶ 83; Price Waterhouse, *Estudio de la Empresa Eléctrica de Guatemala* dated 11 Jan. 1991 (C-7).

due to its condition at the time; and (iv) EEGSA's reliance on INDE, which created significant risks of State intervention.[7] Price Waterhouse further advised that, "[u]ntil a regulatory scheme was established for EEGSA . . . investors would be hesitant to invest in EEGSA;"[8] that the "regulatory scheme" adopted by Guatemala "will directly [affect] the way [investors] will value EEGSA's shares, because it will determine EEGSA's potential profitability;" and that "[v]aluations [of EEGSA's shares] will vary depending on the regulatory scheme that is assumed."[9] In view of EEGSA's long history of poor financial and technical performance, as well as the lack of any stable regulatory regime in Guatemala, Price Waterhouse estimated that, in 1991, the net asset value of Guatemala's 91.7 percent shareholding in EEGSA was worth approximately Q297.8 million (US$ 59.6 million), while a valuation based upon EEGSA's earnings indicated a much lower value of approximately Q69.6 million (US$ 13.9 million).[10]

9. In order to attract much needed foreign investment in EEGSA and to maximize its privatization proceeds, Guatemala thus began considering ways of restructuring its electricity sector more broadly, and, with the help of USAID, hired Chilean consultants Juan Sebastián Bernstein and Jean Jacques Descazeaux to prepare a report for restructuring and deregulating the electricity sector.[11] In their 1993 USAID study, Messrs. Bernstein and Descazeaux concluded that, in order to encourage "the participation of private external investors in competitive generation and distribution," Guatemala must have "objective rules which define the parties' obligations and rights, thus preventing the arbitrary intervention of regulatory entities."[12]

10. Based upon these and other recommendations, Guatemala undertook to establish a new legal and regulatory framework for its failing electricity sector, which would unbundle and depoliticize the generation, transmission, and distribution of electricity, and establish the

[7] Price Waterhouse, *Estudio de la Empresa Eléctrica de Guatemala* dated 11 Jan. 1991, Executive Summary (C-7).

[8] *Id*., at 17.

[9] *Id*., at 1.

[10] *Id*., at 26.

[11] Award ¶¶ 87-89.

[12] Juan Sebastián Bernstein and Jean Jacques Descazeaux, Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report dated June 1993, at 34 (C-9); *see also* Award ¶ 90.

conditions necessary to attract foreign investment.[13] On 16 October 1996, the Congress of the Republic of Guatemala adopted the General Electricity Law ("LGE"), which set forth new rules for regulating electricity tariffs and created a new regulatory body for the electricity sector, the *Comisión Nacional de Energía Eléctrica* ("CNEE").[14] Shortly thereafter, as contemplated in the LGE, the President of Guatemala and the Ministry of Energy and Mines ("MEM") issued regulations (the "RLGE") relating to the LGE, on 21 March 1997.[15]

11. Following the enactment of the LGE and RLGE, Guatemala sought to attract and to induce foreign investment in EEGSA by promoting its new legal and regulatory framework to the foreign electricity companies that it had targeted for EEGSA's privatization, including the TECO group of companies,[16] through various promotional materials, including a Road Show presentation, a Preliminary Information Memorandum, and a Memorandum of Sale.[17] As these materials emphasized, the new legal and regulatory framework adopted by Guatemala guaranteed both a depoliticized tariff review process and fair returns for electricity distribution companies, such as EEGSA, by limiting the role of the regulator in the calculation of a key component of the distributor's tariff, the so-called value added for distribution ("VAD"),[18] which is the portion of the electricity tariff through which the distributor recoups its investment and makes its profit,[19] and by adopting the model efficient company approach using the new replacement value of the assets ("VNR") for calculating the distributor's VAD.[20]

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[13] Award ¶¶ 91-94.

[14] *Id.* ¶¶ 95-112.

[15] *Id.* ¶ 113.

[16] *Id.* ¶ 126; Investors' Profiles, at 7, 9 (C-26).

[17] Award ¶¶ 126-131; Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998 ("Preliminary Information Memorandum") (C-27); Empresa Eléctrica de Guatemala S.A., Memorandum of Sale prepared by Salomon Smith Barney dated 1998 ("Sales Memorandum") (C-29); Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998 ("Roadshow Presentation") (C-28).

[18] Award ¶¶ 106-109.

[19] *See id.* ¶¶ 99-101. The VAD thus compensates the distributor for both operating costs (*i.e.*, costs incurred in distributing electricity) and capital costs (*i.e.*, the financial cost of capital). *See id.*

[20] *Id.* ¶ 100.

12. Specifically, Guatemala represented that EEGSA's VAD would be recalculated every five years by EEGSA based upon a VAD study prepared by an external engineering firm prequalified by the CNEE and selected by EEGSA; that the CNEE's authority during the VAD-calculation process would be limited to reviewing and making observations on EEGSA's VAD study; and that any differences between the CNEE and EEGSA regarding that study would be resolved by an impartial, three-person Expert Commission appointed by the parties.[21] As Guatemala noted in the Memorandum of Sale, "VADs *must be calculated by distributors* by means of a study commissioned [by] an engineering firm," and the CNEE "will review those studies and *can make observations*, but in the event of discrepancy, a Commission of three experts will be convened *to resolve the differences*."[22] LGE Articles 74 and 75 thus provided that "[e]ach distributor shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE]," and that the CNEE "shall review the studies performed and may make comments on the same," but, "[i]n case of differences made in writing," the CNEE and the distributor shall agree on the appointment of a three-person Expert Commission, which "shall rule on the differences in a period of 60 days counted from its appointment."[23]

13. Guatemala also represented that EEGSA's VAD was to be calculated through the model efficient company approach, whereby EEGSA's regulatory asset base would be determined using the VNR method.[24] This meant that EEGSA's VAD was to be calculated off of the regulatory asset base of a hypothetical model efficient company whose assets were new, rather than off of EEGSA's actual assets, which were dilapidated and in need of significant investment.[25] As LGE Article 71 states, "[t]he VAD is the average cost of capital and operation

[21] *Id.* ¶¶ 106-112; LGE, Arts. 74-77 (C-17); Sales Memorandum, at 53 (C-29); Roadshow Presentation, at 19 (C-28); Preliminary Information Memorandum, at 9 (C-27).

[22] Award ¶ 132; Sales Memorandum, at 53 (emphasis added) (C-29).

[23] Award ¶¶ 107, 109-110, 119; LGE, Arts. 74, 75 (C-17); *see also* RLGE, Art. 98 ("If discrepancies between the Commission and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed. The cost of this contracting shall be covered by the Commission and the Distributor in equal parts.") (C-21).

[24] Sales Memorandum, at 14 (C-29); Roadshow Presentation, at 19 (C-28); *see also* Preliminary Information Memorandum, at 9 (C-27).

[25] Award ¶¶ 102-103.

of a distribution network of a benchmark efficient company operating in a given density area,"[26] while LGE Article 73 provides that the average cost of capital "shall be calculated as the constant annuity of cost of capital corresponding to the *New Replacement Value* of an economically sized distribution network."[27] As Guatemala explained in the Memorandum of Sale, under the LGE and RLGE, "the tariff for a given distribution company is not equal to the costs it incurs, but to the 'market' costs inherent in distribution, which result from the theoretical costs of a highly-efficient 'model company.'"[28] Guatemala also specifically represented that, while electricity tariffs historically "have been low, which has severely stunted the distributor's potential for gains . . . [t]he Law addresses this particular issue, empowering the companies (INDE and EEGSA) to fix tariffs by reference to market prices."[29]

2. The TECO Group Of Companies Invested In EEGSA In Reliance Upon The Guarantees And Protections Provided By This Legal And Regulatory Framework

14. In reliance upon Guatemala's representations and its new legal and regulatory framework, the TECO group of companies decided to invest in EEGSA as part of a consortium comprised of Iberdrola Energía, S.A. ("Iberdrola"), a Spanish utility company; TPS de Ultramar Guatemala, S.A. ("TPS"), an indirect, wholly-owned Guatemalan company within the TECO group of companies; and Electricidade de Portugal, S.A. ("EDP"), a Portuguese utility company (collectively, the "Consortium").[30] Pursuant to the Terms of Reference for the public offering, the Consortium had established an investment company in Guatemala, Distribución Eléctrica Centroamericana, S.A. ("DECA"), to purchase EEGSA's shares.[31]

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[26] *Id.* ¶ 99; LGE, Art. 71 (C-17).

[27] Award ¶ 102; LGE, Art. 73 (C-17) (emphasis added).

[28] Sales Memorandum, at 53 (C-29).

[29] *Id.*, at 53.

[30] Award ¶ 135; *see also* Memorial ¶ 45.

[31] Award ¶ 3; Empresa Eléctrica de Guatemala, S.A., Terms of Reference dated May 1998, Art. 3.2 (C-30). In 1999, DECA merged with EEGSA, and Iberdrola, TPS, and EDP formed a new company, Distribución Eléctrica Centroamericana Dos, S.A. ("DECA II"), incorporated in Guatemala, to hold their shares in EEGSA. *See* Award ¶¶ 5-7; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 1999 (C-44).

15. On 30 July 1998, after being prequalified by Guatemala and obtaining analyses of EEGSA's future cash flows based upon the new legal and regulatory framework, the Consortium submitted its bid of US$ 520 million for 80.1 percent of EEGSA's shares, and was declared the winner of the auction, beating the second highest bid of US$ 475 million from a consortium formed by Enron Corporation, a U.S. energy company, and Union FENOSA, a Spanish utility company.[32] By adopting the legal and regulatory framework that it did, Guatemala thus was able to obtain substantial privatization proceeds for the sale of its shareholding in EEGSA, even though EEGSA's network was deteriorated and in need of significant investment.[33]

3. EEGSA's Tariff Review For The 2008-2013 Tariff Period Was Conducted In An Unlawful, Arbitrary, And Non-Transparent Manner, To Obtain The Lowest VAD

16. EEGSA's first tariff review for the 2003-2008 tariff period was conducted by the CNEE in accordance with the criteria set forth in the LGE and RLGE, as well as in a spirit of collaboration and cooperation, and resulted in increased revenue and cash flows for EEGSA.[34] By the time of EEGSA's second tariff review, however, the President of the CNEE was replaced by Mr. Carlos Colom, the nephew of the next President of Guatemala, a then 27 year old with no prior experience in electricity distribution.[35] During EEGSA's second tariff review for the 2008-2013 tariff period, the newly-comprised CNEE deliberately and arbitrarily disregarded the process it had followed during EEGSA's first tariff review in order to achieve the outcome that it wanted, namely, an unjustified sharp reduction in EEGSA's VAD and resulting tariffs.[36]

17. At the time of EEGSA's 2008-2013 tariff review, several factors indicated that EEGSA's VAD would increase significantly, including that EEGSA's network had grown considerably; the cost of materials used in electricity distribution, such as copper and aluminum, had far outpaced the rate of inflation from 2003 to 2008; and that electricity prices had increased,

[32] Award ¶ 138; Notarized Minutes of the Award dated 30 July 1998 (C-36).

[33] Award ¶¶ 93-95, 124-140; Memorial ¶ 62.

[34] Award ¶¶ 144-148; *see also* Memorial ¶¶ 72-83.

[35] *See* Tr. (4 Mar. 2013) 1088:5-12 (Colom Cross); *see also* TECO's Post-Hearing Brief dated 10 June 2013 ("TECO's Post-Hearing Brief") ¶ 200.

[36] *See* Award ¶¶ 153-230.

requiring the use of wider, more expensive cables to decrease electricity losses.[37] In order to prevent an inevitable increase in EEGSA's VAD, the CNEE undertook from the very beginning of EEGSA's 2008-2013 tariff review to manipulate and to control its outcome, culminating in the CNEE's arbitrary and unjustified decision to ignore both the Expert Commission's rulings and EEGSA's revised VAD study, and to unlawfully approve its own VAD study, which neither EEGSA nor its prequalified consultant even had an opportunity to review.[38]

18. Shortly before EEGSA's 2008-2013 tariff review was scheduled to commence, Guatemala amended RLGE Article 98 to allow the CNEE to rely upon its own VAD study in certain limited circumstances to calculate the distributor's VAD, a possibility not contemplated in the LGE or RLGE.[39] Guatemala, moreover, deliberately excluded this amendment from the drafts that it circulated to the electricity industry for comment, thereby preventing EEGSA and other distributors from raising any objections before it went into effect.[40] This amendment subverted the requirement in LGE Article 74 that the distributor calculate the VAD through its own consultant prequalified by the CNEE, and introduced the possibility for the very first time that the CNEE could calculate the distributor's VAD itself on the basis of its own VAD study.[41] According to its terms, however, the newly-adopted regulation only gave the CNEE the ability to perform its own VAD study and to rely upon that study in two limited circumstances: (i) where the distributor fails to submit a VAD study; and (ii) where, after the distributor submits a VAD study and the CNEE has made observations on the same, the distributor fails to respond to the CNEE's observations by correcting its VAD study in accordance with the observations or indicating its disagreement with the CNEE's observations in writing.[42]

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[37] *See* TECO's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility dated 24 May 2012 ("Reply") ¶ 313.

[38] Award ¶¶ 164, 224-226, 315-317.

[39] *Id.* ¶¶ 120-121, 625; Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) (C-104).

[40] Reply ¶ 99.

[41] *See* Award ¶¶ 107, 522, 524-526; Reply ¶ 250.

[42] *See* Award ¶¶ 120-121, 625.

19. On 30 April 2007, after Guatemala had amended RLGE Article 98, the CNEE issued Terms of Reference for EEGSA's 2008-2013 tariff review ("ToR"), which, in Article 1.9, granted the CNEE unlimited discretion to declare EEGSA's VAD study as "not received," if it disagreed with the results, thereby allowing itself to unilaterally calculate the distributor's VAD based upon its own VAD study under newly-amended RLGE Article 98.[43] EEGSA challenged these ToR before the Guatemalan courts,[44] and obtained a provisional protection of its constitutional rights ("*amparo*"), as well as the temporary suspension of the ToR.[45] In order to persuade EEGSA to withdraw its provisional *amparo*, the CNEE subsequently agreed to amend certain objectionable provisions in the ToR, including Article 1.9.[46] Although EEGSA was able to reach agreement with the CNEE on several issues, the ToR still contained numerous objectionable articles regarding the manner in which EEGSA's VAD was to be calculated. As a condition for withdrawing its provisional *amparo*, EEGSA therefore insisted on the addition of a new Article 1.10, which, in accordance with the hierarchy of legal norms under Guatemalan law, expressly provided that the ToR were "guidelines to follow in preparation of the Study," and thus were subject to and did not amend the LGE or RLGE, and that EEGSA's consultant could deviate from the ToR, if it provided a reasoned justification for doing so.[47]

20. After EEGSA and the CNEE reached agreement on Article 1.10, the CNEE issued a revised ToR in January 2008, which included for the very first time a formula for calculating the Capital Recovery Factor or "FRC," which converts the VNR into cash flow payments to the distributor.[48] As confirmed by the CNEE's own internal emails, the FRC calculation was devised by Mr. Jean Riubrugent of Mercados Energéticos, one of the CNEE's consultants, for the express purpose of achieving the lowest tariff.[49] As recommended by Mr. Riubrugent, the

[43] *Id.* ¶¶ 153-155; Memorial ¶ 99.

[44] Award ¶¶ 157-158.

[45] *Id.* ¶ 159.

[46] *Id.* ¶¶ 159, 165-169.

[47] *Id.* ¶¶ 169, 303; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 (C-417).

[48] Award ¶¶ 169, 303, 392; 2007 Terms of Reference dated Jan. 2008, Art. 8.3 (C-417).

[49] Award ¶¶ 161, 164; Reply ¶ 139; Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008 (C-494); Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 (C-496); Email chain between M. Peláez and J. Riubrugent dated 18 June 2008 (C-498); Email from

FRC calculation used the steady-state model applied in Brazil, rather than the VNR method adopted by Guatemala, and included a "2" in the denominator, which, contrary to the express requirement in LGE Article 67 that the distributor's VAD be "calculated based on the *New* Replacement Value of the optimally designed facilities,"[50] resulted in the application of a depreciation factor of 50 percent to the regulatory asset base.[51] Understandably, believing that there must have been a typographical error in the CNEE's formula, EEGSA's prequalified consultant, Bates White, applied the FRC calculation disregarding the "2" in the denominator.[52] In its observations on EEGSA's VAD study, the CNEE maintained that its FRC calculation was correct, but did not explain its reasons for including a "2" in the denominator, *i.e.*, that it was applying the steady-state model applied in Brazil, rather than the VNR method adopted by Guatemala.[53]

21. Following a bid process, the CNEE entered into a contract with Sigla-Electrotek ("Sigla") on 12 November 2007 to prepare its own VAD study for EEGSA, more than four months before EEGSA was even due to deliver its VAD study to the CNEE.[54] In the arbitration, Guatemala argued that this VAD study was to be used both as a benchmark and as an "escape valve," which could be adopted by the CNEE, if EEGSA's VAD study did not comply with the regulatory framework.[55] Although the CNEE and its consultants had worked directly with EEGSA and its prequalified consultant during EEGSA's 2003-2008 tariff review, the CNEE held only one meeting with EEGSA and Bates White during EEGSA's 2008-2013 tariff review to discuss EEGSA's Stage A Report, following which neither the CNEE nor its consultants

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J. Riubrugent to M. Quijivix dated 11 July 2008 (C-501); Email chain between M. Quijivix, A. Brabatti, and J. Riubrugent dated 23 June 2008 (C-499); Email from J. Riubrugent to M. Quijivix dated 7 July 2008 (C-500).

[50] LGE, Art. 67 (emphasis added) (C-17).

[51] Award ¶¶ 177, 225.

[52] Memorial ¶ 159.

[53] *Id.* ¶ 159.

[54] Witness Statement of Luis Maté dated 21 Sept. 2011 ("Maté I") ¶¶ 13-14 (CWS-6); CNEE Accord No. 116-2007 dated 27 July 2007 (publishing a request for a firm to assist the CNEE in preparing its own VAD study) (C-122); Contract 11-189-2007 between the CNEE and Electrotek and Sigla dated 12 Nov. 2007 (C-132); *see also* Expert Report of Rodolfo Alegría Toruño dated 22 Sept. 2011 ¶ 69 (CER-1).

[55] Guatemala's Post-Hearing Brief dated 10 June 2013 ("Guatemala's Post-Hearing Brief") ¶ 218.

submitted any comments for several months.[56] Bates White nonetheless finished all nine stage reports on time, and EEGSA delivered the complete VAD study, along with revised versions of each stage report, to the CNEE on 31 March 2008, as scheduled.[57] Although the CNEE had two months under amended RLGE Article 98 to analyze that study, to accept or reject it, and to provide its observations, on 11 April 2008, only eleven days after EEGSA had delivered its VAD study, the CNEE issued Resolution No. 63-2008, through which it declared EEGSA's VAD study "inadmissible," and advised that EEGSA "must perform the corrections to same pursuant to the [CNEE's] observations" therein "within a term of 15 days."[58]

22. On 5 May 2008, Bates White submitted its revised VAD study to the CNEE as required, responding to the totality of the CNEE's observations in Resolution No. 63-2008, either by revising its study to incorporate those comments or by explaining the reasons that justified their exclusion under Article 1.10 of the ToR.[59] Because Bates White did not accept all of the CNEE's observations in Resolution No. 63-2008, and because the CNEE did not accept Bates White's justifications under Article 1.10 of the ToR, discrepancies persisted between the parties, which were to be resolved by an Expert Commission as required under LGE Article 75.[60] On 16 May 2008, the CNEE thus issued Resolution No. CNEE-96-2008, notifying EEGSA that discrepancies persisted between the parties with regard to its VAD study, and calling for the establishment of an Expert Commission to "decide on the discrepancies," which had been identified therein.[61]

23. Four days after the CNEE called for the establishment of an Expert Commission to resolve the discrepancies between the parties, the Government enacted RLGE Article 98 *bis*, which granted the Government the right to select the presiding member of the Expert

[56] Award ¶¶ 171-174.

[57] *Id.* ¶ 185.

[58] *Id.* ¶ 186; Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 3 (C-193).

[59] Award ¶ 188.

[60] *Id.* ¶ 190; LGE, Art. 75 (C-17); Amended RLGE, Art. 98 (C-105).

[61] Award ¶¶ 192-193; Resolution No. CNEE-96-2008 dated 15 May 2008 (C-209).

Commission, if the parties failed to agree on the selection within three days.[62] This amendment subverted the requirement in LGE Article 75 that the third member of the Expert Commission be appointed "by mutual agreement" of the parties and the objective of the LGE and the Expert Commission process in particular, which was to provide a depoliticized tariff review process and an independent and impartial means of resolving disputes between the regulator and the distributor with respect to the calculation of the distributor's VAD.[63] Following the enactment of RLGE Article 98 *bis*, the CNEE attempted to apply this Article retroactively to EEGSA's tariff review, and relented only after EEGSA threatened to bring a legal action in the Guatemalan courts.[64]

24. Immediately after the CNEE called for the establishment of an Expert Commission, the CNEE and EEGSA also began negotiating the operating rules that would govern the Expert Commission's procedure.[65] One of the main areas of disagreement at that time was who would review EEGSA's revised VAD study, after the Expert Commission had rendered its decisions on the discrepancies, to ensure that it fully incorporated the Expert Commission's rulings —the CNEE or the Expert Commission—as this issue is not expressly regulated by the LGE or RLGE.[66] Given the CNEE's behavior during the tariff review, including its attempt to subvert the Expert Commission's role by enacting Article 98 *bis*, EEGSA, with good reason, did not believe that the CNEE could be trusted to faithfully review EEGSA's VAD study to ensure that it comported with the Expert Commission's rulings. On 28 May 2008, after nearly two weeks of negotiations, the parties reached a final agreement on 12 operating rules, including Rule 12, according to which the Expert Commission, and not the CNEE, would review and confirm that its decisions had been fully incorporated into EEGSA's revised VAD study.[67]

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[62] Award ¶ 195; Government Resolution No. 145-2008 dated 19 May 2008, Art. 1 (C-212).

[63] Award ¶¶ 110, 195; Memorial ¶ 267.

[64] Award ¶¶ 308-309; *see also* Memorial ¶ 135.

[65] Award ¶¶ 192-193, 197; *see also* Memorial ¶¶ 190-191.

[66] Award ¶ 198.

[67] Memorial ¶ 137; Rules proposed by EEGSA on 19 May 2008, Rule 14 (C-211);Operating Rules proposed by CNEE on 15 May 2008, at 2 (C-210); Email from M. Calleja to L. Giacchino, forwarding Email from M.

