INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

(ICSID CASE NO. ARB/10/23)

RESUBMISSION PROCEEDINGS

TECO GUATEMALA HOLDINGS, LLC

Claimant

- v -

REPUBLIC OF GUATEMALA

Respondent

COUNTER-MEMORIAL

2 FEBRUARY 2018

Freshfields Bruckhaus Deringer

CONTENTS

I. INTRODUCTION

1. This Counter-Memorial of the Republic of Guatemala (***Guatemala*** *or the* ***Respondent***) is submitted in accordance with paragraph 15.4.2 of Procedural Order No. 1 of 4 April 2017 and is in response to the Memorial from TECO Guatemala Holdings, LLC (***TGH*** or the ***Claimant***) dated 1 September 2017.

2. Accompanying this Counter-Memorial, Guatemala submits the witness statement of Mr Miguel Antonio Santizo Pacheco and the expert report of Messrs Manuel Abdala and Julián Delamer, of Compass Lexecon. Guatemala also submits 84 factual exhibits numbered from R-1001 to R-1092 and 35 legal authorities numbered from RL-1001 to RL-1035.

3. This Counter-Memorial has been drafted in Spanish and translated into English. Therefore, in case of any discrepancy, Guatemala requests TGH and the Tribunal to refer to the Spanish version.

II. EXECUTIVE SUMMARY

4. This claim arises from certain measures of the regulatory body for the electricity sector in Guatemala, the National Electric Energy Commission (the ***CNEE***, from its name in Spanish, "Comisión Nacional de Energía Eléctrica", or the ***Regulator***), in establishing in 2008 the tariffs for the distribution of electricity for the five-year period 2008-2013 for Empresa Eléctrica de Guatemala, S.A. (***EEGSA***).

5. Electricity tariffs in Guatemala are set according to a modern system, which applies sophisticated technical and economic parameters to evaluate in detail the efficient costs of distribution companies. This involves carrying out a complete appraisal of those costs every five years. The current dispute arose during one of these tariff review processes, namely the 2008 one, which fixed the tariffs for 2008-2013.

6. In 2008, TGH was a shareholder of EEGSA as part of a consortium, which also included Spanish company Iberdrola Energía, S.A. (***Iberdrola***) as operator of EEGSA. In response to the measures of the CNEE in 2008, both TGH and Iberdrola lodged separate

international claims against Guatemala before ICSID tribunals, based on their investments in EEGSA. Once their respective arbitrations were underway, on 21 October 2010 both companies sold their stakes in EEGSA to Empresas Públicas de Medellín (***EPM***), which paid more than US$ 500 million for EEGSA.

7. The claim filed by Iberdrola before ICSID was rejected and the tribunal ordered Iberdrola to pay Guatemala's legal costs, amounting to approximately US$ 5.5 million. Instead, in the arbitration commenced by TGH (the ***Original Arbitration***), Guatemala was found liable. However, the tribunal awarded less than 10 percent of the damages sought by TGH. The Tribunal in the Original Arbitration (the ***Original Tribunal***) found that, in the process of setting EEGSA's tariffs for the period 2008-2013, the regulator (the CNEE) did not sufficiently justify its decision not to determine those tariffs on the basis of the tariff proposal put forward by EEGSA, and did not sufficiently take into account a consultative report prepared by an expert commission. This decision of the Regulator was considered a breach of the minimum standard of fair and equitable treatment provided in Article 10.5 of DR-CAFTA (the ***Treaty***). As explained below, although it condemned this aspect of the CNEE's conduct, the Original Tribunal found in favour of Guatemala in respect of all of the other claims advanced by TGH. This included allegations of breach of legitimate expectations, substantial changes to the regulatory framework and manipulation of the process for establishing tariffs.