25. After agreeing on the operating rules, EEGSA and the CNEE proceeded to discuss the third member of the Expert Commission, and agreed to appoint Mr. Carlos Bastos, the former Secretary of Energy of Argentina.[68] On 6 June 2008, the Expert Commission thus was formally constituted, consisting of the CNEE's appointee, Mr. Riubrugent; EEGSA's appointee, Mr. Giacchino of Bates White; and Mr. Bastos as the third member of the Expert Commission by mutual agreement.[69] Although the members of the Expert Commission subsequently agreed to act independently and impartially, and to refrain from communicating with the parties during the Expert Commission process, TECO submitted evidence showing that the CNEE and its appointee, Mr. Riubrugent, in violation of the experts' agreement, engaged in a series of *ex parte* communications, which undermined the integrity of the Expert Commission process, as well as the spirit of the LGE and RLGE.[70]

26. The Expert Commission members agreed among themselves to rule on the discrepancies in descending order according to the time it would take to revise the VAD study if the CNEE's objections to the study were upheld.[71] The Expert Commission members also agreed that the interim rulings could be disclosed to Bates White—but not to either EEGSA or the CNEE—so that it could begin revising the VAD study, as called for, while the Expert Commission continued deliberating on the other discrepancies.[72] TECO also submitted evidence showing that, in contravention of this express agreement, Mr. Riubrugent disclosed the Expert Commission's interim rulings, as well as its deliberations, to the CNEE.[73]

Quijivix to L. Maté and M. Calleja dated 28 May 2008 (C-218); Email from M. Calleja to C. Bastos dated 2 June 2008 (submitting the Operating Rules for the Expert Commission) (C-220); Witness Statement of Carlos Manuel Bastos dated 21 Sept. 2011 ("Bastos I") ¶¶ 8-9 (CWS-1); Witness Statement of Leonardo Giacchino dated 23 Sept. 2011 ("Giacchino I") ¶ 36 (CWS-4); Second Witness Statement of Carlos Manuel Bastos dated 20 Apr. 2012 ("Bastos II") ¶¶ 3-6 (CWS-7); Tr. (1 Mar. 2013) 727:3-729:6 (Bastos Direct).

[68] Award ¶ 203.

[69] *Id.* ¶ 206; Notarized Record dated 6 June 2008, at 2-3, attached to Email from M. Quijivix (CNEE) to J. Riubrugent, L. Giacchino, and C. Bastos cc: M. Calleja dated 6 June 2008 (C-223).

[70] Award ¶¶ 312-313; Bastos II ¶ 11 (CWS-7); Second Witness Statement of Leonardo Giacchino dated 24 May 2012 ("Giacchino II") ¶ 23 (CWS-10).

[71] *See* Memorial ¶¶ 144-146.

[72] *See* TECO's Post-Hearing Brief ¶ 148; Bastos II ¶ 11 (CWS-7); Giacchino II ¶ 23 (CWS-10).

[73] *See* TECO's Post-Hearing Brief ¶ 150; Bastos II ¶ 11 (CWS-7); Giacchino II ¶ 23 (CWS-10).

27. Despite the CNEE's interference in the Expert Commission process, the Expert Commission, in its Report dated 25 July 2008, nonetheless ruled against the CNEE on several key discrepancies, including the improper FRC calculation that the CNEE and Mr. Riubrugent had devised for the express purpose of decreasing EEGSA's VAD and tariffs.[74] Immediately after the Expert Commission issued its Report, the CNEE proceeded to unilaterally dissolve the Expert Commission in an attempt to prevent it from reviewing and approving EEGSA's revised VAD study, on the alleged ground that the Expert Commission had completed its work.[75] Although EEGSA succeeded in obtaining an *amparo* from the Guatemalan courts ordering the CNEE to "comply in full with the decision of the Expert Commission" and to allow the Expert Commission "to conclude its work, especially the final review of the changes presented to the Expert Commission by the Firm Bates White,"[76] the First Civil Court of First Instance reversed itself by order of the same date, suddenly concluding that it was "unable to hear and decide the merits of the case," because EEGSA allegedly had not exhausted its administrative remedies.[77]

28. These actions led to uncertainty amongst the members of the Expert Commission, and, although Mr. Riubrugent previously had indicated that he was "certain" that Bates White's revised VAD study dated 28 July 2008 had fully incorporated the Expert Commission's decisions on the discrepancies,[78] he refused to participate in the Expert Commission's review and approval of that study, after the CNEE issued a veiled threat to prevent him from doing so.[79] Despite the CNEE's intervention, Messrs. Bastos and Giacchino nonetheless met in Washington, D.C. to review and analyze Bates White's revised VAD study, as required under Rule 12 of the

[74] Award ¶¶ 209, 224; *see also* TECO's Post-Hearing Brief ¶¶ 7, 76.

[75] Award ¶¶ 209-213, 653; Notification Document dated 28 July 2008, enclosing CNEE Resolution No. GJ-Providencia-3121 dated 25 July 2008 (C-247).

[76] Award ¶ 217; First Court of the First Civil Instance Decision dated 30 July 2008, at 2 (C-275).

[77] Award ¶ 218; Resolution of the First Court of the First Civil Instance dated 30 July 2008 (C-278).

[78] Memorial ¶ 181; Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 (C-268).

[79] Award ¶ 219.

Operating Rules, and concluded that Bates White had revised its VAD study in accordance with the Expert Commission's rulings on each discrepancy, and so advised the CNEE and EEGSA.[80]

29. As the CNEE's records confirm, the CNEE itself also reviewed and analyzed the Expert Commission's Report, and determined that setting EEGSA's VAD in accordance with the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD, thus resulting in higher tariffs.[81] The CNEE concluded, among other things, that "[t]he decisions of the Expert Commission would tend to make significant changes [to] EEGSA's [VNR] by reducing it ([by] approximately 50%)," but that "it remains higher than the [VNR] of the CNEE's Independent Study" prepared by its consultant, Sigla; that "[t]he effect of the [FRC] formula increases the [VNR's] Annuity [by] 47% compared to the formula set forth in the ToR;" and that, "[a]ssuming that neither SIGLA's [VNR] nor the costs are changed and that the new [FRC] formula is applied, the [VAD] would be increased [by] approximately 25%."[82] Having determined that complying with the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD, the CNEE proceeded to ignore both the Expert Commission's decisions and EEGSA's 28 July 2008 revised VAD study, and to approve its own VAD study, which did not comply with the Expert Commission's decisions and which had never been reviewed by EEGSA or Bates White, as the basis for setting EEGSA's 2008-2013 VAD.[83]

30. By Resolution No. CNEE-144-2008 dated 29 July 2008, the CNEE, moreover, approved Sigla's VAD study on the purported basis that the Expert Commission's Report had confirmed that Bates White's VAD study *of 5 May 2008* (*i.e.*, the study that had been submitted to the CNEE *before* the establishment of the Expert Commission) had "failed to perform all the corrections pursuant to the [CNEE's] observations" in Resolution No. CNEE-63-2008 of 11

[80] Award ¶¶ 220-221; Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008 (C-288); Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008, attached to Email from L. Giacchino to M. Quijivix (CNEE) and M. Calleja (EEGSA) dated 1 Aug. 2008 (C-284).

[81] *See* Award ¶¶ 690-692; Reply ¶ 174; Analysis of the Expert Commission Opinion (undated) (C-547).

[82] Award ¶ 692; Analysis of the Expert Commission Opinion (undated), at 9 (C-547).

[83] Award ¶¶ 222-224, 664-665.

April 2008.[84] The CNEE thus took the position that the parties had appointed the Expert Commission not to decide the discrepancies between the parties, but rather to determine solely whether Bates White had incorporated all of the CNEE's observations in its Resolution No. CNEE-63-2008, and that it made no difference whether the Expert Commission had ruled that some—or even all—of the CNEE's observations were unfounded and/or contrary to the LGE and RLGE.[85] By Resolutions Nos. CNEE-145-2008 and CNEE-146-2008 dated 31 July 2008, the CNEE then proceeded to establish the tariffs and periodic adjustment formulas for EEGSA's customers, effective from 1 August 2008 to 31 July 2013, as calculated in Sigla's VAD study.[86]

31. Immediately following the CNEE's publication of EEGSA's new tariff schedules based upon Sigla's VAD study, which was in complete disregard of the Expert Commission's rulings, EEGSA filed administrative appeals with the CNEE challenging Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008, which the CNEE summarily rejected,[87] as well as *amparo* petitions for constitutional relief.[88] Although EEGSA prevailed in the first instance,[89] the Constitutional Court subsequently reversed the lower courts' rulings, thus ending EEGSA's legal challenges.[90]

[84] *Id.* ¶ 223; Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 (C-272).

[85] Award ¶¶ 223, 551-552, 659.

[86] *Id.* ¶ 224; Resolution No. CNEE-145-2008 dated 30 July 2008, Art. I, at 3-4 (C-273); Resolution No. CNEE-146-2008 dated 30 July 2008, Art. I, at 4 (C-274).

[87] Award ¶ 227; EEGSA Appeal to Revoke Resolution No. CNEE-144-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 (C-285); EEGSA Appeal to Revoke Resolution No. CNEE-145-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 (C-286); EEGSA Appeal to Revoke Resolution No. CNEE-146-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 (C-287).

[88] Award ¶ 227; EEGSA *Amparo* Request against CNEE Resolution GJ-Providencia-3121 and Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 dated 14 Aug. 2008 (C-291).

[89] *See* Award ¶ 232; Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-2008-7964 (C-328); Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009 (C-330).

[90] *See* Award ¶¶ 233, 235; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009 (C-331); Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010 (C-345).

4. EEGSA's Unjustifiably Low VAD Was Economically Devastating, And Caused TECO To Sell Its Investment At A Substantial Loss

32. By approving Sigla's VAD study as the basis for setting EEGSA's 2008-2013 tariffs, the CNEE unilaterally reduced EEGSA's VAD by more than 45 percent and its revenue by approximately 40 percent, leading to downgrades of EEGSA by the two major rating agencies, and requiring EEGSA to take drastic cost-cutting measures.[91] In downgrading EEGSA, Standard & Poor's specifically blamed EEGSA's reduced tariffs, noting that the rating downgrade reflects the CNEE's announcement of the "applicable tariffs for the 2008-2013 period, establishing a value-added distribution (a component of the tariff that reimburses the distribution company for its investment) that is about 55% lower than EEGSA's tariffs for the previous period," and that "[t]his change will result in deteriorated profitability and cash flow measures as well as limited liquidity during the second half of 2008 and going forward."[92]

33. Moody's similarly observed that "[t]he rating action is driven by the anticipated material deterioration in the near term of EEGSA's credit metrics, in the wake of the August 2008 tariff decision by the Comision Nacional de Electricidad y Energia ('CNEE') regarding the reduction of the Value Added of Distribution-charge ('VAD-charge') by 45% and the subsequent disputes among the CNEE and EEGSA."[93] Moody's further noted that, while historically it "had considered the Guatemalan Regulatory framework to be relatively stable but still untested and developing,"[94] EEGSA's "VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework," and that, "[b]ased upon the results of the VAD-review process, EEGSA's financial profile will deteriorate

[91] *See* Award ¶¶ 212, 225-226; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 (C-297); Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (C-305); TECO's Post-Hearing Brief ¶ 79.

[92] Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 (C-297).

[93] Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (C-305).

[94] *Id.*

substantially from historical results due to a material weakening in its ability to recover operating costs and generate a sufficient rate of return."[95]

34. In view of the significant financial losses that Guatemala's arbitrary and unfair treatment had caused to TECO, TECO subsequently sold its interest in DECA II to EPM on 21 October 2010.[96] In mid-2010, EPM had indicated to Iberdrola that it was interested in purchasing EEGSA, which led TECO and its Consortium partners to negotiate the sale of DECA II, whose main asset was EEGSA, to EPM.[97] In a non-binding offer letter to Iberdrola dated 26 July 2010, EPM indicated that it would be willing to purchase DECA II for US$ 597 million and that it had based its price offer on a "[d]iscounted free cash flow" analysis of EEGSA "appl[ying] different adjustments and assumptions," but "not includ[ing] an increase in tariffs for the years 2013 and 2014."[98] After several weeks of negotiations, EPM sent TECO a binding offer letter to purchase DECA II for US$ 605 million,[99] and the transaction closed for this amount on 21 October 2010.[100] TECO's share of the purchase price, based upon its 30 percent equity interest in DECA II, was US$ 181.5 million.[101] As the Tribunal acknowledged, "the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework."[102]

35. With respect to the parties' positions regarding TECO's damages in the event that the Tribunal found a breach of the Treaty, both parties relied predominantly upon analyses presented by their respective quantum experts, *i.e.*, Mr. Brent Kaczmarek of Navigant

[95] *Id.*

[96] Award ¶¶ 8, 236-237.

[97] *Id.* ¶ 236.

[98] Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (C-557). EPM further indicated that it also had used EBITDA multiples based on comparable publicly traded companies and transactions involving comparable companies in order to calculate its price offer. *See id.*

[99] Award ¶ 236; Letter from EPM to Iberdrola, TPS and EDP dated 6 Oct. 2010 (C-352); Witness Statement of Sandra W. Callahan dated 16 Sept. 2011 ("Callahan I") ¶ 11 (CWS-2).

[100] Award ¶ 237.

[101] *Id.* ¶ 236.

[102] *Id.* ¶ 748.

Consulting, Inc. for TECO, and Dr. Manuel Abdala of Compass Lexecon for Guatemala.[103] In this connection, it was undisputed between the parties and acknowledged by the Tribunal that the value of a distribution company, such as EEGSA, is determined on the basis of its future expected cash flows, which is determined by its VAD.[104] It also was undisputed that the cost components of the VAD are established at the beginning of each tariff period for the duration of the entire five-year period.[105]

[103] *See id.* ¶¶ 333-359, 413-433; Expert Report of Brent C. Kaczmarek dated 23 Sept. 2011 ("Kaczmarek I") (CER-2); Second Expert Report of Brent C. Kaczmarek dated 24 May 2012 ("Kaczmarek II") (CER-5); Opinion on Damages and Economic Regulation by Manuel A. Abdala & Marcelo A. Schoeters dated 24 Jan. 2012 ("Abdala I") (RER-1); Opinion on Damages and Economic Regulation by Manuel A. Abdala & Marcelo A. Schoeters, Second Report dated 24 Sept. 2012 ("Abdala II") (RER-4).

[104] *See* Tr. (22 Jan. 2013) 553:14-17 (President of the Tribunal stating that a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that"); Kaczmarek I ¶ 136 (explaining that the "value of an enterprise is determined by the cash flows produced by the assets of the business") (CER-2); *id*. ¶ 70 (explaining that in Guatemala, the "distributor generates revenues from the generation and transmission of electricity, but also incurs the same amount as a cost," that the "'net revenue' earned by the distributor and charged to the consumer includes only the costs of distribution (including the financial cost of capital) as well as the costs of energy lost in the distribution process," and that "[t]hese cost elements form the portion of the electricity tariff called the Value Added for Distribution ('VAD')"); *id*. ¶ 76, 77 (explaining that the VAD is the source of the distribution company's return of capital as well as return on capital, or profit); Abdala I ¶ 38 (stating that "the VAD is the portion of the end-user tariff paid by users that allows the distributor to remunerate its operating costs, replace the depreciated investments, to have the opportunity to earn a return on the immobilized capital, and to cover efficient system losses") (RER-1); Tr. (22 Jan. 2013) 552:9-553:17 (Claimant's witness, Mr. Gillette, explaining that the Consortium's bid for EEGSA in the 1998 privatization was based on assumptions regarding the future levels of the VAD and that "obviously a scenario that would result in a lower bid price would be if you assumed a low VAD and high expenses, because that would mean a small cash flow stream"); Tr. (4 Mar. 2013) 1002:21-1003:10 (Respondent's witness, Mr. Moller, testifying that in the privatization, he recalled being told that "the potential interested parties in buying the shares of EEGSA were more interested in the consumers and in their consumption profile than in the wires" and testifying that "the consumption related to the sale price or rate, and especially the VAD that is what the Distributor receives from the tariff"); *id.* 1004:5-16 (Respondent's witness, Mr. Moller, testifying as follows: "Q. Do you affirm your prior testimony from Iberdrola that the Experts told you that the setting of tariffs was an element that it directly impacted the purchase price of EEGSA? . . . A. Yes.").

[105] *See* Award ¶ 112 (stating that "Article 77 of the LGE states that 'the methodology for determination of the rates shall be reviewed by [the CNEE] every five (5) years during the first half of January of the year in question'"); *id.* ¶ 758 ("[T]he VAD is recalculated every 5 years"); *id.* ¶¶ 222-226 (discussing the CNEE's rejection of Bates White's VAD study and its adoption of the Sigla VAD for the entire 2008-2013 tariff period); Kaczmarek I ¶ 83 (explaining that the "cost components of the VAD were to be calculated every five years through an independent study," and that, "[i]n between these study or 'rate periods,' the VAD was to be adjusted for inflation and energy prices on a quarterly basis") (CER-2); Abdala I ¶ ("In Guatemala, the regulator must set, every five years, the VAD to be applied by each distributor for the next five years.") (RER-1).

36. Applying these principles, both experts divided the calculation of TECO's damages into two separate heads of damages, *i.e.*, (i) TECO's share of EEGSA's lost historical cash flows from 1 August 2008, when Guatemala imposed the unlawful tariffs, until 21 October 2010, when TECO sold its investment as a result of Guatemala's breach; and (ii) the loss in value that TECO suffered when it sold its interest in EEGSA on 21 October 2010.[106] The experts also agreed that damages under each of the two heads of damages should be calculated as the difference between an actual scenario reflecting Guatemala's unlawful conduct and a "but-for" scenario assuming that Guatemala had not violated its Treaty obligations.[107]

37. With respect to historical lost cash flows, from 1 August 2008, when the CNEE arbitrarily imposed the Sigla VAD on EEGSA, until 21 October 2010, when TECO sold its investment in EEGSA as a result of Guatemala's breach, Mr. Kaczmarek compared EEGSA's actual cash flows with the cash flows that EEGSA would have received "but for" Guatemala's breach.[108] Between August 2008 and July 2010, Mr. Kaczmarek relied upon EEGSA's historical results for cash flows in the actual scenario.[109] Beginning in August 2010, when historical results no longer were available, Mr. Kaczmarek used the Sigla VAD study as the basis for projecting EEGSA's actual cash flows.[110] Mr. Kaczmarek concluded that the actual lost cash flows to TECO until 21 October 2010 amounted to US$ 20,143,686.[111]

38. Guatemala's quantum expert, Dr. Abdala, did not prepare his own valuation model, but rather used Mr. Kaczmarek's model, with certain modifications.[112] Dr. Abdala calculated EEGSA's actual cash flows until 21 October 2010 using the same methodology as Mr.

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[106] *See* Award ¶ 719; Kaczmarek I ¶¶ 126-129 (CER-2); Kaczmarek II ¶ 6 (CER-5); Abdala I ¶ 27 (RER-1).

[107] *See* Award ¶ 719; Kaczmarek I ¶¶ 126-129 (CER-2); Kaczmarek II ¶ 6 (CER-5); Abdala I ¶ 25 (RER-1).

[108] *See* Award ¶¶ 335-336, 719; Kaczmarek I ¶¶ 155-156 (CER-2); Kaczmarek II ¶¶ 8, 9 (CER-5).

[109] *See* Kaczmarek I ¶ 153 (CER-2).

[110] *See* Award ¶ 337; Kaczmarek I ¶ 126 (CER-2); Kaczmarek II, Appendix 3.A (calculating cash flows in the actual scenario based on the Sigla VAD study) (CER-5).

[111] *See* Kaczmarek II ¶ 141, Table 14 (CER-5).

[112] *See* Abdala I § IV entitled "Corrected Valuation of Alleged Damages" (using Navigant's model, and making certain adjustments, to arrive at his calculation of damages) (RER-1); Abdala II § IV (presenting his "[c]orrected [v]aluation of the [a]lleged [d]amage" based on his modifications to Mr. Kaczmarek's updated model) (RER-4).

Kaczmarek, and concluded that the actual lost cash flows to TECO until 21 October 2010 amounted to US$ 24.4 million, *i.e.*, approximately US$ 4 million higher than TECO's calculation.[113]

39. With respect to the cash flows that EEGSA would have received until 21 October 2010 "but for" Guatemala's unlawful measures, Mr. Kaczmarek based his analysis upon Bates White's 28 July 2008 VAD study, which, as set forth above, calculated EEGSA's VAD and tariffs for the 2008-2013 tariff period in accordance with the Expert Commission's rulings.[114] Mr. Kaczmarek concluded that the "but-for" lost cash flows to TECO until 21 October 2010 amounted to US$ 41,244,238.[115] Deducting from this amount the actual cash flows to TECO of US$ 20,143,686, Mr. Kaczmarek concluded that TECO's historical damages until 21 October 2010 amounted to US$ 21,100,552 (before interest).[116]

40. By contrast, Dr. Abdala based his "but-for" analysis upon a VAD study prepared for purposes of the arbitration by Guatemala's industry expert, Mr. Mario Damonte, who provided his own recalculation of EEGSA's VNR by incorporating the Expert Commission's "possible and economically relevant" rulings into Bates White's earlier VAD study dated 5 May 2008, but nevertheless used his own FRC calculation in lieu of that set forth in the Expert Commission's ruling.[117] Indeed, as Dr. Abdala admitted at the Hearing, he did not perform any

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[113] *See* Abdala II ¶ 15, Table I (RER-4).

[114] *See* Award ¶ 337; Kaczmarek I ¶ 126 (explaining that, "[i]n essence, Claimant claims that the VAD should have been implemented on 1 August 2008 in accordance with the Expert Commission's decision. Bates White incorporated in its 28 July 2008 report the Expert Commission's rulings on the discrepancies. Therefore, the VAD and tariff rates reflected in the 28 July 2008 Bates White report constitute the basis for projecting the revenues and profits EEGSA would have generated in the absence of the Measures. As noted earlier, we refer to this as the 'but-for' scenario of EEGSA's performance.") (CER-2); *id.* ¶¶ 153-154 (applying the foregoing approach to the calculation of TECO's historical damages); Kaczmarek II ¶ 14 (CER-5); Memorial ¶ 286 (stating that "Mr. Kaczmarek uses Bates White's final report dated 28 July 2008, which established the VAD and tariffs in accordance with the Expert Commission's rulings, as the basis for projecting what EEGSA's value would have been 'but for' the unlawful measures"); Award ¶ 729 (stating that, "[e]ssentially, the Claimant bases its but for scenario on an asset base of the company (VNR) of US$1,102 million as established in the Bates White 28 July study").

[115] *See* Kaczmarek II ¶ 141, Table 14 (CER-5).

[116] *See* Award ¶ 336; Kaczmarek II ¶ 141, Table 14 (CER-5).

[117] *See* Award ¶¶ 724-728; Abdala I ¶ 92 (stating that Respondent's assessment of damages was based on a "substitution of the value of VNR (and other parameters) of BW July 2008 Study, with the corrections that Damonte made to the BW May 2008 Study" and the "substitution of the CRF [FRC] formula with the one

"calculation of damages using the FRC formula as recommended by the Expert Commission."[118] This was because Guatemala refused to accept the Expert Commission's rulings on any of the issues upon which the Expert Commission ruled against it. Dr. Abdala also used essentially the same amount of capital expenditures as set forth in Bates White's 28 July 2008 VAD study, notwithstanding that he, at the same time, used Mr. Damonte's significantly lower VNR.[119] As a consequence, relative to revenues, capital expenditures in Dr. Abdala's calculation were significantly higher than in Mr. Kaczmarek's calculation.[120]

41. Having used a different FRC calculation, as well as relatively higher capital expenditures, and refusing to incorporate some of the Expert Commission's other rulings,[121] Dr.

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corrected by Damonte") (RER-1); Abdala II ¶ 75 (stating that his assessment of damages involved "[r]eplacing the VNR value (and other relevant parameters) of the Bates White study of July 2008 with the corrections introduced by Damonte to the Bates White study of May 2008" and "[r]eplacing the CRF [FRC] formula with the one corrected by Damonte") (RER-4); Guatemala's Post-Hearing Brief ¶ 192 (stating that "Guatemala asked Mr. Damonte to conduct the same exercise as Mr. Giacchino (incorporating the pronouncements [of the Expert Commission] into the 5 May study)" and that "[b]ased on said instructions, Mr. Damonte proceeded to incorporate all the possible and economically relevant pronouncements" into Bates White's 5 May 2008 study); Award ¶ 726 (noting that "in correcting the Bates White May 2008 study, Mr. Damonte disregarded the Expert Commission pronouncements at least on one important question, i.e. the FRC"); *id.* ¶ 417 n.403 (noting that "Mr. Damonte states that to apply many of the pronouncements of the Expert Commission, additional information and optimizations impossible to achieve in the time available are required").

[118] Tr. (5 Mar. 2013) 1560:22-1561:2 (Abdala Cross); *see also* TECO's Post-Hearing Brief ¶¶ 175-180 (explaining that Dr. Abdala's but-for valuation did not calculate the value that EEGSA would have had, assuming that its VAD had been set on the basis of all of the Expert Commission's rulings); Guatemala's Post-Hearing Reply dated 8 July 2013 ("Guatemala's Post-Hearing Reply") ¶ 164 (not disputing that Dr. Abdala's but-for valuation was not based on the 28 July 2008 Bates White study, and arguing that the Tribunal "must determine the damage resulting from using the May 5 study according to how the CNEE may have corrected it and not based on the study corrected by Bates White itself [*i.e.*, Bates White's 28 July 2008 VAD study]," and that "[t]his is precisely the exercise that Mr. Damonte carried out and that Dr. Abdala used as a *but for* scenario"); Award ¶ 726 (observing in connection with Mr. Damonte's study, which as noted above was used by Dr. Abdala as the basis of his valuation, that "[i]t is . . . undisputed that, in correcting the Bates White May 2008 study, Mr. Damonte disregarded the Expert Commission pronouncements at least on one important question, i.e. the FRC").

[119] *See* Award ¶¶ 737-741; TECO's Post-Hearing Brief ¶¶ 181-184; TECO's Post-Hearing Reply dated 8 July 2013 ("TECO's Post-Hearing Reply") ¶ 131; Kaczmarek II ¶ 55 (CER-5).

[120] *See* Award ¶¶ 737-741; TECO's Post-Hearing Brief ¶¶ 181-184; TECO's Post-Hearing Reply ¶ 131; Kaczmarek II ¶ 55 (CER-5).

[121] *See* Award ¶ 726; Guatemala's Post-Hearing Reply ¶ 164 (arguing that the Tribunal must base any assessment of damages not upon Bates White's 28 July 2008 corrected study but upon the "May 5 study [*i.e.*, Bates White's 5 May 2008 study] according to how the CNEE may have corrected it . . . . This is precisely the exercise that Mr. Damonte carried out and that Dr. Abdala used as a *but for* scenario.") (emphasis in original); *see also* TECO's Post-Hearing Brief ¶ 179 (explaining that Mr. Damonte failed to implement the Expert

Abdala concluded that the "but-for" lost cash flows to TECO until 21 October 2010 amounted to only US$ 13.8 million.[122] Deducting the actual cash flows of US$ 24.4 million, Dr. Abdala's calculation therefore produced a *negative figure* of US$ 10.6 million,[123] implying, absurdly, that TECO obtained a significant *benefit* from having the Sigla VAD imposed upon EEGSA, even though that VAD was more than 45 percent lower than EEGSA's previous VAD, resulting in revenues that were approximately 40 percent lower than in the prior tariff period.[124]

42. With respect to damages for the loss upon the sale of its shares in EEGSA, both experts similarly compared what TECO had obtained for the sale of its interest in EEGSA with what it would have obtained but for Guatemala's breach. With respect to EEGSA's fair market value in the actual scenario, although Mr. Kaczmarek did not question that the purchase price that EPM paid for DECA II reflected EEGSA's fair market value, Mr. Kaczmarek noted that, because "DECA II contained a portfolio of companies, the price paid by EPM for DECA II does not yield a directly observable price for EEGSA."[125] For that reason, Mr. Kaczmarek calculated EEGSA's actual value as of the date of the sale using three accepted valuation approaches, *i.e.*, the discounted cash flow ("DCF") method, the comparable publicly traded company method, and the comparable transaction method.[126]

43. In conducting a DCF to calculate EEGSA's future financial performance in the actual scenario, Mr. Kaczmarek projected EEGSA's cash flows until the end of the 2013-2018

Commission's ruling relating to reference prices, which impacted Mr. Damonte's recalculated VNR); Award ¶ 417 n.403 (noting that "Mr. Damonte states that to apply many of the pronouncements of the Expert Commission, additional information and optimizations impossible to achieve in the time available are required").

[122] Abdala II ¶ 78, Table VI (RER-4).

[123] *See* Abdala I ¶ 109 (stating that his valuation "impl[ies] a historical damage with a negative sign") (RER-1); Abdala II ¶ 80 (stating that his valuation results in "the peculiarity of having a negative historical damage") (RER-4); *id.*¶ 78, Table VI (purporting to provide his "[u]pdated [v]aluation" and showing but-for historical cash flows to EEGSA of US$ 13.8 million and actual historical cash flows to EEGSA of US$ 24.4 million).

[124] *See* TECO's Post-Hearing Brief ¶¶ 184-186.

[125] Kaczmarek II ¶ 134 (CER-5); *see also* Award ¶ 347.

[126] *See* Award ¶ 347; Kaczmarek I ¶¶ 157-219 (CER-2); Kaczmarek II ¶¶ 132-134 (CER-5).

tariff period, whereupon he assigned a terminal value to EEGSA.[127] This projection was based upon the assumption that the Sigla VAD imposed by the CNEE on 1 August 2008 would remain in place for the remainder of the 2008-2013 tariff period,[128] and that, in the subsequent 2013-2018 tariff period, the CNEE would continue to calculate EEGSA's VAD off of a VNR that was depreciated by 50 percent.[129] This assumption was based upon the fact that (i) Guatemala had insisted throughout EEGSA's 2008-2013 tariff review, before the Expert Commission, in the domestic administrative and court proceedings, as well as throughout the arbitration, that using a "2" in the denominator of the FRC formula and, thus, calculating the VAD off of a regulatory asset base that was depreciated by 50 percent, was consistent with the regulatory framework; and that (ii) the CNEE's ToR for EEGSA's subsequent 2013-2018 tariff review, which were published during the course of the arbitration, and which were on the record, contained the very same FRC calculation used to calculate the Sigla VAD, which the CNEE had arbitrarily imposed upon EEGSA during the 2008-2013 tariff review.[130] Mr. Kaczmarek then adjusted EEGSA's projected financial performance after 2013 for various factors, such as the inflation of costs and materials, the growth of the network, and the network's technical losses.[131]

44. In applying the publicly traded company method, Mr. Kaczmarek identified seventy publicly traded companies potentially comparable to EEGSA, twelve of which were sufficiently comparable to EEGSA so as to provide a reasonable basis upon which to value EEGSA. Mr. Kaczmarek then calculated EEGSA's value in the actual scenario based upon the value of these twelve publicly traded companies.[132] Likewise, in applying the comparable transaction method, Mr. Kaczmarek identified sixty-seven transactions involving the sale of companies potentially comparable to EEGSA, nine of which were sufficiently comparable to

[127] *See* Kaczmarek I ¶ 197 (CER-2); TECO's Post-Hearing Brief ¶¶ 169-173; TECO's Post-Hearing Reply ¶ 126.

[128] *See* Kaczmarek I ¶¶ 161-181 (CER-2); Kaczmarek II, Appendix 3 (CER-5).

[129] *See* Kaczmarek I ¶¶ 161-181 (CER-2); Kaczmarek II ¶¶ 80-89 (CER-5); TECO's Post-Hearing Brief ¶¶ 169-170.

[130] *See* TECO's Post-Hearing Brief ¶ 170; CNEE Resolution 161-2012 dated 23 July 2012, at 27 (containing the Terms of Reference for EEGSA's 2013 tariff review) (R-205).

[131] *See* Kaczmarek I ¶¶ 161-181 (CER-2); Kaczmarek II Appendix 2 (CER-5); TECO's Post-Hearing Brief ¶¶ 169-170.

[132] *See* Award ¶ 342; Kaczmarek I ¶¶ 146-147, 198-210 (CER-2); Kaczmarek II ¶¶ 105-131 (CER-5).

EEGSA so as to provide a reasonable basis upon which to value EEGSA. Mr. Kaczmarek then calculated EEGSA's value in the actual scenario based upon the purchase prices in the foregoing nine transactions.[133]

45. Mr. Kaczmarek then weighted the results of these three methods based upon his assessment of the quality of the information available to implement each method, which is standard valuation practice.[134] Mr. Kaczmarek concluded that the fair market value of TECO's interest in EEGSA in the actual scenario as of 21 October 2010 was US$ 115,198,529.[135] As a reasonableness check, Mr. Kaczmarek compared this result against the implied value of EEGSA in the sale of DECA II and found that the two values were within a close range, indicating that his calculation of EEGSA's value in the actual scenario was accurate.[136]

46. Mr. Kaczmarek's approach for calculating EEGSA's value in the actual scenario also was consistent with a Fairness Opinion prepared by Citibank dated 14 October 2010, in which Citibank analyzed the fairness to TECO of EPM's proposed purchase price for DECA II based upon a DCF analysis. In that analysis, Citibank projected EEGSA's future financial performance from 2010 until 2018 (adjusted for similar factors as in Mr. Kaczmarek's analysis), assuming that the VAD methodology imposed by the CNEE during EEGSA's 2008-2013 tariff review would not change, and assigned a terminal value to EEGSA in 2018.[137] Like Mr. Kaczmarek, in analyzing EEGSA's value, Citibank relied upon the publicly traded company

[133] *See* Kaczmarek I ¶¶ 148, 211-216 (CER-2); Kaczmarek II ¶¶ 105-131 (CER-5).

[134] *See* Award ¶ 338; Kaczmarek I ¶¶ 17, 201-208, 214 (CER-2); Kaczmarek II ¶ 118 (CER-5).

[135] *See* Award ¶ 340; Kaczmarek II ¶ 141, Table 14 (CER-5).

[136] *See* Award ¶ 351; Kaczmarek I ¶¶ 239-241 (CER-2); Kaczmarek II ¶ 132 (CER-5).

[137] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 5/PDF p. 15 (explaining that, to conduct its DCF, Citibank projected EEGSA's VAD through 2018 relying upon DECA II's financial documentation, and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate) (C-531); *id.*, at 13/PDF p. 26 (summarizing the assumptions underlying Citibank's discounted cash flow analysis of EEGSA, including, among other things, a projection period of 2010-2018, that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013," and a terminal value to EEGSA in 2018); *id.*, at 14/PDF p. 28 (listing macroeconomic assumptions underlying Citibank's analysis, such as the projected inflation rates in Guatemala); *id.*, at 18/PDF p. 32 (showing a projected business plan for EEGSA, taking into account factors such as projected changes in electricity demand); *id.*, at 21/PDF p. 36 (providing a discounted cash flow analysis of EEGSA); TECO's Post-Hearing Brief ¶¶ 169-171.

method and the comparable transaction method, in addition to the DCF method.[138] Notably, Mr. Kaczmarek's conclusion that the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 amounted to US$ 115,198,529 was within the range of the results of Citibank's DCF analysis, according to which the implied value of TECO's stake in EEGSA was between US$ 112 million and US$ 134.4 million.[139]

47. In the actual scenario, Dr. Abdala relied solely upon the sale of DECA II to value EEGSA.[140] Dr. Abdala accepted that the sales price paid by EPM on 21 October 2010 reflected EEGSA's actual fair market value as of that date; in other words, Dr. Abdala concluded that EPM neither underpaid nor overpaid for EEGSA. Indeed, Guatemala itself observed in this connection that "it is reasonable to assume that EPM's purchase price *reflects the actual tariff level of the 2008 VAD (adjusted for inflation), at least up to 2013*."[141]

48. Because, as noted above, the sales price for DECA II covered a portfolio of companies and the portion of the purchase price attributable to EEGSA was not contemporaneously specified, Dr. Abdala estimated what portion of the purchase price was attributable to EEGSA.[142] Dr. Abdala concluded that TECO's share of the purchase price attributable to EEGSA ranged from US$ 104.5 million to US$ 120 million.[143] Mr. Kaczmarek's conclusion that the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 amounted to US$ 115,198,529 therefore was within the range of values calculated by Dr. Abdala. The parties thus agreed that their "conclusions as to EEGSA's actual value are not

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[138] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 5/PDF p. 15 (explaining that Citibank's financial analysis utilized the "Discounted Free Cash Flow Analysis," the "Selected Precedent Transactions Analysis," and the "Selected Companies Analysis") (C-531); Kaczmarek II ¶¶ 9, 110-111, 128-129 (discussing same) (CER-5).

[139] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 7/PDF p. 17 (summarizing Citibank's DCF analysis and showing the "TECO Stake Implied Value" of EEGSA as ranging from US$ 112.0 million to US$ 134.4 million) (C-531).

[140] Award ¶ 421; Abdala I ¶ 80 (RER-1); Award ¶ 422 (noting Guatemala's position that "the best reference for establishing EEGSA's value in the actual scenario is the price paid by EPM to acquire the DECA II block of shares").

[141] Guatemala's Post-Hearing Brief ¶ 362 (emphasis added).

[142] *See* Award ¶¶ 422-424; Abdala I ¶¶ 79-83 (RER-1); Abdala II ¶ 32 (RER-4).

[143] Abdala II ¶ 78, Table VI (RER-4).

significantly different and, thus, have no material impact on the calculation of damages,"[144] and that they "are essentially in agreement regarding EEGSA's value in the actual scenario."[145] The Tribunal did not question the parties' agreed position in this regard.[146]

49. With respect to EEGSA's fair market value in the "but-for" scenario, Mr. Kaczmarek again applied the three accepted valuation approaches discussed above, *i.e.*, the DCF method, the comparable publicly traded company method, and the comparable transaction method, and calculated a weighted average of the results of the three methods.[147] In calculating EEGSA's future "but-for" financial performance using the DCF method, Mr. Kaczmarek relied upon Bates White's 28 July 2008 VAD study for the remainder of the 2008-2013 tariff period, and, for the period after 2013, Mr. Kaczmarek assumed that the Expert Commission's FRC calculation, rather than the FRC calculation arbitrarily imposed by the CNEE, would apply.[148] He then made various adjustments to account for factors that would affect the VAD calculation in the next tariff period, such as the projected growth of the network.[149] Mr. Kaczmarek concluded that the fair market value of TECO's interest in EEGSA in the "but-for" scenario as of 21 October 2010 was US$ 337,683,311.[150] Deducting from this amount the actual fair market value of TECO's interest in EEGSA of US$ 115,198,529, Mr. Kaczmarek concluded that TECO's damages arising from the sale of its shares in EEGSA amounted to US$ 222,484,783

[144] TECO's Post-Hearing Brief ¶ 165; *see also* TECO's Post-Hearing Reply ¶ 153 ("[a]t bottom, the only disagreement that Respondent's expert has with Claimant's damages analysis concerns the calculation of EEGSA's capital expenditures *in the but-for scenario*") (emphasis added).

[145] Guatemala's Post-Hearing Brief ¶ 334; *see also* Guatemala's Post-Hearing Reply ¶ 161 (stating that the "truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM").

[146] *See* Award ¶ 750 (stating that, as regards the actual scenario, the parties are only in a "slight disagreement" regarding the portion of the sales price paid by EPM for the bundle of assets including EEGSA "that is attributed to EEGSA").

[147] *See* Award ¶ 338; Kaczmarek I ¶¶ 161-181 (CER-2); Kaczmarek II ¶ 140 (CER-5).

[148] *See* Award ¶ 337; Kaczmarek I ¶ 161 (CER-2); Kaczmarek II ¶ 81 (CER-5).

[149] *See* Kaczmarek I ¶¶ 161-181 (CER-2); Kaczmarek II Appendix 2 (CER-5).

[150] Award ¶ 340; Kaczmarek II ¶ 141, Table 14 (CER-5).

(before interest).[151] TECO's historical and loss of value damages combined thus totaled US$ 243.6 million.[152]

50. By contrast, Dr. Abdala relied solely upon the DCF method to calculate EEGSA's "but-for" value,[153] and calculated that value using Mr. Damonte's VAD study, which, as set forth above, did not incorporate critical Expert Commission rulings.[154] As with calculating TECO's lost cash flows until 21 October 2010, when calculating EEGSA's but-for value, Dr. Abdala did not use the FRC formula ruled upon by the Expert Commission and also used significantly higher capital expenditures (relative to revenues) than Mr. Kaczmarek.[155] Dr. Abdala concluded that TECO's damages arising from sale of its shares in EEGSA ranged from US$ 3.1 million to US$ 18.6 million (before interest).[156] There thus was no dispute between the parties that, in the event the Tribunal found a breach, TECO was entitled to damages for the impaired value at which TECO sold its investment in EEGSA, *i.e.*, the dispute between the parties was limited to the amount of such damages only. Because Dr. Abdala concluded that damages arising from EEGSA's lost historical cash flows until 21 October 2010 amounted to a *negative* US$ 10.6 million, he determined that TECO's overall damages ranged from zero to US$ 8.1 million.[157]

51. In summary, the parties did not dispute valuation in the actual scenario, both with respect to TECO's share of EEGSA's historical cash flows until 21 October 2010, when TECO sold its investment, and with respect to the actual value of TECO's interest in EEGSA at the time of the sale. Indeed, according to Dr. Abdala, "[t]here [were] no major differences with [Mr.

[151] Award ¶ 340; Kaczmarek II ¶ 141, Table 14 (CER-5).

[152] Award ¶ 434; Kaczmarek II ¶ 14, Table 3 (providing an updated total damages amount before interest of US$ 243.6 million) (CER-5); TECO's Post-Hearing Brief ¶ 10; Award ¶ 340 (noting the foregoing figure).

[153] Award ¶ 421; Abdala I ¶ 92 (RER-1); Abdala II ¶ 14 (RER-4).

[154] *See* Award ¶¶ 417, 724; Abdala I ¶¶ 72-78 (RER-1); Abdala II ¶ 75 (RER-4); Guatemala's Post-Hearing Brief ¶ 192; Award ¶ 730.

[155] *See* Award ¶¶ 737-741; TECO's Post-Hearing Brief ¶¶ 181-184; TECO's Post-Hearing Reply ¶ 131; Kaczmarek II ¶ 55 (CER-5).

[156] *See* Abdala II ¶ 78, Table VI (showing but-for future cash flows to TECO of US$ 123.1 million and actual future cash flows to TECO as ranging from US$ 104.5 million to US$ 120 million; deducting the latter from the former, results in damages relating to the sale of TECO's shares ranging from US$ 3.1 million to US$ 18.6 million) (RER-4).

[157] *See* Award ¶ 426; Abdala II ¶ 78 (RER-4).

Kaczmarek] in the valuation of EEGSA in the *actual* scenario."[158] Similarly, Mr. Kaczmarek stated that "[t]here [was] no material difference in the [experts'] measurement of actual cash flows and actual value."[159] Likewise, as TECO observed in its Post-Hearing Brief, "the parties' conclusions as to EEGSA's actual value are not significantly different and, thus, have no material impact on the calculation of damages;"[160] and, as Guatemala put it, "the parties are essentially in agreement regarding EEGSA's value in the actual scenario."[161]

52. The parties, however, disagreed greatly with respect to the "but-for" scenario.[162] The difference in the parties' valuations resulted almost entirely from the fact that Guatemala had refused to calculate damages based upon the Expert Commission's rulings as implemented by Bates White in its 28 July 2008 VAD study, and instead based its damages calculation upon the VNR and FRC calculation in Mr. Damonte's VAD study, which deliberately disregarded the Expert Commission's rulings. Indeed, as Mr. Kaczmarek explained, if Dr. Abdala had input into his valuation the VNR calculated in Bates White's 28 July 2008 VAD study, and if he had used the FRC calculation per the Expert Commission's ruling, keeping all other factors constant, Dr. Abdala's calculation would have produced slightly *higher* damages than Mr. Kaczmarek's calculation.[163]

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[158] Abdala II ¶ 2 (emphasis in original) (RER-4); *see also* Abdala I ¶ 25 (stating that Navigant "estimates the alleged damages to Claimant through the difference between a *but-for* scenario and an *actual* scenario," that the "difference between both (*i.e.*, *but for* less *actual*) represents the presumed economic damages suffered by TGH," and that the "methodology to calculate damages by difference between these two scenarios is standard and appropriate for this case") (emphasis in original) (RER-1).

[159] Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 13.

[160] TECO's Post-Hearing Brief ¶ 165; *see also* TECO's Post-Hearing Reply ¶ 153 ("[a]t bottom, the only disagreement that Respondent's expert has with Claimant's damages analysis concerns the calculation of EEGSA's capital expenditures *in the but-for scenario*") (emphasis added).

[161] Guatemala's Post-Hearing Brief ¶ 334; *see also* Guatemala's Post-Hearing Reply ¶ 161 (stating that the "truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM").

[162] *See* Award ¶ 750 (stating with respect to the actual scenario that the parties are in "slight disagreement" regarding the "share of the price" paid by EPM "that is attributed to EEGSA"); *id.* ¶ 751 (stating that the "Parties nevertheless differ substantially as to EEGSA's *but for* value").

[163] Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 19.