8. In the Original Arbitration, TGH claimed damages for a total of US$ 249.5 million, including interest. TGH claimed up to 40 percent more of what Iberdrola claimed in its parallel arbitration, without giving any explanation for the difference. TGH's claim for damages was divided into (i) "historical damages" for the period between 1 August 2008 (the date when the tariffs in question came into force) and 20 October 2010 (the date it sold its stake to EPM); and (ii) "future damages" for the period after the sale of its interest, which included, on the one hand, the damages claimed for the remainder of the tariff period still underway at the time (that is, from 21 October 2010 to 31 July 2013), and, on the other hand, the alleged losses from 1 August 2013 onwards. For this latter element, TGH assumed that the measures adopted by Guatemala in the context of

EEGSA's tariff review, which by definition were restricted to the five-year period 2008-2013, had a *perpetual* and *definitive* impact on its investment in EEGSA.

9. TGH did not provide support for this claim. TGH obtained more than US$ 150 million through the sale of EEGSA. As such, TGH should have proved, with contemporaneous evidence from the time of the sale, that the price it obtained from the sale was impaired as a result of the tariff fixed by the CNEE in the 2008 tariff review of EEGSA, and the extent of any such impairment. TGH did not provide this evidence. Furthermore, the claim for future damages lacked any logic, since the tariff fixed by the CNEE for EEGSA in 2008, and which was rebuked by the Original Tribunal, had – by definition – a clear time limit of application of five years. Specifically, it came into force on 1 August 2008 and expired on 31 July 2013. As provided in the regulatory framework, on 1 August 2013 EEGSA's new tariff came into force. This new tariff resulted from a review process conducted in complete normality and without any dispute between EEGSA and the CNEE. As a result of this review, EEGSA's tariffs increased by 19 percent.

10. In line with the above, and considering that TGH had provided no evidence for the underlying calculations and assumptions which determined the sale price of its interest in EEGSA, the Original Tribunal rejected the vast majority of the damages claimed by TGH, as unproven and speculative. In its award, the Original Tribunal awarded TGH only the "historical damages" claimed (which accounted for less than 10 percent of its claim). These reflected losses in the period between the moment in which the tariff was set in 2008 and the sale of the investment in 2010. In particular, the Original Tribunal found that there was no evidence for the future damages allegedly sustained by TGH. The Original Tribunal further noted, in particular, that it was incorrect to assume that the tariffs fixed for the period 2008-2013 would remain in force after 2013 (as, indeed, did not happen) when a new tariff for the next five-year period would enter into force, and thereafter every five years.

11. The ICSID Annulment Committee (the ***Committee***) rejected TGH's argument that the Original Tribunal had acted contradictorily in awarding TGH historical damages while

rejecting its claim for future damages.[1] However, the Committee found that the Original Tribunal had not provided sufficient reasons for its decision to reject future damages for lack of evidence, and thus annulled that portion of the decision.[2]

12. On this basis, TGH now appears before this Tribunal reiterating its claim for future damages in substantially the same terms as it did before the Original Tribunal. Two circumstances emerge immediately from a review of the Claimant's Memorial. Firstly, TGH tries to inject some colour into its factual account by referring to a variety of claims it had already presented in the Original Arbitration and which were expressly rejected in the award. Secondly, despite including a detailed account of the background of the case, TGH's description of the Decision on Annulment fails to mention that the Committee rejected the argument that the Original Tribunal acted contradictorily when it awarded TGH historical damages and not future damages. This is very relevant because, as the Committee pointed out, the claim for future damages is distinct from that for historical damages. In particular, the claim for future losses involves evidentiary and causation obstacles, stemming from the sale of EEGSA and the fact that the measure found to be in breach of the Treaty was a tariff fixed in 2008 but which ceased to be in force in 2013. In the Original Arbitration, TGH did not clear any of these hurdles.