B. The Tribunal's Findings

1. Liability

53. In the Award, the Tribunal held that the actions taken by Guatemala during EEGSA's 2008-2013 tariff review, culminating in its decision to reject both the Expert Commission's decisions and EEGSA's revised VAD study, and to impose its own VAD study on EEGSA, reflected a willful disregard of the legal and regulatory framework, and constituted arbitrary treatment in violation of Article 10.5 of the DR-CAFTA.[164]

54. Specifically, the Tribunal found that the international law minimum standard of treatment under Article 10.5 of the DR-CAFTA is infringed by State conduct that is "arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety,"[165] and that "a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard."[166] The Tribunal likewise found that "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."[167] As the Tribunal observed, the standard thus "prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner," and "obliges the State to observe due process in administrative proceedings."[168] The Tribunal also noted that "[a] lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was a lack of due process in administrative proceedings."[169]

55. Applying these principles, the Tribunal held that, "in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD Calculation, the CNEE acted

[164] Award ¶¶ 707-711.

[165] *Id.* ¶ 454.

[166] *Id.* ¶ 457.

[167] *Id.* ¶ 458.

[168] *Id.* ¶ 587.

[169] *Id.* ¶ 587.

arbitrarily and in violation of the fundamental principles of due process in regulatory matters."[170] In so doing, the Tribunal correctly found that the CNEE had "repudiated the two fundamental principles upon which the tariff review process regulatory framework is premised," namely, that, save in limited circumstances, "the tariff would be based on a VAD calculation made by a prequalified consultant appointed by the distributor," and that, "in case of disagreement between the regulator and the distributor, such disagreement would be resolved having regard to the conclusions of a neutral Expert Commission."[171]

56. With respect to the legal and regulatory framework, the Tribunal found that, "[b]y providing that the tariff would be established based on a VAD study realized by the distributor's consultant, the regulatory framework guarantees that the distributor would have an active role in determining the VAD and prevents the regulator from determining it alone and discretionally, save in limited circumstances."[172] Indeed, as the Tribunal rightly noted, the "entire regulatory framework is based on the premise" that the CNEE "did not enjoy unlimited discretion in fixing the tariff."[173] Rather, as amended RLGE Article 98 reflects, the CNEE is entitled to fix the tariff on the basis of its own VAD study only in two limited circumstances, *i.e.*, where the distributor fails to submit a VAD study, or where the distributor fails to respond to the CNEE's observations by correcting its VAD study in accordance with the observations or indicating its disagreement with the CNEE's observations in writing.[174]

57. The Tribunal further found that, contrary to Guatemala's arguments, "the role of the Expert Commission was not . . . to verify that all the observations made by the regulator on the VAD study were implemented by the distributor's consultant;" rather, the role of the Expert Commission was "to pronounce itself on any disagreement regarding such observations, which implies that the Expert Commission could make findings either in favor or against the

[170] *Id.* ¶ 664.

[171] *Id.* ¶ 665.

[172] *Id.* ¶ 506.

[173] *Id.* ¶ 563.

[174] *Id.* ¶¶ 580-667.

regulator."[175] As the Tribunal observed, "the language used in Article 75 of the LGE clearly suggests that, in case of a disagreement between the CNEE and the distributor on the distributor's VAD report, such disagreement would be resolved on the basis of a determination made by the Expert Commission."[176] Under LGE Article 75, the Expert Commission's role thus "was to provide a solution to disagreements between the CNEE and the distributor, not to act as the guardian of the regulator's views."[177]

58. The Tribunal likewise found that the distributor "could not have the obligation to implement corrections to its VAD report upon which a disagreement had properly been submitted to the Expert Commission."[178] As the Tribunal remarked, it would be "entirely nonsensical" to submit points of disagreement to the Expert Commission, while simultaneously obliging the "distributor to immediately incorporate any such point of disagreement in its VAD Study."[179] The Tribunal further remarked that "[i]t would be even more nonsensical to allow the regulator to unilaterally impose its own VAD study because observations upon which there were disagreements and that were subject to a pending pronouncement of the Expert Commission had not been immediately incorporated in the VAD study."[180] As the Tribunal concluded, "because the regulatory framework provides that a neutral Expert Commission would pronounce itself on any disagreement regarding the observations of the regulator, RLGE Article 98 only mandates the distributor to implement such observations in respect of which (i) there is no disagreement, or (ii), in case of disagreement, the Expert Commission pronounced itself in favor of the regulator (unless the regulator expresses valid reasons to depart from the experts' pronouncements)."[181]

[175] *Id.* ¶ 669.

[176] *Id.* ¶ 567.

[177] *Id.* ¶ 568.

[178] *Id.* ¶ 577.

[179] *Id.* ¶ 579.

[180] *Id.* ¶ 580.

[181] *Id.* ¶ 668.

59. Despite the language in the Sales Memorandum, the LGE, the CNEE's submissions to Guatemala's Constitutional Court, and in the CNEE's own internal documents,[182] the Tribunal rejected TECO's contention that the rulings of the Expert Commission were binding, finding that they "are not technically binding in the sense that the Expert Commission has no adjudicatory powers."[183] The Tribunal explained, however, that although not technically binding "the regulator had the duty to give [the Expert Commission's rulings] serious consideration and to provide reasons in the case it decided to depart from them."[184] As the Tribunal noted, "the regulatory framework would make no sense," if the CNEE could disregard the Expert Commission's decisions at whim.[185] The Tribunal thus ruled that the regulator "could not decide to disregard the Expert Commission's pronouncements without providing any reason," which obligation "derives from both the regulatory framework and from the international obligations of the State under the minimum standard."[186]

60. With respect to EEGSA's 2008-2013 tariff review, the Tribunal found that the CNEE's Resolution No. 144-2008 was "inconsistent with the regulatory framework," and that, "[b]y rejecting the distributor's study because it had failed to incorporate the *totality* of the observations that the CNEE had made in April 2008 [before the parties' discrepancies were even submitted to the Expert Commission], with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review."[187] As the Tribunal noted, "the CNEE did not consider the report of the Expert Commission as the pronouncement of a neutral panel of experts which it had to take into account in establishing the tariff," but rather "used the expert report to ascertain that

[182] *See* Sales Memorandum, at 49 (C-29); LGE Arts. 75-76 (C-17); CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 6-7 (C-81); Email from A. Campos to A. Garcia, J.F. Orozco, M. Santizo, M. Peláez, M. Estrada, D. Herrera, M. Ixmucane Cordova dated 16 May 2007, attaching Terms of Reference for VAD Studies and Replies to EEGSA Comments, at 2 (C-483); Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 (C-494); *see also* Memorial ¶¶ 41-43; Reply ¶¶ 37-50; TECO's Post-Hearing Brief ¶ 85.

[183] Award ¶ 670.

[184] *Id.* ¶ 670.

[185] *Id.* ¶ 576.

[186] *Id.* ¶ 583.

[187] *Id.* ¶ 681 (emphasis in original).

some of the observations it had made in April 2008 had not been incorporated in the study, regardless of whether there was a disagreement, and irrespective of the views that had been expressed by the experts on such disagreements."[188] The CNEE accordingly "failed without any reasons to take the Expert Commission's pronouncements into account."[189]

61. The Tribunal further held that "the regulator's decision to apply its own consultant's study does not comport with Article 98 of the RLGE," and that, "in order for the regulator's decision to comport with Article 98, it should have [shown] that the distributor failed to correct its study according to the pronouncements of the Expert Commission, or explained why the regulator decided not to accept the Expert Commission's pronouncements."[190] In the Tribunal's view, once the CNEE "had received the Expert Commission's report, [it] should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reasons to consider that such conclusions were inconsistent with the regulatory framework, in which case it had the obligation to provide valid reasons to that effect."[191] No such reasons, however, were provided.[192]

62. The Tribunal also found that the CNEE's "preliminary review" of EEGSA's revised VAD study "performed in less than one day was clearly insufficient to discharge" its obligation to seriously consider the Expert Commission's findings, and was evidence of "[t]he arbitrariness of the regulator's behavior."[193] The Tribunal explained that, "both under the regulatory framework and under the minimum standard of treatment, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White's study."[194] As the Tribunal noted, it could "find no justification,

[188] *Id.* ¶ 678.

[189] *Id.* ¶ 678.

[190] *Id.* ¶¶ 679-680.

[191] *Id.* ¶ 683.

[192] *Id.* ¶ 683.

[193] *Id.* ¶¶ 690-691.

[194] *Id.* ¶ 690.

other than its desire to reject the Bates White study in favor of the more favorable Sigla's study, for [the CNEE's] behavior."[195]

63. Finding that Guatemala's "behavior therefore breaches Guatemala's obligation to grant fair and equitable treatment under article 10.5 of CAFTA-DR,"[196] the Tribunal further held that "such breach has caused damages to the Claimant, in respect of which the Claimant is entitled to compensation."[197]

2. Quantum

64. In analyzing TECO's damages claim, and in determining what VAD EEGSA would have charged and, thus, what revenue it would have earned, absent Guatemala's breach, the Tribunal first considered, "[a]s an initial matter, . . . whether the proper base of valuation should be the Bates White 5 May, 2008 report as corrected by Mr. Damonte or the 28 July, 2008 report" prepared by Bates White.[198] As discussed above, Mr. Damonte's study admittedly incorporated only what Respondent deemed to be the "possible and economically relevant" rulings of the Expert Commission into Bates White's 5 May 2008 study. The Tribunal found that, because Mr. Damonte's study did not incorporate all of the Expert Commission's rulings, including, most importantly, its ruling on the FRC calculation,[199] it could not "usefully [be] refer[red] to . . . as a basis for assessing the but for scenario."[200]

65. The Tribunal thus properly decided that it would "work on the basis of the July 28, 2008 version of the [Bates White] study," as "this approach will allow calculation of damages with a sufficient degree of certainty based on what the tariffs should have been had the CNEE complied with the regulatory framework."[201] In so holding, the Tribunal "accepted the Claimant's views on the three issues that [were] in dispute in respect of that study (i.e. the VNR,

[195] *Id.* ¶ 690.

[196] *Id.* ¶ 711.

[197] *Id.* ¶ 711.

[198] *Id.* ¶ 723.

[199] *See id.* ¶¶ 726-727, 733.

[200] *Id.* ¶ 727.

[201] *Id.* ¶ 728.

the FRC, and the CAPEX)."[202] The Tribunal thus rejected Guatemala's objection that Bates White's 28 July 2008 study did not incorporate the Expert Commission's rulings, holding that "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission's pronouncements or that there is any reason to depart from such pronouncements."[203]

66. With respect to historical damages for the period from 1 August 2008, when the CNEE arbitrarily imposed the Sigla VAD on EEGSA, until 21 October 2010, when TECO sold its investment as a result of Guatemala's breach, the Tribunal found that damages should be established on the basis of "what the tariffs should have been had the CNEE complied with the regulatory framework."[204] Because the Tribunal found that the CNEE breached that regulatory framework by refusing, without legitimate reason, to calculate the tariffs on the basis of Bates White's 28 July 2008 VAD study, which had incorporated the Expert Commission's rulings, the Tribunal agreed with TECO that it was entitled to its share of the cash flow that EEGSA would have received, if the CNEE had set EEGSA's 2008-2013 VAD and tariffs based upon Bates White's 28 July 2008 VAD study, rather than the VAD study prepared by the CNEE's own consultant, Sigla.[205] The Tribunal concluded that such damages amounted to "(i) Claimant's share of the higher revenues that EEGSA would have received had the CNEE observed due process in the tariff review, (ii) to run from the moment the high[er] revenues would have been first received until the moment when the Claimant sold its share[s] in EEGSA."[206] On that basis, the Tribunal awarded TECO historical losses in the full amount claimed, *i.e.*, US$ 21,100,552.[207]

67. With respect to TECO's claim for the loss upon the sale of its shares, the Tribunal noted that it had "no reasons to doubt that, as reflected in the [corporate board] minutes, the decision to divest was taken primarily as a consequence of the breach by the CNEE of the

[202] *Id.* ¶ 742.

[203] *Id.* ¶ 731.

[204] *Id.* ¶¶ 728, 742.

[205] *Id.* ¶¶ 728, 742.

[206] *Id.* ¶ 742.

[207] *Id.* ¶¶ 742, 780.

regulatory framework."[208] The Tribunal further observed that both parties had agreed upon the methodology to be applied in calculating TECO's damages for the loss of value, *i.e.*, the difference between "EEGSA's sale value to EPM" and "the higher value to which EEGSA would have been sold to EPM in [the] absence of [the] breach."[209] The Tribunal also accepted that the value of a distribution company, such as EEGSA, is determined on the basis of its VAD and its future expected cash flows, which also would be determined by its future VAD.[210] Finally, the Tribunal acknowledged that "the existing tariffs were taken into account in fixing the price of the transaction" between TECO and EPM.[211]

68. Having found that "Respondent's breach caused losses to the Claimant,"[212] and that "the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework,"[213] the Tribunal nonetheless proceeded to deny TECO's claim for loss upon the sale of its shares on the purported basis that there was "no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013,"[214] and thus "no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale."[215]

69. In so ruling, the Tribunal notably did not analyze the parties' extensive expert reports (including the fact that even Respondent's expert assigned a positive value to this portion of Claimant's damages claim), but rather focused solely on a brief press interview given by a representative of EPM, the purchaser of EEGSA—who was not a witness in the arbitration, had not been made available for examination, and, for understandable reasons, would not have been inclined to make any statements that might antagonize the CNEE or Guatemala—to a

[208] *Id.* ¶ 748.

[209] *Id.* ¶ 719.

[210] *See Id.* ¶ 728.

[211] *Id.* ¶ 752.

[212] *Id.* ¶ 742.

[213] *Id.* ¶ 748.

[214] *Id.* ¶ 754.

[215] *Id.* ¶ 749.

Guatemalan newspaper on 23 October 2010, the day after it purchased EEGSA.[216] Indeed, in the interview, the Chief Executive Officer of EPM, Mr. Federico Restrepo, evidently sought to cast EPM in a politically favorable light, emphasizing the "cultural affinity" between Guatemala and EPM's home country, Colombia, and stating that EPM was not "com[ing] in with any flag," is "very respectful of people's roots," and is "different from the previous owner" of EEGSA, and that, with respect to the problems that the previous owners of EEGSA had encountered with the Guatemalan authorities in connection with the VAD, this "is an issue for [EEGSA's previous owners], we did not buy those fights."[217] In the interview, Mr. Restrepo further stated:

> Q. *The shareholders argued that there would be lower revenue and profitability due to the VAD*. Despite this issue, you decided to buy?
>
> A. *This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout* [*i.e.*, the Sigla VAD] *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*.
>
> Q. You must start preparing for the VAD of the next five year period [*i.e.*, the 2013-2018 tariff period]. Do you think it can improve with respect to the current one?
>
> A. Our valuation process of the company included various scenarios one of them being that the VAD – value received by distributors for the service – would not be modified. This is what we studied.
>
> Q. [W]hen you mention the valuation process, does it mean that the company would have costed more with another VAD?
>
> A. That is possible. *For the same cost you receive more revenue, you have more cash of course*.[218]

70. The Tribunal drew two conclusions from this interview. First, the Tribunal observed that the interview confirmed that the "existing tariffs were considered as a relevant

[216] *Id.* ¶¶ 753-754.

[217] Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (R-133).

[218] Award ¶ 753 (citing and providing the Tribunal's own translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (emphasis added) (R-133)).

factor in determining the price of the transaction."[219] Second, focusing on the last question and answer, the Tribunal concluded that, on the other hand, the interview "only mentions as a '*possibility*,'" rather than a certainty, "that with a higher VAD for the rest of the tariff period, the transaction price would have been higher."[220] The Tribunal further noted, erroneously, that "there [was] no evidence in the record of how the transaction price has been determined," and remarked that it was unaware of "what other factors might have come into play," in determining the sales price. The Tribunal then held that it could not "conclude with sufficient certainty that an increase in revenues in 2013 would have been reflected in the purchase price and to what extent,"[221] even though it earlier had acknowledged the undisputed fact that the value of a distribution company is determined by its VAD;[222] had concluded that "the existing tariffs were taken into account in fixing the price of the transaction" between TECO and EPM;[223] and had determined that those existing tariffs gave rise to damages from 1 August 2008 until 21 October 2010, while TECO held its investment in EEGSA.[224]

71. In so ruling, the Tribunal also ignored, without explanation, the evidence regarding the transaction price, including the 14 October 2010 Citibank Fairness Opinion, in which Citibank concluded that "DECA II's operating and financial performance was heavily impacted by the tariff revision process of 2008, which has resulted in lower revenues and margin contraction,"[225] and projected EEGSA's future financial performance over the period from 2010 to 2018 based upon the assumption that the CNEE would "not institute any change in EEGSA's VAD tariff upon the next reset in 2013."[226] The Tribunal similarly ignored EPM's non-binding

[219] *Id.* ¶ 754.

[220] *Id.* ¶ 754 (emphasis added).

[221] *Id.* ¶ 754.

[222] *See* Tr. (22 Jan. 2013) 553:14-17 (President of the Tribunal stating that a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that.").

[223] Award ¶ 752.

[224] *See supra* ¶ 66; Award ¶ 742.

[225] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 12/PDF p. 24 (C-531).

[226] *See id.*, at 13/PDF p. 26.

offer letter to Iberdrola, signed by EPM's CEO, Mr. Restrepo, in which EPM explained to EEGSA the "methodologies used" by EPM to calculate the purchase price that EPM had offered for DECA II, noting that EPM had based its price offer on a "[d]iscounted free cash flow" analysis of EEGSA "appl[ying] different adjustments and assumptions," but "*not includ[ing] an increase in tariffs for the years 2013 and 2014*."[227] The Tribunal also ignored the parties' agreement with respect to the actual price at which EEGSA had been sold,[228] as well as Guatemala's acknowledgment that "it is reasonable to assume that EPM's purchase price *reflects the actual tariff level of the 2008 VAD* (adjusted for inflation), *at least up to 2013*."[229]

72. The Tribunal further stated that there was "no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever,"[230] and that, while Mr. Restrepo had indicated in his interview that EPM had assumed that the tariffs were likely to remain the same for future tariff periods, he also said "that such a scenario was only one of those which were considered by the purchaser."[231] Agreeing with Guatemala that "'it is actually impossible to know what will happen with the tariffs in the future,'"[232] the Tribunal ruled that Claimant's claim for loss upon the sale of its shares was "speculative."[233] According to the Tribunal, there was "nothing preventing the distributor from seeking an increase of the tariffs at the end of the 2008-2013 tariff period," and, "[i]n this respect, no information has been provided to the Arbitral Tribunal

[227] Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (emphasis added) (C-557).

[228] *See* TECO's Post-Hearing Brief ¶ 165 ("[T]he parties' conclusions as to EEGSA's actual value are not significantly different and, thus, have no material impact on the calculation of damages"); TECO's Post-Hearing Reply ¶ 153 ("At bottom, the only disagreement that Respondent's expert has with Claimant's damages analysis concerns the calculation of EEGSA's capital expenditures in the but-for scenario"); Abdala II ¶ 2 ("There are no major differences with NCI [Mr. Kaczmarek] in the valuation of EEGSA in the *actual* scenario") (emphasis in original) (RER-4); Guatemala's Post-Hearing Brief ¶ 334 ("[T]he parties are essentially in agreement regarding EEGSA's value in the actual scenario"); Guatemala's Post-Hearing Reply ¶ 161 ("[The] truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM").

[229] Guatemala's Post-Hearing Brief ¶ 362 (emphasis added).

[230] Award ¶ 755.

[231] *Id.* ¶ 756.

[232] *Id.* ¶ 757 (quoting and agreeing with Guatemala's Post-Hearing Brief ¶ 354).

[233] *Id.* ¶ 757.

regarding the establishment of the 2013-2018 tariffs."[234] In so ruling, the Tribunal, however, ignored, without explanation, the Terms of Reference issued by the CNEE for EEGSA's 2013-2018 tariff review, which, as explained above, were on the record and contained the same FRC calculation that the CNEE had imposed on EEGSA during its 2008-2013 tariff review.[235] The Tribunal also noted that there was "no indication that the distributor will be prevented from seeking a change in the tariffs in 2018,"[236] and that the regulatory framework may change, impacting future tariff reviews and VADs.[237] As discussed above, neither TECO nor Guatemala, however, projected EEGSA's financial performance beyond 2018.[238]

73. With respect to interest, the Tribunal granted TECO pre-award and post-award interest at the U.S. Prime rate plus two percent, compounded annually, from the day of the sale to EPM on 21 October 2010.[239] The Tribunal, however, declined to grant pre-award interest for the two-year period prior to the sale during which the Sigla tariffs were in effect,[240] stating that "calculating interest on the entire amount of the historical damages as from the first day of the tariff period would result in an unjust enrichment of the Claimant."[241] The Tribunal thus held that "interest should only accrue from the date of the sale of EEGSA to EPM in October 2010."[242] The Tribunal's ruling not only mischaracterizes TECO's claim, because, as set forth below, TECO requested interest accruing in tranches as from 1 August 2009 (and not from the first day of the tariff period on 1 August 2008), but the Tribunal's decision also is contrary to the agreed position of the parties, which did not dispute the method of calculation of interest, and came as a complete surprise to TECO, as the Tribunal never questioned this agreed

[234] *Id.* ¶ 758.

[235] *See supra* ¶ 43.

[236] Award ¶ 758.

[237] *Id.* ¶ 759.

[238] *See supra* ¶¶ 38, 43, 46, 49.

[239] Award ¶ 768.

[240] *See id.* ¶¶ 353, 432.

[241] *Id.* ¶ 765.

[242] *Id.* ¶ 765.

methodology.[243] Similarly, the Tribunal failed to award TECO pre-award interest at the 8.8 percent rate agreed by the parties.[244]

74. Finally, applying the principle that costs should follow the event,[245] the Tribunal ordered Guatemala to support the entirety of its costs, and to reimburse 75 percent of TECO's costs, *i.e.*, US$7,520,695.39.[246] As TECO demonstrated in its submissions, an award of costs to TECO was justified by Guatemala's egregious breach of the Treaty, as well as its misconduct in the underlying arbitration, including, among other things, Guatemala submitting a Reply on Jurisdiction despite the parties' express agreement and Tribunal's order prohibiting it from doing so, and thus causing TECO to incur costs of preparing a Rejoinder submission; violating the Tribunal's orders by repeatedly submitting evidence and testimony from an earlier ICSID arbitration brought by Iberdrola against Guatemala under the Spanish-Guatemala bilateral investment treaty; objecting to the production of the same category of documents that Guatemala itself had earlier requested; withholding responsive documents from production in defiance of the Tribunal's order and the parties' agreement; misrepresenting the record; and failing to provide required translations.[247] To date, Guatemala has not paid TECO the amount of the Award, including its cost award.

III. LEGAL STANDARDS APPLICABLE TO ANNULMENT

A. Manifest Excess Of Powers

75. Article 52(1)(b) of the ICSID Convention provides that an award may be annulled when a tribunal has manifestly exceeded its powers.[248] As explained by Professor Schreuer, this annulment ground is meant to ensure, among other things, that tribunals do not exceed their

[243] *See infra* § IV.B.

[244] *See infra* § IV.B.

[245] *See* Award ¶¶ 777-778.

[246] *Id.* ¶ 779.

[247] *See* TECO's Submission on Costs dated 24 July 2013; TECO's Reply on Costs dated 7 Aug. 2013.

[248] *See* ICSID Convention, Art. 52(1)(b).

jurisdiction, or fail to apply the law agreed upon by the parties.[249] It also is well established that a tribunal deciding issues beyond those raised by the parties engages in a manifest excess of powers, and that this is a ground for annulment.[250] As Aron Broches, the former General Counsel of the World Bank and the main architect of the ICSID Convention, has explained, "the expression 'manifestly exceeded its powers' concerned the cases referred to earlier as *ultra petita*, namely, where the Tribunal would have gone beyond the scope of agreement of the parties or would have decided points which had not been submitted to it or had been improperly submitted to it."[251] Several *ad hoc* committees have reached similar conclusions.

76. In *Soufraki v. United Arab Emirates*, the *ad hoc* committee found that "[t]o exceed the scope of one's powers means to do something beyond the reach of such powers as defined by three parameters, the jurisdictional requirements, the applicable law and the issues raised by the Parties."[252] The *Soufraki* committee explained that there is "an excess of power if the tribunal does 'too little,' as far as its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis* is concerned," which means that, with respect to a question posed to the tribunal, "a manifest excess of power would consist in answering some other question not raised by the parties, or in answering only a part of a question in fact raised by the parties."[253]

77. In *Impregilo v. Argentina*, the *ad hoc* committee likewise remarked that a "[m]anifest excess of powers may occur when an arbitral tribunal decides on matters which the parties did not submit to it,"[254] while the *ad hoc* committee in *CDC v. Seychelles* noted that

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[249] *See* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2d ed., Cambridge University Press, 2009) Art. 52 (hereinafter "SCHREUER COMMENTARY ART. 52"), p. 938 ¶¶ 132-133 (CL-N-146).

[250] *See, e.g.*, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment of 24 Jan. 2014 ("*Impregilo v. Argentina*, Decision on Annulment"), ¶¶ 124-125 (CL-N-133); *Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki of 5 June 2007("*Soufraki v. UAE*, Decision on Annulment"), ¶ 41 (CL-N-132); *CDC Group PLC v. Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles of 29 June 2005 ("*CDC v. Seychelles*, Decision on Annulment"), ¶ 40 (CL-N-128).

[251] ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION, Volume II, Part 2 (1968), at 850 (CL-N-149).

[252] *Soufraki v. UAE*, Decision on Annulment, ¶ 41 (CL-N-132).

[253] *Id.* ¶ 44.

[254] *Impregilo v. Argentina*, Decision on Annulment, ¶ 125 (CL-N-133).

"[c]ommon examples of such 'excesses [of powers]' are a Tribunal deciding questions not submitted to it or refusing to decide questions properly before it."[255] As the *ad hoc* committee in *CDC* explained, "a Tribunal's legitimate exercise of power is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, *i.e.*, absent jurisdiction)."[256]

78. The *ad hoc* committee in *Caratube v. Kazakhstan* similarly observed that an "excess of power can be committed both by overreach and by defect," and that "[a]wards can be annulled if tribunals assume powers to which they are not entitled, and also if arbitrators do not use the powers that have been vested upon them by the parties."[257] As the *ad hoc* committee explained, "the power of any arbitral tribunal derives from the authority vested upon it through the consent of the parties; if arbitrators address disputes not included in the powers granted, or decide issues not subject to their jurisdiction or not capable of being solved by arbitration, their decision cannot stand and must be set aside."[258]

79. *Ad hoc* committees, moreover, have considered that an excess of powers qualifies as "manifest" within the meaning of Article 52(1)(b), when it is obvious, self-evident, clear, flagrant, and substantially serious.[259] As Professor Schreuer has explained, "[t]he word [manifest] relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis."[260]

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[255] *CDC v. Seychelles*, Decision on Annulment, ¶ 40 (CL-N-128).

[256] *Id.* ¶ 40.

[257] *Caratube Int'l Oil C. LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP of 21 Feb. 2014 ("*Caratube v. Kazakhstan*, Decision on Annulment"), ¶ 75 (CL-N-127).

[258] *Id.* ¶ 74.

[259] *See, e.g.*, *Impregilo v. Argentina*, Decision on Annulment, ¶ 128 (CL-N-133); *Soufraki v. UAE*, Decision on Annulment, ¶ 40 (CL-N-132); *Malicorp Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited of 3 July 2013 ("*Malicorp v. Egypt*, Decision on Annulment"), ¶ 6 (CL-N-136).

[260] SCHREUER COMMENTARY ART. 52, p. 938 ¶ 135 (CL-N-146).

80. In *Wena Hotels v. Egypt*, the *ad hoc* committee observed that "[t]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest."[261] The *ad hoc* committee in *CDC v. Seychelles* similarly remarked that, "if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy," and that "[a]ny excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other,' is not manifest."[262]

B. Serious Departure From A Fundamental Rule Of Procedure

81. Article 52(1)(d) of the ICSID Convention provides that an award may be annulled when the tribunal seriously departed from a fundamental rule of procedure.[263] One of the most fundamental rules of procedure is the right to be heard. As the drafting history of the ICSID Convention reflects, Article 52(1)(d) encompasses "principles of natural justice," including the principle that "both parties must be heard and that there must be adequate opportunity for rebuttal."[264] As Professor Schreuer has explained, the "principle that both sides must be heard on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings," and "is reflected throughout the ICSID Arbitration Rules."[265]

82. In *Wena Hotels v. Egypt*, the *ad hoc* committee confirmed that "[i]t is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal," and that "[t]his includes the right to state its claim or its

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[261] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of 28 Jan. 2002 ("*Wena v. Egypt*, Decision on Annulment"), ¶ 25 (CL-N-144).

[262] *CDC v. Seychelles*, Decision on Annulment, ¶ 41 (CL-N-128).

[263] *See* ICSID Convention, Art. 52(1)(d).

[264] ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION, Volume II, Part 1 (1968), at 480 (CL-N-148); *see also Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide of 23 Dec. 2010 ("*Fraport v. Philippines*, Decision on Annulment"), ¶ 197 (observing that "[t]he requirement that the parties be heard is undoubtedly accepted as a fundamental rule of procedure, a serious failure of which could merit annulment" and that "[i]t was expressly referred to as an example of such a rule by the framers of the ICSID Convention") (CL-N-131).

[265] SCHREUER COMMENTARY ART. 52, p. 987 at ¶ 305 (CL-N-146).

defense and to produce all arguments and evidence in support of it."[266] As the *ad hoc* committee observed, "[t]his fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other."[267] The *ad hoc* committee in *Fraport v. The Philippines* similarly confirmed that "[t]he right to present one's case, or 'principe de la contradiction,' in arbitral proceedings includes the right of each party to make submissions on evidence presented by its opponent," and that, "[i]f an arbitral tribunal fails to accord such a right, then its award will be subject to annulment."[268]

83. As the Centre explained in its Background Paper on Annulment, this annulment ground extends to the tribunal's "treatment of evidence and burden of proof."[269] As the *ad hoc* committee in *Klöckner II v. Cameroon* observed, "the ICSID system seems to link, in theory, the regime of proof to procedure," and a "reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure."[270] The *ad hoc* committee in *Impregilo v. Argentina* similarly observed that the "treatment of evidence and burden of proof" is among the fundamental rules of procedure.[271]

84. With respect to the seriousness of the departure from a fundamental rule of procedure, *ad hoc* committees have considered a departure to be "serious" within the meaning of Article 52(1)(d) when the departure is substantial and deprived the "party of the benefit or

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[266] *Wena v. Egypt*, Decision on Annulment, ¶ 57 (CL-N-144); *see also MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Decision on Annulment of 21 Mar. 2007 ("*MTD v. Chile*, Decision on Annulment"), ¶ 49 (CL-N-138); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment of 1 Sept. 2009 ("*Azurix v. Argentina*, Decision on Annulment"), ¶ 212 (CL-N-124).

[267] *Wena v. Egypt*, Decision on Annulment, ¶ 57 (CL-N-144).

[268] *Fraport v. Philippines*, Decision on Annulment, ¶ 200 (CL-N-131); *see also Malicorp v. Egypt*, Decision on Annulment, ¶ 36 (finding that the "*principe du contradictoire* . . . is a rule of procedure that ensures equality of the parties in an adversarial proceeding" and "is a fundamental rule of procedure") (CL-N-136).

[269] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID, 10 Aug. 2012, ¶ 100 (stating that "[e]xamples of fundamental rules of procedure identified by *ad hoc* Committees" include the "treatment of evidence and burden of proof") (CL-N-147).

[270] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment of 17 May 1990 ("*Klöckner v. Cameroon*, Decision on Annulment II"), ¶ 6.80 (CL-N-135).

[271] *Impregilo v. Argentina*, Decision on Annulment, ¶ 165 (CL-N-133).

protection which the rule was intended to provide."[272] In *Wena Hotels*, the *ad hoc* committee remarked that, "[i]n order to be a 'serious' departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[273] As the *ad hoc* committee observed in *Pey Casado v. Chile*, an applicant is not, however, "required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed."[274]

C. Failure To State Reasons On Which The Award Is Based

85. Article 52(1)(e) of the ICSID Convention provides that an award may be annulled when it has failed to state the reasons on which it is based.[275] As Professor Schreuer has explained, the "purpose of a statement of reasons is to explain to the reader of the award, especially to the parties, how and why the tribunal came to its decision in the light of the facts and applicable law."[276] Indeed, ICSID Convention Article 48(3) provides that the award "shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."[277] Accordingly, ICSID Arbitration Rule 47(1)(i) requires that the award include "the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."[278]

86. In *Rumeli v. Kazakhstan*, the *ad hoc* committee explained that "[t]he purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party," but "to enable the reader (and specifically the parties) to see the reasons upon which the

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[272] *Maritime Int'l Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision of 14 Dec. 1989 ("*MINE v. Guinea*, Decision on Annulment"), ¶ 5.05 (CL-N-137).

[273] *Wena v. Egypt*, Decision on Annulment, ¶ 58 (CL-N-144).

[274] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile of 18 Dec. 2012 ("*Pey Casado v. Chile*, Decision on Annulment"), ¶ 80 (CL-N-143).

[275] *See* ICSID Convention, Art. 52(1)(e).

[276] SCHREUER COMMENTARY ART. 52, p. 1003 ¶ 363 (CL-N-146).

[277] ICSID Convention, Art. 48(3).

[278] ICSID Arbitration Rule, Rule 47(1)(i).

award itself is based."[279] The *ad hoc* committee in *MINE v. Guinea* likewise stated that the award must enable "one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law."[280]

87. Recognizing that "there will probably never be a case where there is a *total absence of reasons for the award*,"[281] the *ad hoc* committee in *Soufraki v. United Arab Emirates* noted that, "even short of a total failure, some defects in the statement of reasons could give rise to annulment."[282] As the *ad hoc* committee observed, "insufficient or inadequate reasons as well as contradictory reasons can spur an annulment,"[283] because they "cannot, in themselves, be a reasonable basis for the solutions arrived at."[284] In *Caratube v. Kazakhstan*, the *ad hoc* committee similarly noted that "*ad hoc* committees have held that contradictory or frivolous reasons are to be equated with a failure to state reasons and can result in annulment," and that "[c]ontradictory reasons cancel each other and will not enable the reader to understand the tribunal's motives," while "[f]rivolous reasons are those manifestly irrelevant and knowingly so to the tribunal."[285]

88. The reasons requirement also extends to the tribunal's duty to consider or otherwise respond to the arguments and evidence presented by the parties. As the *ad hoc* committee in *Wena Hotel v. Egypt* observed, "the answer to the question the Tribunal omitted to decide may have direct or collateral effect upon the arguments which are at the basis of the Tribunal's conclusions."[286] The *ad hoc* committee confirmed that the "ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a

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[279] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee of 25 Mar. 2010 ("*Rumeli v. Kazakhstan*, Decision on Annulment"), ¶ 104 (CL-40).

[280] *MINE v. Guinea*, Decision on Annulment, ¶ 5.09 (CL-N-137).

[281] *Soufraki v. UAE*, Decision on Annulment, ¶ 122 (emphasis in original) (CL-N-132).

[282] *Id.* ¶ 122 (emphasis in original).

[283] *Id*.

[284] *Id.* ¶ 123 (emphasis in original).

[285] *Caratube v. Kazakhstan*, Decision on Annulment, ¶ 102 (CL-N-127).

[286] *Wena v. Egypt*, Decision on Annulment, ¶ 101 (CL-N-144).

question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award."[287]

IV. GROUNDS FOR PARTIAL ANNULMENT OF THE AWARD

A. The Tribunal's Decision Denying TECO Damages For The Loss Of Value Arising From The Sale Of EEGSA Should Be Annulled

89. As set forth above, with respect to TECO's claim for damages suffered as a result of the impaired value at which TECO sold its investment in EEGSA, although the Tribunal found that "Respondent's breach caused losses to the Claimant;"[288] that TECO's "decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework;"[289] that the value of a distribution company like EEGSA is derived from its VAD;[290] and that EEGSA's 2008-2013 tariffs, which had been arbitrarily imposed by the CNEE, "were taken into account in fixing the price of the transaction" between TECO and EPM,[291] the Tribunal nonetheless concluded, based upon a *single word* taken out of context from a brief press interview given by the purchaser of EEGSA, that TECO was not entitled to *any* damages arising from the sale of its investment in EEGSA, because there was "no sufficient evidence that, had

[287] *Id.* ¶ 101.

[288] Award ¶ 742.

[289] *Id.* ¶ 748.

[290] *See* Tr. (22 Jan. 2013) 553:14-17 (President of the Tribunal stating that a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that."); *see also* Kaczmarek I ¶ 136 (explaining that the "value of an enterprise is determined by the cash flows produced by the assets of the business") (CER-2); *id.* ¶ 70 (explaining that in Guatemala, the "distributor generates revenues from the generation and transmission of electricity, but also incurs the same amount as a cost," that the "'net revenue' earned by the distributor and charged to the consumer includes only the costs of distribution (including the financial cost of capital) as well as the costs of energy lost in the distribution process," and that "[t]hese cost elements form the portion of the electricity tariff called the Value Added for Distribution ('VAD')"); *id.* ¶ 76, 77 (explaining that the VAD is the source of the distribution company's return of capital as well as return on capital, or profit); Abdala I ¶ 38 (stating that "the VAD is the portion of the end-user tariff paid by users that allows the distributor to remunerate its operating costs, replace the depreciated investments, to have the opportunity to earn a return on the immobilized capital, and to cover efficient system losses") (RER-1); Kaczmarek I ¶ 126 (stating that the framework for measuring TECO's damages involves measuring the difference between EEGSA's "but-for" value, in which EEGSA's VAD and tariffs are determined based on Bates White's 28 July 2008 VAD study, and EEGSA's "actual" value, in which EEGSA's VAD and tariffs are determined based on the Sigla VAD study); Abdala I ¶ 25 (stating that Navigant's "methodology to calculate damages by difference between these two scenarios is standard and appropriate for this case") (RER-1).

[291] Award ¶ 752.

the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company,"[292] and because the Tribunal "cannot accept that the sale price to EPM was based on the assumption that tariffs would remain forever unchanged post-2013."[293] The Tribunal's ruling is subject to annulment on several grounds.

1. The Tribunal's Reasoning For Denying TECO Damages For Loss Of Value Cannot Be Reconciled With Its Other Findings

90. As set forth above, the Tribunal found that, but for Guatemala's breach, EEGSA's tariffs for the 2008-2013 tariff period—that is, for each year between 2008 and 2013—would have been set on the basis of the VAD study prepared by EEGSA's consultant, *i.e.*, EEGSA would have received higher revenues throughout the 2008-2013 tariff period.[294] On this basis, the Tribunal awarded TECO damages in the full amount claimed for its historical losses sustained from 1 August 2008 until 21 October 2010, during which time TECO held its investment in EEGSA, because EEGSA had lost the additional revenues that it would have generated had its 2008-2013 tariffs been set based upon Bates White's 28 July 2008 VAD study, as required under the legal and regulatory framework.[295] Indeed, Guatemala itself had argued in the arbitration that, if EEGSA's 2008-2013 tariffs had been set based upon Bates White's 28 July 2008 VAD study, as the Tribunal found should have been the case, this would have "raise[d] the

[292] *Id.* ¶ 754.

[293] *Id.* ¶ 760.

[294] *See supra* ¶¶ 60-66; Award ¶ 728 (stating in a general section relating to TECO's damages, *i.e.*, before addressing specifically the damages before and after the sale of EEGSA to EPM, that "the Arbitral Tribunal will work on the basis of the July 28, 2008 version of the study," *i.e.*, the revised study in which EEGSA's consultant implemented the rulings of the Expert Commission, and that "this approach will allow calculation of damages with a sufficient degree of certainty based on what the tariffs should have been had the CNEE complied with the regulatory framework"); *id.* ¶ 733 (observing with respect to the 2008-2013 tariff period, that the "difference between the Parties on the FRC is that the July 28 Bates White's study [*i.e.*, the study prepared by EEGSA's consultant] is based, as proposed by the Expert Commission, on an FRC which incorporates a lower rate of amortization (i.e. 1,09), *thus leading to a higher VAD*) (emphasis added); *id.* ¶ 742 (stating that the assessment of damages "is properly made on the basis of the Bates White's July 28, 2008 study" because the "Arbitral Tribunal has accepted the Claimant's views on the three issues that are in dispute in respect of that study (i.e. the VNR, the FRC and the CAPEX)").

[295] *See supra* ¶ 66; Award ¶ 742 (holding that TECO suffered losses amounting to "Claimant's share of the higher revenues that EEGSA would have received had the CNEE observed due process in the tariff review," that "such losses must be quantified in the 'but for' scenario discussed by the Parties, on the basis of what the tariffs should have been had the CNEE complied with the regulatory framework," and that "such assessment is properly made on the basis of the Bates White's July 28, 2008 study").

profitability of the company" for the 2008-2013 tariff period, and the "annual average return of US$98 million for the prior five-year period would increase to almost double."[296] The Tribunal's reasoning and holding leave no doubt that, if TECO had not sold its interest in EEGSA in October 2010, it would have been entitled to its share of the difference between what EEGSA would have earned had Bates White's 28 July 2008 VAD study been used to set its tariffs and its actual tariffs for the entire five-year tariff period. Importantly, this would have resulted in a damages award to TECO in the range of at least US$ 48 million,[297] plus interest, as compared with the approximately US$ 21 million, plus interest, which was awarded to TECO for historical damages for the two-year period before it sold its interest in EEGSA.

91. Furthermore, the Tribunal correctly found that EEGSA's 2008-2013 tariffs, which had been set based upon the CNEE's own artificially low VAD, "were taken into account in fixing the price of the transaction" between TECO and EPM.[298] This was a logical and, indeed, indisputable proposition, as the parties agreed, and the Tribunal did not question, that the VAD constitutes a Guatemalan electricity distribution company's sole source of profit and, hence, that the value of a Guatemalan distribution company would be determined on the basis of its VAD.[299] Nor did the Tribunal question the parties' agreement that EPM paid fair market value for EEGSA, *i.e.*, that EPM neither underpaid nor overpaid for TECO's shares in EEGSA.[300] There also was no dispute between the parties that, by approving its own VAD study as the basis for

[296] Guatemala's Post-Hearing Brief ¶ 350; *see also id.* ¶ 348 (presenting a table of EEGSA's purported increased profitability levels over time through 2013); TECO's Post-Hearing Reply ¶ 145 (explaining that there was nothing unreasonable about the higher profitability levels that EEGSA would have achieved with the Bates White VAD); Kaczmarek II ¶ 146 (concluding that "Claimant would not even earn an economic return (i.e., a rate of return higher than the cost of capital) on its investment in EEGSA even if the tribunal were to award it the damages that Claimant is seeking. . . . [T]his IRR test demonstrates that the damages we have calculated are reasonable since Claimant would still fall short of recovering its investment and a reasonable rate of return.") (CER-5).

[297] *See* Guatemala's Post-Hearing Brief ¶ 356 (stating that "[i]f Mr. Kaczmarek's DCF model is limited only to the 2008-2013 period," the resulting damages would amount to "US$ 47.9 million"); *see also* Kaczmarek II, Appendix 3.A (adding the five figures in Row 9 representing EEGSA's Bates White/"but-for" cash flows until 31 July 2013, subtracting the sum of the Sigla/actual cash flows in Rows 10 and 12 for the same time period, and applying to the result TECO's 24.26% interest in EEGSA, results in US$ 52.4 million damages to TECO for the full five year-period between 2008-2013) (CER-5).

[298] Award ¶ 752.

[299] *See supra* ¶ 35.

[300] *See* Award ¶¶ 347, 422, 719.

setting EEGSA's 2008-2013 tariffs, the CNEE reduced EEGSA's VAD by more than 45 percent and its revenue by approximately 40 percent, and that EEGSA subsequently was downgraded by the two major rating agencies.[301]

92. In such circumstances, it is contradictory to conclude, on the one hand, that the higher revenues and profits that EEGSA would have earned but for Guatemala's breach of the Treaty had significant value and gave rise to damages in excess of US$ 21 million while TECO held its investment in EEGSA, but that, on the other hand, "[t]here is . . . no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected [those same] higher revenues of the company until 2013,"[302] in other words, that the value of EEGSA's shares to a third-party buyer would not have been impaired by the Sigla VAD and tariffs arbitrarily imposed upon EEGSA by the CNEE. This contradiction in the Tribunal's reasoning demonstrates that the Tribunal's findings cannot be reconciled and thus amounts to a failure to state the reasons on which the Tribunal's decision not to award any damages suffered as a result of the impaired value at which TECO sold its investment in EEGSA was based.[303]

93. As set forth above, "insufficient or inadequate reasons as well as contradictory reasons can spur an annulment,"[304] because they "cannot, in themselves, be a reasonable basis for the solutions arrived at."[305] As the *ad hoc* committee in *Caratube v. Kazakhstan* explained, "*ad hoc* committees have held that contradictory . . . reasons are to be equated with a failure to state reasons and can result in annulment," because "[c]ontradictory reasons cancel each other and will not enable the reader to understand the tribunal's motives."[306]

94. In the present case, the Tribunal's conclusion that Guatemala breached its Treaty obligations when it imposed the Sigla tariffs on EEGSA for the *entire* 2008-2013 tariff period,

[301] *See* TECO's Post-Hearing Brief ¶ 79.

[302] Award ¶ 754.

[303] ICSID Convention, Article 52(1)(e); *see also, e.g.*, *Caratube v. Kazakhstan*, Decision on Annulment, ¶ 102 ("Contradictory reasons cancel each other and will not enable the reader to understand the tribunal's motives.") (CL-N-127).

[304] *Soufraki v. UAE*, Decision on Annulment, ¶ 122 (emphasis in original) (CL-N-132).

[305] *Id.* ¶ 123 (emphasis in original).