13. In the present arbitration, to support its claim for future damages, TGH presents to this Tribunal the very same evidence and arguments already dismissed by the Original Tribunal as inadequate. This finding of the Original Tribunal is not prejudiced by the fact that in the opinion of the Committee, the Original Tribunal had not provided enough reasoning for its decision. After failing in its first attempt, TGH is now asking this Tribunal to automatically assume that the tariff fixed by the Regulator in 2008 and in force until 2013 caused future damages until the end of the EEGSA concession in 2049, as if there were no tariff reviews every five years in Guatemala.

14. According to TGH, these damages are proved by the sale price of its interest in EEGSA to EPM, which would reflect a loss in value imputable to the 2008 tariff. However,

---

1 Decision on Annulment, 5 April 2016, par. 107.

2 *Ibid*, para. 138.

beyond the argumentative efforts of TGH and its valuation expert, there is nothing in the record that supports this conclusion. The evidence offered by TGH to this end is insufficient. Both in the Original Arbitration and in these proceedings, Guatemala asked TGH to present the documentary evidence on the sale of its shares to EPM (including with respect to the calculation of the sale price) that would show the alleged loss, assuming such a loss occurred. Nevertheless, TGH has stated that it does not have any such document.[3]

15. TGH's claim for future damages is even less credible if we consider that some 87 percent of the total amount claimed is based on the hypothesis that both the tariff fixed by the Regulator in 2008 for the period 2008-2013 and the tariff that, according to TGH, should have applied in that same period, would have remained perpetually unaltered in the future tariff reviews of EEGSA. That hypothesis is wrong. TGH cannot be allowed to distort the reality that the dispute between the Parties concerns tariffs that were only applicable for a five-year period, and not an issue that has been repeated or that will be repeated in subsequent tariff reviews. In practice, TGH's position would result in holding Guatemala responsible for actions it has not performed, i.e. future tariffs that have not yet been set.

16. TGH cannot seriously argue that in a regulatory framework such as that in force in Guatemala, where distribution tariffs are set every five years, it is reasonable to assume that the tariffs will remain unaltered. The tariff system is based on the so called 'model company' system, which obliges the distributor and the CNEE to completely recalculate the company's efficient costs according to market and technology changes. The best evidence of this reality is the 2013 tariff review itself, in which EEGSA and the Regulator agreed on tariff variations and did so in the context of a process that took place without incidents.

17. What this proves is that this arbitration is no more than an attempt by TGH to try its luck again, in front of a new Tribunal, with a claim that is obviously speculative. Guatemala is a developing country seeking to position itself in the global scenario as a productive

3 *See* Section IV.B.2 below.

economy. TGH's claim in this arbitration constitutes an abuse of the international system for the protection of foreign investments that this Tribunal should not endorse.

18. This Counter-Memorial is structured as follows:

(a) Section III summarises the facts underlying the dispute and the Original Arbitration. It corrects the fabrications and distortions in the account given by TGH, which is trying to re-open issues that have already been dismissed by the Original Tribunal;

(b) Section IV shows that TGH's claim for loss of value is groundless, as TGH has neither discharged its burden of proof nor demonstrated the causal relationship between Guatemala's conduct and the alleged loss of value of its shares in EEGSA. Subsidiarily, this section also elucidates the flaws in the calculation of the alleged future damages made by the Claimant's experts, and proposes an alternative valuation; and

(c) finally, Section V explains why TGH's claim for the costs of the Original Arbitration lacks any support and should be rejected.

III. BACKGROUND TO TGH's CLAIM

A. FACTS AND BACKGROUND TO THE DISPUTE

19. This section describes the facts and background to the dispute, as was submitted to the Original Tribunal. Where relevant, it makes reference to the determinations made by the Original Tribunal in its award (the ***Award***). As it will be noted, in its Memorial, TGH ignores several of those determinations. This results in a distorted account of the facts underlying this dispute.