[306] *Caratube v. Kazakhstan*, Decision on Annulment, ¶ 102 (CL-N-127).

giving rise to damages from 1 August 2008 until 21 October 2010, while TECO held its investment in EEGSA, cannot be reconciled with its finding that there was "no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013."[307] The Tribunal's conclusion that there was no sufficient evidence that TECO sold its investment at an impaired value is logically inconsistent with its finding that the 2008-2013 tariffs arbitrarily imposed by the CNEE resulted in significantly lower revenues and profits for EEGSA, and that those tariffs "were taken into account in fixing the price of the transaction" between TECO and EPM.[308] Such contradictory reasons are not a "reasonable basis for the solutions arrived at," and amount to a failure to state reasons.[309]

2. The Tribunal Failed To State Any Reasons For Disregarding The Extensive Documentary and Expert Evidence Of Loss Of Value

95. As set forth above, in dismissing TECO's claim for damages arising upon the sale of its shares, the Tribunal ruled that the interview of EPM's CEO, Mr. Restrepo, "only mentions as a '*possibility*,'" rather than a certainty, "that with a higher VAD for the rest of the tariff period, the transaction price would have been higher,"[310] and that, because "there [was] no evidence in the record of how the transaction price has been determined," the Tribunal was unaware of "what other factors might have come into play," and thus could not "conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent."[311] The Tribunal further stated that there was "no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever."[312] In addition, the Tribunal remarked that, according to Mr. Restrepo's interview, the scenario in which the tariffs "were likely to remain the same" was "only one of those [scenarios] which were considered by the

[307] Award ¶ 754.

[308] *Id.* ¶ 752.

[309] *Soufraki v. UAE*, Decision on Annulment, ¶ 123 (CL-N-132).

[310] Award ¶ 754 (emphasis added).

[311] *Id.* ¶ 754.

[312] *Id.* ¶ 755.

purchaser,"[313] and thus concluded that "'it is actually impossible to know what will happen with the tariffs in the future.'"[314] With respect to the 2013-2018 tariff period, the Tribunal found, moreover, that there was "nothing preventing the distributor from seeking an increase of the tariffs," and that "no information has been provided to the Arbitral Tribunal regarding the establishment of the 2013-2018 tariffs."[315] With respect to the tariff period beginning in 2018, the Tribunal similarly remarked that there was no indication that the distributor "will be prevented from seeking a change in the tariffs in 2018."[316] The Tribunal also noted that the "regulatory framework may change, with consequences on future tariff review processes as well as on the future level of the VAD."[317] The Tribunal thus concluded that, "[a]s a consequence" of these findings, the Tribunal "cannot accept that the sale price to EPM was based on the assumption that tariffs would remain forever unchanged post-2013,"[318] and that, "[a]s a consequence of the foregoing, the Arbitral Tribunal will reject the claim for loss of value."[319]

96. In so ruling, the Tribunal, however, failed to address or even acknowledge the extensive expert and documentary evidence adduced by the parties regarding the loss of value of TECO's interest in EEGSA. It also failed to explain why the portions of the interview, upon which it relied, should prevail over that evidence, or indeed over other parts of that same interview, which is fully consistent with the conclusion that, had EEGSA's VAD and tariffs been set at a higher rate in the 2008-2013 tariff review, EPM would have paid a higher purchase price for EEGSA.

97. As set forth above, the *ad hoc* committee in *Rumeli v. Kazakhstan* explained that the purpose of the reasons requirement is "to enable the reader (and specifically the parties) to see the reasons upon which the award itself is based."[320] In the present case, the Tribunal failed

[313] *Id.* ¶ 756.

[314] *Id.* ¶ 757.

[315] *Id.* ¶ 758.

[316] *Id.* ¶ 758.

[317] *Id.* ¶ 759.

[318] *Id.* ¶ 760.

[319] *Id.* ¶ 761.

[320] *Rumeli v. Kazakhstan*, Decision on Annulment, ¶ 104 (CL-40).

to articulate any reasons why the extensive documentary and expert evidence adduced by the parties regarding the loss of value of TECO's interest in EEGSA allegedly amounted to "no evidence"[321] or "no information"[322] as to loss of value arising from the sale of EEGSA, or why the part of the interview of the EPM representative, Mr. Restrepo, relied upon by the Tribunal should prevail over that evidence, or over other parts of that same interview, which is fully consistent with the conclusion that, had EEGSA's VAD and tariffs been set at a higher rate in the 2008-2013 tariff review, EPM would have paid a higher purchase price for EEGSA. In such circumstances, one cannot "follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion"[323] with respect to its decision not to award TECO any damages for its loss upon the sale of its shares in EEGSA.

98. Specifically, while the Tribunal concluded that there is "no evidence in the record of how the transaction price has been determined,"[324] the record contained contemporaneous documentary evidence reflecting *precisely* that information, which the Tribunal failed to address, without any explanation.[325] As set forth above, the record contained—and Claimant relied upon in support of its damages claim—EPM's non-binding offer letter to Iberdrola, signed by Mr. Restrepo, in which EPM offered to purchase DECA II for US$ 597 million, explaining the "methodologies used" by EPM and its advisor to calculate EPM's proposed transaction price.[326] EPM's letter does not contain anything to suggest that EPM had expected that the VAD or tariffs that the CNEE had imposed upon EEGSA for the 2008-2013 tariff period would change after the sale. To the contrary, according to EPM's letter, the methodologies EPM used to calculate its proposed transaction price included a "[d]iscounted free cash flow" analysis of EEGSA, "appl[ying] different adjustments and assumptions," but "*not includ[ing] an increase in tariffs*

[321] Award ¶ 754.

[322] *Id.* ¶ 758.

[323] *MINE v. Guinea*, Decision on Annulment, ¶ 5.09 (CL-N-137).

[324] Award ¶ 754.

[325] *See supra* ¶¶ 46, 68-72.

[326] *See* Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 (C-557); *see also* TECO's Post-Hearing Brief ¶ 173 (citing same).

for the years 2013 and 2014."[327] Thus, the Tribunal had before it an explicit contemporaneous confirmation by the purchaser itself, EPM, that, in calculating its proposed transaction price, EPM had no expectation of any changes in the tariffs or in the VAD following the sale.

99. Moreover, the record contained—and Claimant relied upon in support of its damages claim—the 14 October 2010 Citibank Fairness Opinion, whereby Citibank analyzed the fairness to TECO of EPM's price offer of US$ 605 million,[328] which is the price at which the shares in DECA II ultimately were sold to EPM.[329] In the Fairness Opinion, Citibank concluded that "DECA II's operating and financial performance was heavily impacted by the tariff revision process of 2008, which has resulted in lower revenues and margin contraction."[330] As the Citibank Fairness Opinion also explains, like EPM, Citibank analyzed EEGSA's value by conducting a DCF analysis of EEGSA, projecting EEGSA's future financial performance from 2010 until 2018, whereupon it assigned a terminal value to EEGSA.[331] Crucially, the Citibank

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[327] Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 (emphasis added) (C-557).

[328] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. (C-531); *see also* Kaczmarek II ¶ 130 (relying on the Citibank Fairness Opinion) (CER-5); TECO's Post-Hearing Brief ¶ 169 (explaining that, like Mr. Kaczmarek, "Citibank . . . forecasted EEGSA's future cash flows for ten years in its DCF analysis"); *id.* ¶ 171 (explaining that "Citibank, like Mr. Kaczmarek, assumed that the VNR would change over time to account for inflation, material price increases, and network expansion, but also assumed that the VAD would continue to be calculated off of a depreciated VNR, and that the VNR itself would not change dramatically"); *id.* ¶ 173 (explaining that in conducting a DCF analysis of EEGSA, Citibank made assumptions regarding EEGSA's future cash flows, and, like Mr. Kaczmarek, Citibank did not project EEGSA's tariffs into perpetuity, but projected them only through 2018, whereupon it set a terminal value for EEGSA); Tr. (22 Jan. 2013) 589:2-17 (Cross of Claimant's witness, Ms. Callahan) ("Q: . . . But, ultimately, if you look, for example, at the discounted cash flow [presented in the Citibank Fairness Opinion], the 181.5 million you had received from the transaction was pretty much in the middle of the range that Citibank came up with. Is that fair? A. That was the conclusion from their fairness opinion, that the current market value for our share in DECA II supported the purchase price that EPM had offered. . . . [T]hat did take into account EPM's expectation of *what they would realize in the future, understanding that there were lower VAD rates in effect* . . . less than it would have been otherwise had not the VAD decision that occurred in 2008 taken place. *They were buying damaged goods*.") (emphasis added).

[329] Award ¶ 237.

[330] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 12/PDF p. 24 (C-531).

[331] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 5/PDF p. 15 (explaining that, to conduct its DCF analysis of EEGSA, Citibank projected EEGSA's VAD through 2018, and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate) (C-531); *id.*, at 21/PDF p. 36 (providing a discounted cash flow analysis of EEGSA); *see also* TECO's Post-Hearing Brief ¶¶ 169-171,

Fairness Opinion explains that these "projections assume that *the CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013*."[332] As the Fairness Opinion reflects, Citibank concluded that the "TECO Consideration to be received in the Transaction is fair, from a financial point of view, to TECO."[333]

100. The foregoing contemporaneous evidence demonstrates how the purchase price by EPM was calculated, and reveals not only the assumptions upon which the purchaser based its offered transaction price, but also the assumptions used by an internationally experienced and independent bank to arrive at a fair purchase price for EEGSA. Moreover, because the transaction price offered by EPM and the transaction price that Citibank verified as fair were virtually identical, it is logical to infer that EPM based its model of EEGSA's future cash flows on similar assumptions as Citibank. The Tribunal, however, failed to articulate any reasons for ignoring the foregoing documentary evidence and concluding that there was "no evidence in the record of how the transaction price has been determined"[334] and "no evidence that . . . the valuation of the company reflected the assumption that the tariffs would remain unchanged."[335]

101. Moreover, as elaborated above, the damages suffered by TECO upon the sale of its interest in EEGSA were exhaustively analyzed by TECO's quantum expert, Mr. Kaczmarek, and by Guatemala's quantum expert, Dr. Abdala.[336] The experts agreed that TECO's damages for the loss of value in TECO's interest in EEGSA should be calculated as the difference between the actual value of EEGSA, reflecting Guatemala's unlawful conduct, and the "but-for"

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173 (discussing same). Similar to EPM, Citibank also relied upon the publicly traded company method and the comparable transaction method to value EEGSA. *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 5/PDF p. 15 (explaining that Citibank's financial analysis utilized the "Discounted Free Cash Flow Analysis," the "Selected Precedent Transactions Analysis," and the "Selected Companies Analysis") (C-531); *see also* Kaczmarek II ¶¶ 9, 110-111, 128-129 (discussing same) (CER-5).

[332] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 13/PDF p. 26 (emphasis added) (C-531); *see also* TECO's Post-Hearing Brief ¶ 171 n.652 (quoting same).

[333] Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at 3/PDF p. 3 (C-531)

[334] Award ¶ 754.

[335] *Id.* ¶ 755.

[336] *See supra* ¶¶ 36-52.

value of EEGSA, assuming that Guatemala had not violated its Treaty obligations.[337] Because the purchase price for DECA II covered a portfolio of companies and did not assign a value to each particular company, including EEGSA, Mr. Kaczmarek calculated EEGSA's actual value as of the sale applying three accepted valuation approaches, *i.e.*, the DCF method, the comparable publicly traded company method, and the comparable transaction method, and weighted the results of the three methods.[338] In applying the DCF method, similar to EPM and Citibank, Mr. Kaczmarek projected EEGSA's cash flows until 2018 based on the assumption that the CNEE would continue to calculate EEGSA's VAD off of a VNR that was depreciated by 50 percent, made adjustments to the projected financial performance after 2013 for various factors (such as the inflation of costs and materials, the growth of the network, and the network's technical losses), and assigned a terminal value to EEGSA as of 2018.[339] Mr. Kaczmarek compared the result of his analysis against the implied value of EEGSA in the sale of DECA II and found that the two values were within a close range.[340] This indicates that the assumptions upon which EPM and Citibank based their assessment of EEGSA's value were similar to Mr. Kaczmarek's assumptions.[341]

102. As also set forth above, Guatemala's quantum expert, Dr. Abdala, relied solely on the sale of DECA II to value EEGSA in the actual scenario, and concluded that EEGSA's actual value corresponded to a range of values out of the purchase price paid by EPM.[342] The value calculated by Mr. Kaczmarek was within that range.[343] The parties therefore agreed that their "conclusions as to EEGSA's actual value are not significantly different and, thus, have no material impact on the calculation of damages,"[344] and that they "are essentially in agreement

[337] *See supra* ¶ 36.

[338] *See supra* ¶ 42.

[339] *See supra* ¶¶ 43-46.

[340] *See supra* ¶ 46.

[341] *See* TECO's Post-Hearing Brief ¶¶ 167-173.

[342] *See supra* ¶ 47.

[343] *See supra* ¶ 48.

[344] TECO's Post-Hearing Brief ¶ 165; *see also* TECO's Post-Hearing Reply ¶ 153 ("[a]t bottom, the only disagreement that Respondent's expert has with Claimant's damages analysis concerns the calculation of EEGSA's capital expenditures *in the but-for scenario*") (emphasis added).

regarding EEGSA's value in the actual scenario."[345] The Tribunal did not question the parties' agreed position in this regard.[346] The fact that the result of Dr. Abdala's calculation of EEGSA's actual value (which attributed a portion of the purchase price for DECA II to EEGSA) was in agreement with the result of Mr. Kaczmarek's calculation (which included a DCF analysis projecting EEGSA's future cash flows until 2018 based on the assumption that the CNEE would continue to calculate EEGSA's VAD off of a VNR that was depreciated by 50 percent) is a further indication that the transaction price was based on similar assumptions regarding the future VAD and tariffs as those made by Mr. Kaczmarek.[347]

103. As with the EPM non-binding offer and the Citibank Fairness Opinion, however, the Tribunal failed to articulate any reasons why it ignored the foregoing expert evidence and concluded that there was "no evidence in the record of how the transaction price has been determined,"[348] and "no evidence that . . . the valuation of the company reflected the assumption that the tariffs would remain unchanged."[349]

104. Moreover, although the Tribunal concluded that there was "no evidence that, *as submitted by the Claimant*, the valuation of the company reflected the assumption that the *tariffs* would remain unchanged beyond 2013 and forever,"[350] TECO did not argue that the price paid by EPM was based on an assumption that tariffs would remain forever unchanged post-2013. Rather, as elaborated above, Mr. Kaczmarek projected EEGSA's cash flows until 2018,

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[345] Guatemala's Post-Hearing Brief ¶ 334; *see also* Guatemala's Post-Hearing Reply ¶ 161 (stating that the "truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM").

[346] *See* Award ¶ 750 (stating that, as regards the actual scenario, the parties are only in a "slight disagreement" regarding the portion of the sales price paid by EPM for the bundle of assets including EEGSA "that is attributed to EEGSA").

[347] *See* TECO's Post-Hearing Brief ¶¶ 167-173. Ultimately, the difference in the results of the parties' calculations of Claimant's damages for Claimant's loss upon the sale of its shares arose not in connection with EEGSA's actual value in the sale to EPM, but because Guatemala based its analysis of what EEGSA's cash flows would have been "but-for" Guatemala's breach upon the VAD study prepared for purposes of the arbitration by Guatemala's industry expert, Mr. Damonte (which the Tribunal held was not a proper basis for the analysis), rather than Bates White's 28 July 2008 VAD study. *See supra* ¶¶ 51-52.

[348] Award ¶ 754.

[349] *Id.* ¶ 755.

[350] *Id.* ¶ 755 (emphasis added).

whereupon he assigned a terminal value to EEGSA.[351] In so doing, Mr. Kaczmarek did not assume that the *tariffs* would remain unchanged, but rather that the CNEE would continue to calculate the *VAD* based on a VNR depreciated by 50 percent.[352] Mr. Kaczmarek thus adjusted EEGSA's projected financial performance after 2013 for various factors, such as the inflation of costs and materials, the growth of the network, and the network's technical losses.[353] All of this was explained in Mr. Kaczmarek's expert report, as well as in TECO's submissions, including in its Post-Hearing Brief.[354] The Tribunal, however, failed to articulate any reasons for concluding that it was TECO's position that the price paid by EPM reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever.

105. Similarly, while the Tribunal noted that "no information has been provided to the Arbitral Tribunal regarding the establishment of the 2013-2018 tariffs,"[355] the record, in fact, contained the 2013-2018 Terms of Reference—on which TECO relied–whereby the CNEE established the procedures for setting the VAD and the tariffs for the 2013-2018 tariff period.[356] The 2013-2018 Terms of Reference set forth the very same FRC calculation as the one that the CNEE had imposed on EEGSA during its 2008-2013 tariff review, which had resulted in an unjustifiable 50 percent depreciation of EEGSA's regulatory asset base.[357] As explained above, Mr. Kaczmarek's assumption that the CNEE would continue to apply the foregoing FRC formula through 2018 therefore was consistent with the 2013-2018 Terms of Reference.[358] The Tribunal, however, failed to articulate any reasons for ignoring the 2013-2018 Terms of Reference, and for concluding that there was "no information" regarding the establishment of the 2013-2018 tariffs,

[351] *See supra* ¶ 43.

[352] *See id*.

[353] *See id*.

[354] *See* Kaczmarek I ¶¶ 161-181, 197 (CER-2); Memorial ¶¶ 288-292; TECO's Post-Hearing Brief ¶¶ 169-171; TECO's Post-Hearing Reply ¶ 126.

[355] Award ¶ 758.

[356] *See supra* ¶ 43; *see also* CNEE Resolution 161-2012 dated 23 July 2012, at 27 (containing the Terms of Reference for EEGSA's 2013 tariff review) (R-205); TECO's Post-Hearing Brief ¶ 170 (discussing same).

[357] *See supra* ¶¶ 20, 43; *see also* CNEE Resolution 161-2012 dated 23 July 2012, at 27 (containing the Terms of Reference for EEGSA's 2013 tariff review) (R-205); TECO's Post-Hearing Brief ¶ 170 (discussing same).

[358] *See supra* ¶ 43.

notwithstanding the fact that TECO made express reference in its submission to the fact that the 2013-2018 Terms of Reference contained the same FRC formula as that which was imposed on EEGSA in the 2008-2013 tariff review.[359]

106. The Tribunal also did not provide any explanation as to why the interview of the EPM representative, Mr. Restrepo, should prevail over the foregoing comprehensive documentary and expert evidence.[360] Moreover, other portions of Mr. Restrepo's interview, which the Tribunal disregarded without any explanation, confirm that EPM would have paid a higher purchase price for TECO's shares in EEGSA, if EEGSA's VAD and tariffs had been higher. As the interview reflects, Mr. Restrepo was asked about EPM's decision to purchase EEGSA, despite the fact that its shareholders had argued that "there would be lower revenue and profitability due to the VAD."[361] Mr. Restrepo explained that EPM decided to purchase EEGSA notwithstanding this issue, because "*[t]his is reflected in the value of the transaction.*"[362] In other words, the fact that there would be lower revenue and profitability due to the Sigla VAD having been imposed on EEGSA was unsurprisingly reflected in EPM's purchase price. As Mr. Restrepo further explained, EPM "bought on the basis that the current tariff model and layout [i.e., the Sigla VAD] is the one that exists," which "*[c]learly [] has an impact on the final valuation and we had no expectation that it would be modified or changed*."[363]

107. As Mr. Restrepo's interview thus establishes, if EEGSA's VAD and tariffs had been higher—which, as the Tribunal found, would have been the case but for Guatemala's breach—EPM would have paid a higher purchase price for EEGSA. This, in fact, is the only

[359] *See* TECO's Post-Hearing Brief ¶ 170. The Terms of Reference for EEGSA's 2013-2018 tariff review were issued on 23 July 2012, after TECO's Reply submission, which was dated 24 May 2012. *See* CNEE Resolution 161-2012 dated 23 July 2012, at 20 (containing the Terms of Reference for EEGSA's 2013 tariff review) (R-205). TECO thus did not have an opportunity to address the 2013-2018 Terms of Reference until after its Reply.

[360] *See* Award ¶¶ 755-760.

[361] *Id.* ¶ 753 (citing and providing the Tribunal's own translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (R-133)).

[362] *Id.* ¶ 753 (emphasis added) (citing and providing the Tribunal's own translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (R-133)).

[363] *Id.* ¶ 753 (emphasis added) (citing and providing the Tribunal's own translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (R-133)).

logical conclusion to draw from the largely undisputed facts. In concluding that there was "no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013,"[364] the Tribunal, however, ignored the foregoing portions of the interview, and focused instead upon Mr. Restrepo's remark that "only mentions as a 'possibility' that with a higher VAD for the rest of the tariff period, the transaction price would have been higher,"[365] without providing any reasons why this portion of the interview should prevail over the other portions of the interview discussed above.

108. Finally, with respect to Guatemala's argument that it is impossible to know what will happen with the tariffs in the future, which was accepted by the Tribunal, this argument was raised for the first time in Guatemala's Post-Hearing Brief. Although TECO fully rebutted that argument in its Post-Hearing Reply, by explaining that its claim for damages for loss of value does not depend upon "knowing" what will happen to the tariffs in the future, and only depends upon a showing that, as of October 2010, a purchaser of EEGSA would project lower future revenues, and therefore, pay less for the company as a result of the CNEE's imposition of the 2008 VAD (and the manner in which the CNEE established that VAD by using an FRC formula that calculates the VAD off of a VNR that is depreciated by half),[366] the section of the Award dealing with this issue does not address TECO's rebuttal, without stating any reasons as to why the Tribunal disregarded TECO's explanation.[367]

109. In short, the Tribunal's dismissal of TECO's claim for loss of value arising from the sale of EEGSA fails to state the reasons upon which it is based.

[364] *Id.* ¶ 754.

[365] *Id.* ¶ 754 (quoting and providing the Tribunal's own translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (R-133)).

[366] *See* TECO's Post-Hearing Reply ¶¶ 126-127.

[367] *See* Award ¶ 757 (quoting Guatemala's Post-Hearing Brief ¶ 354 but not addressing TECO's response).

3. The Tribunal Unjustifiably Penalized TECO For The Purported Evidentiary Difficulties Caused By Guatemala's Treaty Breach And Imposed An Impossible Evidentiary Burden Upon TECO, Seriously Departing From Fundamental Rules Of Procedure

110. As elaborated above, the "treatment of evidence and burden of proof" is among the fundamental rules of procedure,[368] which include, among other things, the principle of equal treatment of the parties,[369] and the well-known principle that no one can be allowed to take advantage of his own wrong.[370] As the tribunal in *Gemplus v. Mexico* observed, "as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), *the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation* – as was indicated in the *Sapphire* award regarding the "'behaviour of the author of the damage.'"[371] In *Sapphire*, the tribunal ruled that "[i]t is not necessary to prove the exact damage suffered in order to award damages. On the contrary, *when such a proof is impossible, particularly as a result of the behaviour of the author of the damage*, it is enough for the judge to be able to admit with *sufficient probability* the existence and extent of the damage."[372] Citing *Sapphire*, the tribunal in *Gemplus* concluded that, "confronted by evidential difficulties created by the respondent's own wrongs, the tribunal

[368] *Impregilo v. Argentina*, Decision on Annulment, ¶ 165 (CL-N-133).

[369] *See, e.g.*, *MINE v. Guinea*, Decision on Annulment, ¶ 5.06 (including equality of parties among examples of fundamental rules of procedure) (CL-N-137); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 of 24 May 2006 ("*Biwater v. Tanzania*, Procedural Order No. 2"), ¶ 13 (stating that "[i]t is indeed one of the most fundamental principles of international arbitration that the parties should be treated with equality") (CL-N-125).

[370] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 149 (Cambridge University Press 2006) (1958) (CL-48).

[371] *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award of 16 June 2010 ("*Gemplus v. Mexico*, Award"), ¶ 13-92 (quoting *Sapphire Int'l Petroleum, Ltd. v. National Iranian Oil Co.*, Arbitral Judgment of 15 Mar. 1963, 35 I.L.R. 136, 187-188 (1963)) (emphasis added) (CL-22).

[372] *Sapphire Int'l Petroleum, Ltd. v. National Iranian Oil Co.*, Arbitral Judgment of 15 Mar. 1963, 35 I.L.R. 136 ("*Sapphire v. NIOC*, Award"), 187-188 (1963) (emphasis added) (CL-N-141).

considers that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise."[373]

111. Similarly, the tribunal in *Impregilo v. Argentina* held that, while it was incumbent upon the claimant "in principle . . . to prove that it suffered the damage for which it asks to be compensated," because "it cannot be established with certainty in what situation AGBA – and thus Impregilo – would have been, had the Argentine Republic's breach of the fair and equitable treatment standard not occurred," and "it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo."[374] The tribunal thus ruled that, "[i]nstead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation."[375] Likewise, the tribunal in *Kardassopoulos v. Georgia* observed that the "principle articulated by the vast majority of arbitral tribunals . . . does not impose on the Parties any burden of proof beyond a balance of probabilities," and quoted with approval the decision in *Sapphire*.[376] The *ad hoc* committee in *Rumeli v. Kazakhstan* likewise endorsed the approach in *Sapphire*, holding that "[t]he fact that the [valuation] exercise is inherently uncertain is not a reason for the tribunal to decline to award damages."[377]

112. Moreover, where, as here, the tribunal imposes upon a party an evidentiary burden so onerous that it cannot possibly be discharged, the tribunal violates the principle of equal treatment of the parties. As the tribunal in *Achmea v. Slovak Republic* explained:

> It is for Claimant to prove its case regarding the 'damage caused'. That said, *the requirement of proof must not be impossible to discharge*. Nor must the requirement for reasonable precision in the assessment of the quantum be carried

[373] *Gemplus v. Mexico*, Award, ¶¶ 13-92 (citing *Sapphire v. NIOC*, Award, at 187-188) (CL-22).

[374] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011 ("*Impregilo v. Argentina*, Award"), ¶ 371 (CL-N-134).

[375] *Id.* ¶ 371.

[376] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award of 3 Mar. 2010 ("*Kardassopoulos v. Georgia*, Award"), ¶ 229 (quoting *Sapphire v. NIOC*, Award, at 187-188) (CL-121).

[377] *Rumeli v. Kazakhstan*, Decision on Annulment, ¶ 144 (citing *Sapphire v. NIOC*, Award, at 187-188) (CL-40).

> so far that the search for exactness in the quantification of losses becomes *disproportionately onerous* when compared with the margin of error.[378]

113. In the present case, the Tribunal's Award suggests that the only evidence that would have satisfied the Tribunal would have been evidence from the third-party purchaser itself regarding the manner in which it had calculated its purchase price.[379] Such evidence, however, typically is confidential, proprietary business information of the third-party purchaser, and thus outside of the control of the seller. In addition, to the extent that the Tribunal was seeking evidence from EPM as regards EEGSA's value in the hypothetical scenario absent Guatemala's breach, such evidence would not exist, as a third-party purchaser typically has no reason to conduct an analysis of what the purchase price would be in a hypothetical scenario, in which the host State's wrongful conduct is assumed away and the company's future cash flows are higher. In so doing, the Tribunal imposed an impossible evidentiary burden upon TECO, violating TECO's right to be heard and the principle of equal treatment of the parties.

114. In addition, although the Tribunal found that TECO's "decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework,"[380] the Tribunal rejected TECO's claim for damages arising from that divestiture, finding that it could not "conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent,"[381] even though it earlier had concluded

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[378] *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award of 7 Dec. 2012 ("*Achmea v. Slovak Republic*¸Final Award"), ¶ 323 (emphasis added) (CL-N-123); *see also* MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 73 (Kluwer Law International 2008) ("[T]he amount of lost profits does not need to be established concretely or with certainty. That would place an *almost insurmountable burden on the claimant and benefit the party who caused the damage* and prevented the claimant from being able to prove concretely its loss. In order to be entitled to lost profits, the claimant must show with reasonable certainty that profits would have been made absent the respondent's actions. Once a claimant is able to show with reasonable certainty the fact of loss of profits, the claimant then needs only to provide a basis upon which a tribunal can reasonably estimate the extent of the claimant's loss of profits. This approach strikes a balance between the need for evidence upon which a tribunal may base an award of lost profits and the recognition that the difficulty in proving damages stems from the respondent's action.") (quoting John Y. Gotanda, *Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes, presented at* BIICL 8th Annual Investment Treaty Forum, 11 May 2007) (emphasis added) (CL-N-150).

[379] *See* Award ¶¶ 753-756.

[380] *Id.* ¶ 748.

[381] *Id.* ¶ 754.

that "the existing tariffs were taken into account in fixing the price of the transaction" between TECO and EPM,[382] and that those existing tariffs gave rise to damages due to the higher revenues that EEGSA would have received absent Guatemala's breach from 1 August 2008 until 21 October 2010, while TECO held its investment in EEGSA.[383]

115. In short, the Tribunal had no evidentiary difficulties holding that EEGSA's lost revenues from the beginning of the 2008-2013 tariff period until the sale of EEGSA supported an award to TECO of damages in the full amount claimed, and it also accepted that the sale of EEGSA was a consequence of Guatemala's breach; at the same time, however, the Tribunal held that there was not sufficient evidence that EEGSA's lost revenues during the remainder of the 2008-2013 tariff period reduced EEGSA's fair market value in the sale, even though the parties agreed that EPM had neither underpaid nor overpaid for EEGSA. In so doing, the Tribunal penalized TECO for selling its interest in EEGSA during the tariff period, although it acknowledged that the sale was a direct consequence of Guatemala's Treaty breach. The Tribunal thus rewarded Guatemala for the evidentiary difficulties caused by Guatemala's breach, departing from fundamental rules of procedure, namely, the principle of equality of the parties and the principle that no one can be allowed to take advantage of his own wrong, as reflected in the cases discussed above. The departure is serious, because it resulted in the denial of TECO's claim for damages for the loss of value arising from the sale of EEGSA.

4. The Tribunal's Treatment Of The Evidence Deprived TECO Of Its Right To Be Heard

116. As the *ad hoc* committee in *Wena Hotels v. Egypt* confirmed, "[i]t is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal," and that "[t]his includes the right to state its claim or its defense and to produce all arguments and evidence in support of it."[384]

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[382] *Id.* ¶ 752.

[383] *See supra* ¶ 66; Award ¶ 742.

[384] *Wena v. Egypt*, Decision on Annulment, ¶ 57 (CL-N-144); *see also MTD v. Chile*, Decision on Annulment, ¶ 49 (CL-N-138); *Azurix v. Argentina*, Decision on Annulment, ¶ 212 (CL-N-124).

117. As set forth above, in the present case, the Tribunal denied TECO's claim for damages arising from the sale of its shares in EEGSA, after concluding that Mr. Restrepo's press interview "only mentions as a '*possibility*' that with a higher VAD for the rest of the tariff period, the transaction price would have been higher."[385] Mr. Restrepo, however, was not a witness in the arbitration, was not a representative of either party in the arbitration, and had not been made available for examination at the Hearing. As the tribunal in *BIVAC v. Paraguay* observed, moreover, "newspaper reports . . . may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced," and, for that reason, they are "of limited, if any, probative value."[386] In these circumstances, TECO had no reason to expect that the Tribunal would place decisive weight upon Mr. Restrepo's reported statement, and doing so without warning constituted a departure from a fundamental rule of procedure and denied Claimant its right to be heard.

118. Moreover, the procedural rules governing the arbitration required that "[f]or factual exhibits . . . the parties will translate into the other procedural language an appropriate excerpt *that is relied upon by the party making the submission.*"[387] Notably, neither party had submitted an English translation of the portion of Mr. Restrepo's interview upon which the Tribunal expressly relied, *i.e.*, where he discusses the "possibility" that the company would have cost more with a different VAD.[388] Neither party thus considered the untranslated portion of the interview relevant to its case. Nor did the Tribunal indicate to the parties the central importance that it intended to place on this section of the interview, which *it itself translated* in its Award.[389]

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[385] Award ¶ 754 (emphasis added).

[386] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction of 9 Oct. 2012 ("*BIVAC v. Paraguay*, Further Decision on Objections to Jurisdiction"), ¶ 234 (CL-N-126).

[387] Minutes of the First Session held on 23 May 2011, Item 10 (emphasis added)).

[388] The record only contained the translation of excerpts of the interview, not including the question and answer referencing the "possibility" that the company would have cost more with a different VAD. *See* Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (emphasis added) (R-133).

[389] *See* Award ¶ 753 n. 606 (indicating that the portions of the interview quoted in the Award were the "Tribunal['s] translation").

119. In particular, at no time during the Hearing did the Tribunal question counsel, the witnesses, or the parties' quantum experts regarding this aspect of the press interview.[390] In fact, the Tribunal at no point during the Hearing indicated that it had any doubts that, if liability were found, Claimant would be entitled to damages for loss suffered as result of the sale of its shares, as both experts agreed. Indeed, although Claimant's counsel expressed concern that, in order to accommodate the Tribunal's schedule and end early on the final day of the Hearing (which already had been rescheduled and truncated due to unfortunate circumstances involving a Tribunal member), it would be compelled to forfeit time that it had reserved specifically to use during the direct examination of its own quantum expert and the cross-examination of Respondent's quantum expert,[391] the Tribunal not only did not indicate that this might have an impact on its ability to fully appreciate Claimant's damages claim, but even requested that Claimant transfer some of its unused time to Respondent, which fully utilized its allotted time during the Hearing.[392] Thereafter, although the Tribunal provided the parties with a list of questions to address in their post-hearing submissions, it did not include any question regarding this aspect of the press interview upon which it ultimately based its decision to deny TECO's claim for damages for loss upon the sale of its shares.[393] This underscores the fact that TECO had no reason to suspect that the Tribunal would rely upon—and, indeed, place determinative weight upon—Mr. Restrepo's purported statement that there was only a "possibility" that EEGSA would have cost more with a higher VAD.

[390] *See* Tr. (22 Jan. 2013) 402:22-403:15 (President of the Tribunal noting that the interview submitted as Exhibit R-133 contains the statement that "there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods" and requesting that the parties address the question "[w]hy was there such an assumption, given that the tariff is reviewed every five years?," but not pointing out or asking any questions about the untranslated portions of the interview); *id.* 403:16-20 (President of the Tribunal asking the parties to address the question "[h]ow was the 2008 tariff, which in the interview [Exhibit R-133] is referred to as being low, how was that taken into account in fixing the sales price to EPM?," but not pointing out or asking any questions about the untranslated portions of the interview).

[391] *See* Tr. (5 Mar. 2013) 1486:3-16 (Claimant).

[392] *See id.* 1486:17-1487:1 (President of the Tribunal and Claimant).

[393] *See* Letter from the Tribunal to the parties dated 11 Mar. 2013 (requesting the parties to address in their post-hearing submissions the "[e]vidence of the value attributed to EEGSA in the sale to EDM [sic – EPM]," but not referencing the interview).

120. In such circumstances, the Tribunal's reliance upon the untranslated, selective and out-of-context quote from the purported statement to the press of a non-witness representing a non-party, who could not be examined, coupled with the Tribunal's failure to inform the parties of the central importance that it intended to attach to this statement while ignoring extensive expert evidence and other portions of the interview, constitutes a serious departure from a fundamental rule of procedure, namely, the right to be heard.[394] The departure is serious, because it resulted in the denial of TECO's claim for damages for the loss of value arising from the sale of EEGSA, which constituted the majority of TECO's claim for damages.

5. The Tribunal Overstepped The Parties' Dispute, Manifestly Exceeding Its Powers And Violating A Fundamental Rule of Procedure

121. As set forth above, the parties' experts agreed that, assuming liability, TECO would have suffered losses upon the sale of its shares in EEGSA.[395] Specifically, as discussed above, the parties agreed that there were no material differences between them as regards EEGSA's value in the actual scenario.[396] The parties' calculation of EEGSA's value in the "but-for" scenario differed considerably; however, *even Respondent's but-for value of EEGSA as of the date of the sale was higher than its actual value*.[397] In particular, Guatemala's position was that, if liability were found, TECO would have suffered US$ 3.1 million to US$ 18.6 million in compensable damages as a result of having sold its shares in EEGSA to EPM.[398] Despite the

[394] ICSID Convention, Article 52(1)(d); *see also, e.g.*, *Pey Casado v. Chile*, Decision on Annulment, ¶¶ 261-70 (annulling the damages section of the award on the grounds that the tribunal violated Chile's right to be heard when it awarded the claimants damages for a violation of fair and equitable treatment notwithstanding that the parties' pleadings focused almost exclusively on damages relating to the claimants' expropriation claim, thereby depriving Chile of the "right to present its arguments on the standard applicable to the calculation of damages for the breach by Chile of the fair and equitable treatment provision of the BIT") (CL-N-143).

[395] *See supra* ¶ 50.

[396] *See supra* ¶ 51.

[397] *See* Abdala II ¶ 78, Table VI (showing the results of Dr. Abdala's revised damages calculation, including but-for future cash flows to TECO of US$ 123.1 million and actual future cash flows to TECO as ranging from US$ 104.5 million to US$ 120 million; deducting the latter from the former, results in loss-of-value damages ranging from US$ 3.1 million to US$ 18.6 million) (RER-4); Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 12 (showing that under Dr. Abdala's damages calculation, the damages to TECO arising from loss of value amount to approximately US$ 3 million to US$ 19 million).

[398] *See* Abdala II ¶ 78, Table VI (showing the results of Dr. Abdala's revised damages calculation, including but-for future cash flows to TECO of US$ 123.1 million and actual future cash flows to TECO as ranging from

parties' agreement that, assuming liability, TECO would have suffered a loss upon the sale of its shares, the Tribunal denied TECO's claim for that loss *in its entirety*.

122. Moreover, as also explained above, the reason why Guatemala's "but-for" valuation of EEGSA was so low— and, therefore, its calculation of TECO's loss upon the sale of its shares in EEGSA was so low—was because its quantum expert, Dr. Abdala, based his valuation of EEGSA in the "but-for" scenario on the modified VAD study prepared for the purposes of the arbitration by Guatemala's expert Mr. Damonte. Dr. Abdala did not calculate EEGSA's "but-for" value using Bates White's 28 July 2008 VAD study, which, the Tribunal properly found, should have been used as the basis of the valuation analysis. The only valuation of the "but-for" scenario before the Tribunal based upon Bates White's 28 July 2008 VAD study was the one presented by TECO's expert, Mr. Kaczmarek, which the Tribunal accepted in full in awarding TECO damages for its historical losses. Mr. Kaczmarek calculated a "but-for" valuation for TECO's share in EEGSA of US$ 337,683,311[399] and corresponding damages to TECO of US$ 222,484,783[400] in loss of share value (*i.e.*, the difference between TECO's share of EEGSA's "but-for" and actual value as of the date of the sale).

123. As discussed above, it is well established that a tribunal deciding issues beyond those raised by the parties engages in a manifest excess of powers, and that this is a ground for annulment,[401] including that "a manifest excess of power would consist in answering some other question not raised by the parties, or in answering only a part of a question in fact raised by the parties."[402] In the present case, with respect to damages for the loss upon the sale of TECO's shares in EEGSA, the parties agreed that, assuming that liability were established, TECO would

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US$ 104.5 million to US$ 120 million; deducting the latter from the former, results in loss-of-value damages ranging from US$ 3.1 million to US$ 18.6 million) (RER-4); Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 12 (showing that under Dr. Abdala's damages calculation, the damages to TECO arising from loss of value amount to approximately US$ 3 million to US$ 19 million); TECO's Post-Hearing Brief ¶¶ 184-185.

[399] Award ¶ 340; Kaczmarek II ¶ 141, Table 14 (CER-5).

[400] Award ¶ 340; Kaczmarek II ¶ 141, Table 14 (CER-5).

[401] *See, e.g.*, *Impregilo v. Argentina*, Decision on Annulment, ¶ 125 (CL-N-133); *Soufraki v. UAE*, Decision on Annulment, ¶ 41 (CL-N-132 *CDC v. Seychelles*, Decision on Annulment, ¶ 40 (CL-N-128).

[402] *Soufraki v. UAE*, Decision on Annulment, ¶ 44 (CL-N-132).

be entitled to damages, and the matter submitted by the parties to the Tribunal for resolution thus was limited to the *amount* of such damages. The Tribunal, however, overstepped the scope of the dispute submitted to it when it denied TECO's claim for loss upon the sale of its shares in EEGSA in its entirety notwithstanding the parties' agreed positions. In so doing, the Tribunal decided upon matters which the parties did not submit to it, manifestly exceeding its powers.

124. Likewise, as also discussed above, it is accepted that "the treatment of evidence and burden of proof" is a fundamental rule of procedure.[403] Among the most basic principles of burden of proof is that a party need not prove an allegation that is accepted by the opposing party. As the *Rompetrol v. Romania* tribunal explained, "whether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it. A trivial example is that, *if a factual allegation is put forward by one side and conceded by the other, it no longer requires to be 'proved'*."[404] By denying TECO's claim for damages arising from the sale of its investment in EEGSA in its entirety when Guatemala conceded that, if liability were found, TECO would have suffered damages upon the sale of its interest in EEGSA, the Tribunal thus also violated a fundamental rule of procedure.

B. The Tribunal's Failure To Award Interest On The Damages Awarded For The Period Until 21 October 2010 And To Apply The Agreed-Upon Pre-Award Interest Rate Went Beyond The Parties' Dispute And Violated TECO's Fundamental Right To Be Heard

125. As discussed above, with respect to the damages awarded, the Tribunal ruled that "interest shall only accrue from October 21, 2010," because "historical losses damages correspond to revenues that would have progressively flowed into EEGSA from August 2008 until October 2010," and, therefore, "calculating interest on the entire amount of the historical damages as from the first day of the tariff period would result in an unjust enrichment of the Claimant."[405] The Tribunal's ruling, however, not only constitutes a manifest excess of powers,

[403] *Impregilo v. Argentina*, Decision on Annulment ¶ 165 (CL-N-133).

[404] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 ("*Rompetrol v. Romania*, Award") ¶ 178 (emphasis added) (CL-109).

[405] Award ¶ 765.

but also denied TECO the opportunity to be heard. As set forth below, there was no dispute between the parties that, in the event that TECO were awarded damages for the cash flows that EEGSA had lost as a result of Guatemala's breach from 1 August 2008 until the sale of TECO's shareholding in EEGSA on 21 October 2010, TECO would be entitled to interest on the amount awarded, accruing in tranches as from August 2009. Nor was there any dispute regarding the interest rate applicable with respect to that time period. The Tribunal thus manifestly exceeded its powers by deciding an issue beyond the parties' dispute. Furthermore, the Tribunal failed to give the parties—and, particularly, TECO–an opportunity to address the issue of whether an award of such interest would amount to unjust enrichment, which issue had not been raised by either Guatemala or the Tribunal during the course of the arbitration, but instead appeared for the very first time in the Tribunal's Award.

126. As set forth in its submissions, TECO requested that it be awarded compound interest on any damages award at a reasonable commercial rate as calculated by TECO's quantum expert, Mr. Kaczmarek.[406] Mr. Kaczmarek calculated interest at a rate of 5.7 percent to 7.0 percent per annum, which equaled the yield on Guatemala's sovereign bonds.[407] Mr. Kaczmarek also presented two alternative interest rates, namely, the U.S. Prime Rate plus 2 percent and LIBOR plus 4 percent, both of which reflected a commercial bank lending rate to a creditworthy buyer.[408]

127. As regards the date as of which interest should start running, Mr. Kaczmarek calculated TECO's nominal (before interest) historical damages for the period from the imposition of the unlawful VAD until TECO's sale of its interest in EEGSA as the sum of three amounts, *i.e.*, TECO's share of EEGSA's lost cash flows from 1 August 2008 to 31 July 2009; from 1 August 2009 to 31 July 2010; and from 1 August 2010 to 21 October 2010.[409] He then applied interest to each of these three amounts accruing as from 1 August 2009, 1 August 2010,

[406] *See* Memorial ¶¶ 307-311; Reply ¶¶ 315-320.

[407] *See* Memorial ¶ 310; Kaczmarek I ¶ 221 (CER-2); Reply ¶ 315; Kaczmarek II ¶ 174 (CER-5).

[408] *See* Memorial ¶ 310 n.1153; Kaczmarek I ¶ 221 (CER-2); Reply ¶ 315; Kaczmarek II ¶ 174 (CER-5).

[409] *See* Kaczmarek I ¶ 224, Table 20 (CER-2); Kaczmarek II ¶ 26, Table 5 (providing an updated damages amount, including interest) (CER-5).

and 22 October 2010, respectively.[410] TECO accordingly claimed interest "*running from the end of each year* for lost cash flow."[411]

128. Guatemala's position, based on the opinion of its expert, Dr. Abdala, was that different interest rates should apply with respect to the periods before and after the sale. With respect to the period before the sale, Guatemala argued that, in principle, a rate corresponding to EEGSA's weighted average cost of capital ("WACC") should apply.[412] That rate, both parties agreed, was 8.8 percent.[413] With respect to the period after the sale, Guatemala argued that because the sale of EEGSA to EPM was not caused by Guatemala's Treaty breach, a risk-free rate corresponding to 10-year United States Government bond yields should apply.[414]

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[410] *See* Kaczmarek I ¶ 224, Table 20 (calculating damages for the period through 21 October 2010, as well as the related interest) (CER-2); Kaczmarek II ¶ 26, Table 5 (providing an updated damage amount, including interest) (CER-5); *id.* ¶ 141, Table 14 (providing an updated damages amount *before* interest, including the US$ 21,100,552 in lost cash flows that the Tribunal awarded to TECO as damages relating to the period 1 August 2008 – 21 October 2010).