1. Relevant aspects of the regulatory framework of the electricity sector in Guatemala

a. Privatisation of the sector

20. As part of the changes brought in by a new era of democracy that had started several years earlier, in the early 1990s Guatemala launched an ambitious program of

institutional and social reforms. The main objective of the Government program was modernising the country's infrastructure and reducing poverty and social marginalisation.[4] This modernisation project was focused in particular on the energy and telecommunications sectors, which until then had been controlled by the State. The goal was to provide citizens with quality services at a reasonable cost. The Government plan envisaged the privatisation of these sectors with a view to reducing public expenditure and providing financing for social development policies promoted by the Government.[5]

21. The electricity sector, in particular, required urgent reform in order to decentralise its structures and modernise its infrastructure. From 1959, the generation, transportation and distribution of electricity in Guatemala were under the quasi-monopolistic control of the National Institute of Electricity (***INDE***), a public body depending from the Ministry of Energy and Mines (***MEM***).[6] In the early 1990s, INDE lacked sufficient resources to finance the investments needed to meet the growing demand for electricity.[7]

22. In response the Government, with the support of the United States Agency for International Development (***USAID***), commissioned a series of studies to consider available options to implement necessary reforms in the electricity sector.[8] In 1993 two Chilean expert engineers from the company Synex Ingenieros Consultores Ltda. (***Synex***), Sebastián Bernstein and Jean Jacques Descazeaux, prepared a diagnostic study and a

---

4 Guatemala was among the top ten countries worldwide which had introduced the most structural reforms. World Bank, Central America Department, Poverty Reduction and Economic Management Unit, Latin American and Caribbean Region, "Guatemala, Evaluation of Poverty", 18 March 2009, **Exhibit R-1047**, p. 8.

5 Government Resolution No. 865-97, 17 December 1997, **Exhibit R-1011**, second Whereas.

6 Law Decree No. 1287, 1959, **Exhibit R-1001**; Government Resolution No. 865-97, 17 December 1997, **Exhibit R-1011**; Award, 19 December 2013, paras. 81-83.

7 Award, 19 December 2013, para. 80.

8 An initial study was produced by Pricewaterhouse in January 1991. It concluded that, at the time, a privatisation of EEGSA was premature. The study emphasised the high level of subsidies in electricity tariffs, the low returns estimated for the sale of EEGSA and the close inter-dependency between EEGSA and INDE. Pricewaterhouse, *Estudio de la Empresa Eléctrica de Guatemala*, 11 January 1991, **Exhibit C-1001**, Executive Summary, p. 2. Over the next three years, Guatemala raised its electricity tariffs to reduce the need to depend on state subsidies and, in 1992, began to reorganise INDE and diminish its involvement in the generation of electricity to enable the participation of private enterprises. *See* S Berger, "Guatemala: coup and countercoup", Report on the Americas, North American Congress on Latin America (NACLA), July 1993, **Exhibit C-1108**, para. 3; Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, 2003, **Exhibit C-1107**, pp. 13, 14.

proposal to reform the sector.[9] That study confirmed that it would be appropriate to restructure the electricity sector in order to improve its efficiency, through the participation of the private sector in its development and operation.[10] It also confirmed the need for a new legislative framework for the sector.[11]

23. In December 1994, the Government amended the law governing the INDE in order to facilitate the de-monopolisation of the sector and enable private actors to compete with the State enterprise.[12] Article 50 of the INDE's Organic Law established that a global proposal for the reform of the sector would be presented to Congress within six months.[13] In this context, various bills of the new General Electricity Law (the ***LGE***, from its name in Spanish, "Ley General de Electricidad") were presented with a view to decentralising and de-monopolising the sector and creating legal certainty.[14] Having received a favourable opinion by the Energy and Mines Committee of Congress, the LGE was approved by Congress on 16 October 1996.[15] The LGE Regulation (***RLGE***, from its name in Spanish, "Reglamento de la Ley General de Electricidad") was approved a few months later, on 21 March 1997.[16]

24. With the regulatory framework in place, the process to privatise the major electricity distribution companies in Guatemala began. These companies included three public

---

9 JS Bernstein and JJ Descazeaux, "Restructuring the power sector in Guatemala: analysis of decentralization and private participation mechanisms. Final report", June 1993, **Exhibit R-1002**, pp. 5-13; Award, 19 December 2013, para. 83.