[411] Memorial ¶ 312 (emphasis added).

[412] *See* Guatemala's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits dated 24 Jan. 2012 ("Counter-Memorial") ¶¶ 623-626 (stating that "[t]o update the losses to their current value as of October 21, 2010, it is necessary to actualize the presumed damages calculated by the DCF method from the date the damages occurred until the aforementioned date," and that "[a]s Messrs. Abdala and Schoeters explain, in order to do so, it is necessary to apply an actualization factor based on EEGSA's cost of capital (best represented by the 'WACC'"); Abdala I ¶ 109 (stating that "[c]onceptually, for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used) (RER-1); Abdala II ¶ 80 (stating that "theoretically, the alleged historical damages (from August 2008 to the sale in October 2010) had to be updated on the basis of EEGSA's cost of capital ('WACC')") (RER-4); Guatemala's Post-Hearing Reply ¶ 175 (stating that "TGH's alleged damages must be adjusted to the WACC in effect before TGH's sale (since TGH even assumed an operating risk)"); Award ¶ 764 (quoting the foregoing language from paragraph 175 of Guatemala's Post-Hearing Reply).

[413] *See* Abdala I ¶ 109 (stating that "EEGSA's cost of capital ('WACC') . . . [was] estimated at 8.80% by the NCI [Mr. Kaczmarek], for which we do not have calculation discrepancies") (RER-1); Reply ¶ 318 (noting the parties' agreement that EEGSA's WACC was 8.8 percent and agreeing that the WACC provides an appropriate interest rate).

[414] Award ¶ 433 (stating that "[a]ccording to Guatelama [sic], it would be appropriate to use, post October 21, 2010, an actualization factor based on a risk-free rate, such as US 10-year government bonds (2.8 percent during the period of October 2010-December 2011)"); *see also* Guatemala's Post-Hearing Reply ¶¶ 174-175 (asserting that "Iberdrola did not sell its shares to EPM because of the measures, but rather as a corporate strategy to consolidate investments," and, "*[t]herefore*, [TECO's] alleged damages must be adjusted to the WACC in effect before [TECO's] sale . . . and from 21 October 2010 onwards using an adjustment factor based on a risk-free rate") (emphasis added).

129. Because, as elaborated above, Dr. Abdala's calculation of historical damages until the sale resulted in a negative figure, Guatemala argued that interest on historical damages should be calculated using the risk-free rate as well.[415] Guatemala thus argued that it was beneficial *to TECO* to award interest on historical damages at the lowest possible rate, because the lower the interest rate applied, the lower the resulting *negative* amount of damages would be.[416] As TECO explained, this was a non-sensical position, because if interest were to be awarded, that would presume a finding of liability *and damages* and, hence, TECO would benefit from the highest, and not the lowest, interest rate. In other words, there was no scenario under which the Tribunal could (i) find liability, (ii) determine that TECO had not suffered any damage from the breach of the Treaty, but, instead, had financially benefitted from the breach, (iii) calculate a negative award of damages to TECO, (iv) make an award of interest on that negative award, and (v) order TECO to pay Guatemala for Guatemala's breach of the Treaty. Indeed, Dr. Abdala acknowledged that, if the Tribunal were to find liability and award TECO damages, interest should be awarded for historical losses at a rate of 8.8 percent, corresponding to EEGSA's WACC:

> [Q:] Now, let us assume that the Tribunal disagrees and finds that TECO suffered actual damages during this two-year period. So, in that event, you would agree that it would be appropriate to apply an interest rate of 8.8 percent to those damages; is that correct?
>
> A. That is correct.[417]

130. Dr. Abdala also acknowledged that in circumstances where the investor's "exit" from its investment is not "voluntary" (which, the Tribunal ruled, was the case here),[418] "I do recommend using the WACC as the . . . pre-judgment interest rate."[419]

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[415] *See* Counter-Memorial ¶¶ 623-626; Abdala I ¶ 109 (stating that "[c]onceptually, for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used," but because his damage calculation "*impl[ies] a historical damage with negative sign* . . . we have used a risk-free interest rate") (emphasis added) (RER-1); Abdala II ¶ 80 (stating that "theoretically, the alleged historical damages (from August 2008 to the sale in October 2010) had to be updated on the basis of EEGSA's cost of capital ('WACC') but *given the peculiarity of having a negative historical damage*, we considered conservative [sic] to use the risk-free rate in this case as well") (emphasis added) (RER-4).

[416] *See* Abdala II ¶ 80 (RER-4).

[417] Tr. (5 Mar. 2013) 1587:7-13 (Abdala Cross).

131. Having considered Guatemala's position, TECO agreed with Guatemala that the 8.8 percent rate corresponding to EEGSA's WACC was appropriate as the pre-award interest rate.[420] There thus was no dispute between the parties as regards the interest rate applicable through 21 October 2010 (the date of the sale) with respect to historical damages; neither was there any dispute between the parties that in the event that the sale of EEGSA was caused by Guatemala's Treaty breach (as the Tribunal found), the 8.8 percent rate should apply up to the date of the Award.

132. Furthermore, at no point did Guatemala dispute TECO's position that, in the event that TECO were awarded historical damages through 21 October 2010, TECO was entitled to interest accruing in tranches as from 1 August 2009.[421] To the contrary, Dr. Abdala consistently opined that, in the event that it were established that TECO suffered damages with respect to the period through 21 October 2010, there were no conceptual differences between the experts as

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[418] Award ¶ 748 (holding that "the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework"); *see also* TECO Energy, Inc. Board of Directors Meeting October 14, 2010, Proposed Sale of DECA II dated 14 Oct. 2010 (C-353); Callahan I ¶ 8 (CWS-2); TECO's Post-Hearing Brief ¶ 202.

[419] Tr. (5 Mar. 2013) 1591:2-15 (Abdala Cross); *see also* TECO's Post-Hearing Brief ¶ 202 (noting same).

[420] *See* TECO's Post-Hearing Brief ¶ 202 (stating that "[a]t the Hearing, Dr. Abdala acknowledged that, if the Tribunal finds liability and damages, an appropriate pre-judgment interest rate for the more than two-year period between 1 August 2008 and 21 October 2010 is 8.8 percent, which was EEGSA's WACC at that time" and that the "Tribunal should award Claimant pre- and post-award compound interest at 8.8 percent"); Award ¶ 352 (noting TECO's position that TECO "should be awarded both pre-award and post-award compound interest at a rate of 8.8 percent up to the date of effective discharge of the obligations"); *id.* ¶ 353 (noting TECO's position that "Respondent's expert Dr. Abdala acknowledged at the hearing that this would be an appropriate pre-award interest rate for the period between August 1, 2008 and October 21, 2010, since it corresponds to EEGSA's WACC at that time").

[421] *See generally* Counter-Memorial; Abdala I ¶¶ 107-111 (disputing the applicable interest rate but not the date as from which interest should start accruing) (RER-1); Guatemala's Rejoinder dated 24 Sept. 2012 ("Rejoinder") (not disputing the start date for interest on historical damages); Abdala II ¶¶ 80-83 (disputing the applicable interest rate but not the date as from which interest should start accruing) (RER-4); Guatemala's Post-Hearing Brief (not disputing the start date for interest on historical damages); Guatemala's Post-Hearing Reply (not disputing the start date for interest on historical damages); Award ¶¶ 264-435 (not mentioning in the Tribunal's description of the parties' positions any dispute concerning the start date for interest on historical damages).

regards interest.[422] Indeed, in his own damages calculation, Dr. Abdala applied interest to historical damages starting from 1 August 2009.[423]

133. In light of the parties' agreement on this issue, the parties had no reason to address or even anticipate the question of whether an award of such interest would constitute "unjust enrichment,"[424] and the Tribunal did not give the parties any opportunity to do so. Had the Tribunal given the parties such an opportunity—by either asking a question at the Hearing or including a question in the list of questions sent to the parties to be addressed in the post-hearing submissions—TECO would have explained that it had not requested interest running on the "entire" amount of damages as from 1 August 2008, but rather had requested interest in tranches as from 1 August 2009, and that awarding such interest would not constitute unjust enrichment, because absent Guatemala's breach, the additional cash flows that EEGSA would have generated during the first two years of the 2008-2013 tariff period would have become available to TECO as from the end of the first and second year of the tariff period, *i.e.*, as from August 2009 and August 2010, respectively. TECO thus would have been able to reinvest those funds as of that time and start earning interest on them as from those dates. TECO also would have explained that, in these circumstances, not awarding TECO interest on these amounts as from August 2009 and August 2010 would be contrary to the universally accepted principle that compensation must make the injured party whole for the time-value of money, and that Guatemala itself recognized this by calculating interest in the very same manner.

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[422] *See* Abdala I ¶ 109 (stating that "[c]onceptually, for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used" and that with respect to "[t]his factor, estimated at 8.80% by the NCI [Navigant/Mr. Kaczmarek] . . . we do not have calculation discrepancies") (RER-1); Abdala II ¶ 80 (stating that "we do not disagree with the view that, for the period prior to the sale in October 2010, an interest rate that includes a risk component based on the opportunity cost of EEGSA's money should be included") (RER-4); *id.* ¶ 83 (stating that "we have no theoretical disagreements" with Mr. Kaczmarek with respect to interest relating to the period through 21 October 2010); *see also* Counter-Memorial ¶¶ 623-626 (adopting Dr. Abdala's position); Rejoinder ¶ 520 (same); Guatemala's Post-Hearing Reply ¶ 175 (same).

[423] *See* Abdala II (RER-4), damages model (DAS-37) (electronic file), tab "3.A. Valuation Summary," rows 90-97 (calculating discount factors for historical damages using the 10-year U.S. debt rate of 3.29 percent running from August 2009 and August 2010 until 21 October 2010); *id*., rows 22, 24 (applying these discount factors in formulas calculating EEGSA's lost historical cash flows as of 21 October 2010).

[424] Award ¶ 765.

134. Given the central importance of this issue to the Tribunal's decision on interest for the period through 21 October 2010, the Tribunal's failure to give the parties an opportunity to address this issue amounts to a serious departure from a fundamental rule of procedure, namely, the right to be heard. As set forth above, the right to be heard must be "ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other,"[425] and "[i]f an arbitral tribunal fails to accord such a right, then its award will be subject to annulment."[426] It equally applies when a tribunal fails to accord a party the right to address an argument raised and relied upon by the tribunal itself. The *ad hoc* committee in *Pey Casado v. Chile* thus annulled the damages section of the award on the ground that the tribunal had violated Chile's right to be heard, when it awarded the claimants damages for a violation of fair and equitable treatment notwithstanding that the parties' pleadings focused almost exclusively on damages relating to the claimants' expropriation claim.[427] Similarly, the *ad hoc* committee in *Fraport v. Philippines* annulled the award on the ground that the tribunal had violated the claimant's right to be heard when it failed to give the claimant an opportunity to submit its comments on a new piece of evidence that was of "particular significance" to the tribunal's decision, stating that the tribunal "ought not to have proceeded to analyse and consider this evidence itself in its deliberations without having afforded the parties the opportunity to make submissions on it, and availed itself of the benefit of those submissions."[428]

135. In the present case, the Tribunal failed to give TECO an opportunity to present arguments on the Tribunal's "unjust enrichment" theory, which had not been raised by either Guatemala or by the Tribunal at any time during the course of the proceedings, and which the parties had no reason to anticipate. The Tribunal's departure from this fundamental rule of procedure, moreover, is serious, because it resulted in a significant under-compensation to

[425] *Wena v. Egypt*, Decision on Annulment, ¶ 57 (CL-N-144).

[426] *Fraport v. Philippines*, Decision on Annulment, ¶ 200 (CL-N-131); *see also Malicorp v. Egypt*, Decision on Annulment, ¶ 36 (finding that the "*principe du contradictoire* . . . is a rule of procedure that ensures equality of the parties in an adversarial proceeding" and "is a fundamental rule of procedure") (CL-N-136).

[427] *Pey Casado v. Chile*, Decision on Annulment, ¶¶ 261-70 (holding that Chile was deprived of the "right to present its arguments on the standard applicable to the calculation of damages for the breach by Chile of the fair and equitable treatment provision of the BIT") (CL-N-143).

[428] *Fraport v. Philippines*, Decision on Annulment, ¶ 230 (CL-N-131).

TECO, and deprived TECO "of the benefit or protection which the rule was intended to provide."[429] Indeed, through 1 October 2014, the under-compensation arising from the Tribunal's decision is in the range of US$ 1 million.[430]

136. Moreover, as set forth above, it is well established that a tribunal deciding issues beyond those raised by the parties constitutes a manifest excess of powers, and is a ground for annulment.[431] As the *ad hoc* committee in *Soufraki v. United Arab Emirates* affirmed "a manifest excess of power would consist in answering some other question not raised by the parties, or in answering only a part of a question in fact raised by the parties."[432]

137. In the present case, as explained above, the parties agreed upon the interest rate applicable to TECO's historical damages before the sale, and did not dispute that such interest should start accruing in tranches as from August 2009. There thus was no dispute between the parties that, if the Tribunal were to find Guatemala liable and award damages to TECO for the period before the sale, TECO would be entitled to interest at the rate of 8.8 percent accruing in tranches as from August 2009. In ruling that TECO was not entitled to *any* interest before 21 October 2010, the Tribunal thus decided a matter not submitted to it, and overstepped the bounds of the parties' dispute, thereby manifestly exceeding its powers.[433]

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[429] *MINE v. Guinea*, Decision on Annulment, ¶ 5.05 (CL-N-137).

[430] This amount is obtained by applying Navigant's interest calculation and the 8.8 percent interest rate until 21 October 2010 and the annually compounded interest rate of U.S. Prime rate plus two percent thereafter (per Award ¶ 780), and comparing the result against the amount of interest one obtains when the Tribunal's decision on interest at paragraph 780 of the Award is applied. *See also* Kaczmarek I ¶ 224, Table 20 (showing significant amounts of interest accruing on historical damages) (CER-2).

[431] *See supra* § III.A; *see also Impregilo v. Argentina*, Decision on Annulment, ¶ 125 (noting that a "[m]anifest excess of powers may occur when an arbitral tribunal decides on matters which the parties did not submit to it") (CL-N-133); *Soufraki v. UAE*, Decision on Annulment, ¶ 41 (finding that "a manifest excess of power would consist in answering some other question not raised by the parties, or in answering only a part of a question in fact raised by the parties") (CL-N-132); *CDC v. Seychelles*, Decision on Annulment, ¶ 40 (noting that "[c]ommon examples of such 'excesses [of powers]' are a Tribunal deciding questions not submitted to it or refusing to decide questions properly before it") (CL-N-128).

[432] *Soufraki v. UAE*, Decision on Annulment, ¶ 44 (CL-N-132).

[433] TECO observes in this connection that as a consequence of the Tribunal's decision that it would constitute unjust enrichment to award TECO interest accruing as from before the sale of EEGSA on 21 October 2010 the Tribunal made no determination as to what interest rate applied with respect to that time period. *See* Award ¶¶ 762-768. Nevertheless, the Tribunal stated that "applying EEGSA's WACC *post-October 2010* would not

138. Likewise, by failing to award TECO pre-award interest at the 8.8 percent rate, the Tribunal overstepped the bounds of the parties' dispute, thereby manifestly exceeding its powers; and by discarding the parties' agreed position without notice, the Tribunal deprived TECO of its right to be heard.

139. It follows that the Award must be partially annulled insofar as it denies TECO interest accruing as from 1 August 2009 at a rate of 8.8 percent.

V. THE STAY OF ENFORCEMENT OF THE AWARD SHOULD BE LIFTED

140. In its Application for Annulment, Guatemala requested that, in accordance with Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54, the enforcement of the Award be provisionally stayed.[434] Guatemala further indicated that it would elaborate its request for a continued stay of the enforcement of the Award at an "appropriate procedural stage."[435]

141. While TECO reserves its right to submit a further response should Guatemala submit such elaboration of its request for a continued stay of enforcement, for the reasons discussed below, the Committee should either terminate the provisional stay of enforcement of the Award, or condition the continuation of the stay upon Guatemala posting a bond in the full amount of the Award.

142. In deciding requests for a stay of enforcement, *ad hoc* committees have considered the prospects of compliance with the award, if not annulled. In *Sempra v. Argentina*, the *ad hoc* committee considered it "essential to its decision whether to terminate or continue the stay that it should first assess the prospects of Argentina complying with the Award, should it not be annulled."[436] Similarly, the *ad hoc* committee in *MTD v. Chile* observed that "[a]s a general

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make sense since the Claimant had sold its interest in EEGSA and ceased to assume the company's operating risk." *Id.* ¶ 766 (emphasis added). This suggests that if the Tribunal had awarded TECO interest accruing during the period before the sale, it would have applied a rate corresponding to EEGSA's WACC until the sale.

[434] Guatemala's Application for Annulment ¶ 83.

[435] *Id.* ¶ 84.

[436] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of Mar. 5, 2009 ("*Sempra v. Argentina*, Decision on Request for Continued Stay of Enforcement"), ¶ 30 (CL-N-142).

matter a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled, will be complied with."[437]

143. In the present case, shortly after the Award was rendered, a press article providing an interview of Guatemala's President, Otto Pérez Molina, stated that "[a]chieving the annulment of the compensation ordered by ICSID is an automatic priority for the State *because it does not have the funds to pay that amount*."[438] As in *MTD v. Chile*, Guatemala has failed to give any reasonable assurances that it will pay the Award, if the Award is not annulled; to the contrary, Guatemala has indicated publicly that it does not have adequate funds to do so. Guatemala accordingly is not entitled to a continued stay of enforcement of the Award.

144. Moreover, in circumstances where the enforcement of the award is stayed, several *ad hoc* committees have ruled that the award debtor must provide security for the eventual payment of the award in the event that the application for annulment is denied.[439] As

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[437] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution of June 1, 2005 ("*MTD v. Chile*, Decision on Request for Continued Stay of Enforcement"), ¶ 29 (CL-N-139); *see also CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award ("*CMS v. Argentina*, Decision on Request for Continued Stay of Enforcement"), ¶ 38 (CL-N-130).

[438] *See Prensa Libre, The State to Appeal ICSID Award of Millions*, 22 Dec. 2013, *submitted herewith* as Exh. C-N-637 (emphasis added). TECO observes in this connection that Procedural Order No. 1, Item 14.1 provides that "[i]n principle, no new documents or evidence shall be admitted, except insofar as the exclusion of documents proposed but not admitted in the original arbitration is advanced as grounds for annulment," and that "[s]hould a party wish to introduce new documents or evidence, other than legal authorities, such party shall request leave from the Committee as soon as possible, and, in any case, prior to submitting the evidence." As is apparent from their terms, these provisions apply to new evidence or documents submitted by a party in support of its application for annulment or its opposition to the other party's application for annulment. Here, TECO is submitting the foregoing press article solely in connection with Guatemala's request for a continuation of the stay of enforcement of the Award. Accordingly, the foregoing press article is not covered by Item 14.1 of Procedural Order No. 1. Indeed, in assessing the prospects of compliance with an award, if not annulled, *ad hoc* committees typically look to evidence that has not been submitted during the arbitration proceedings, such as the State's history of payment or non-payment of arbitral awards or statements by State officials regarding the State's intention to pay or not to pay the award, as this evidence typically post-dates the award and is not relevant to the issues resolved by the original tribunal. *See, e.g.*, *Sempra v. Argentina*, Decision on Request for Continued Stay of Enforcement, ¶¶ 65-76 (discussing the history of Argentina's compliance with international awards) (CL-N-142).

[439] *See, e.g.*, *Wena Hotels Ltd. v. Arab Republic of Egypt*, Procedural Order No. 1 on Continuation of Stay Award ("*Wena v. Egypt*, Procedural Order No. 1"), ¶ 7(b) (finding it "fair and just . . . that the continuation of the stay be counter-balanced by requiring the posting of security for the performance of the Award in the event the application is denied") (CL-N-145); *CDC Group PLC v. Seychelles*, ICSID Case No. ARB/02/14, Decision

commentators likewise have observed, "[a] discretionary stay of enforcement pending an annulment application should be obtainable only at a cost. The cost should be a bond, a bond that would more likely than not be needed at the end of the day."[440]

145. In the present case, Guatemala's status as the Award debtor is not affected by TECO's Partial Annulment Application, as TECO is not seeking annulment of the portions of the Award holding Guatemala liable and awarding TECO compensation for historical losses.[441] The only party that is seeking annulment of those portions of the Award is Guatemala. In order to protect TECO's legitimate interests in obtaining payment of the Award in the event that Guatemala's Application for Annulment is rejected, the Committee, if it decides that the stay of enforcement of the Award should continue, should condition the continuation of the stay of enforcement upon Guatemala posting a bond in the full amount of the Award.

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on Continuation of Stay of 14 July 2004 ("*CDC v. Seychelles*, Decision on Continuation of Stay"), ¶ 22 (finding that the "continuation of the complete stay of the Award on condition of the posting of full security maximally protects the legitimate interests of both Parties to this proceeding") (CL-N-129); *Repsol YPF Ecuador SA v Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/01/10, Procedural Order No. 1 concerning the Stay of Enforcement of the Award of 22 Dec. 2005 ("*Repsol v. Ecuador*, Procedural Order No. 1"), ¶ 8 ("[T]he rule emerging from earlier arbitration proceedings is that the party requesting the annulment of an award may obtain its stay of enforcement for the duration of the proceeding, upon the posting of a bond for the total amount of the award") (CL-N-140).

[440] PAUL D. FRIEDLAND, *Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings*, *in* ANNULMENT OF ICSID AWARDS, IAI Series on International Arbitration No. 1, p. 185 (E. Gaillard & Y. Banifatemi eds., 2004) (CL-N-151).

[441] For the avoidance of doubt, TECO notes that, although it is seeking annulment of the Tribunal's decision with respect to the interest awarded to TECO on its historical losses, it is not in any way seeking to annul the Tribunal's decision with respect to TECO's historical losses itself, for which Guatemala owes TECO damages under the Award.

VI. CONCLUSION

146. For the above reasons, TECO respectfully requests that the Committee issue a decision:

1. Partially annulling the damages section of the Award insofar as it does not award TECO any compensation for losses arising from the sale of EEGSA on 21 October 2010;

2. Partially annulling the damages section of the Award insofar as it does not award TECO any interest accruing in the period from 1 August 2009 until 21 October 2010;

3. Partially annulling the damages section of the Award with respect to the interest rate applicable to pre-award interest at the U.S. Prime rate plus two percent; and

4. Ordering Guatemala to pay TECO's legal fees and costs incurred in these proceedings.

147. With respect to Guatemala's request that the Committee order the continuation of the stay of enforcement of the Award, for the above reasons, TECO respectfully requests that the Committee either deny Guatemala's request or condition such stay on Guatemala's posting of a bond in the full amount of the Award.

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Respectfully submitted,

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