10 JS Bernstein and JJ Descazeaux, "Restructuring the power sector in Guatemala: analysis of decentralization and private participation mechanisms. Final report", June 1993, **Exhibit R-1002**, pp. 8-9.

11 *Ibid*, p. 37; Award, 19 December 2013, paras. 87-90.

12 Organic Law of the National Institute of Electricity, Decree of the Congress, 64-94, 7 December 1994, published on *Diario de Centro América* No. 86 of 20 February 1995, 7 December 1994, **Exhibit R-1003**. In turn, INDE was created by the Law Decree No. 1287. Law Decree No. 1287, 1959, **Exhibit R-1001**; Award, 19 December 2013, para. 91.

13 Bill of the General Electricity Law and its Regulations, Final Draft, Republic of Guatemala, 4 April 1995, **Exhibit R-1004**; Award, 19 December 2013, para. 91.

14 Award, 19 December 2013, paras. 93-94.

15 General Electricity Law, Decree No. 93-96, 16 October 1996, **Exhibit R-1008**. For example, article 4 of LGE added that apart from being a technical agency, the CNEE would enjoy functional independence in the exercise of its powers. Daily record of the Republic of Guatemala Congress's sessions, 16 October 1996, **Exhibit R-1009**, p. 112.

16 Regulations of the General Electricity Law, 21 March 1997, **Exhibit R-1010**.

companies that together covered most of Guatemala's territory: Distribuidora Eléctrica de Occidente S.A. (***DEOCSA***) and Distribuidora Eléctrica de Oriente S.A. (***DEORSA***), which operated in rural areas with low population densities, and EEGSA, which distributed electricity in urban, highly populated areas. EEGSA's distribution area included the country's capital, Guatemala City, and the company satisfied approximately 80 percent of the total electricity consumption of Guatemala.[17]

25. On 17 December 1997, the government authorised the public offering of 80 percent of the share capital of EEGSA, both in Guatemala and abroad. This represented almost the entirety of the State's shareholding in the company.[18] EEGSA itself was given the task of leading the privatisation process. To that end, a *data room* was set up and EEGSA issued the terms of reference for the public offer, as well as a sale memorandum and a term sheet for the stock purchase agreement.[19]

26. TECO Energy, Inc., which had been previously contacted as a potential investor,[20] formed a bidding consortium (the ***Consortium***) with Iberdrola and Electricidade de Portugal (***EDP***). It did so through one of its subsidiary companies, TECO Power Services (***TPS***).[21] In accordance with the terms of reference for the public tender, the Consortium set up a Guatemalan investment company, Distribution Eléctrica Centroamericana S.A. (***DECA I***), to acquire the shares of EEGSA. The shares in DECA I held by the Consortium's members were allocated as follows: 49 percent to Iberdrola, 30 percent to TPS and 21 percent to EDP.[22] On 30 July 1998, having satisfied the prequalification

---

17 Award, 19 December 2013, para. 81.

18 Government Resolution No. 865-97, 17 December 1997, **Exhibit R-1011**; Award, 19 December 2013, para. 124. The State placed on the market 96 percent of its stake in EEGSA, reserving for itself (until today) an interest of 4 percent.

19 Empresa Eléctrica de Guatemala S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney, April 1998, **Exhibit C-1006**.

20 *Ibid*. In April 1998, the financial adviser of EEGSA in the privatisation, Salomon Smith Barney prepared a preliminary information memorandum which was sent to potential investors who had been detected, among them, TGH.

21 Witness statement of Mr Gordon L. Gillette I, 23 September 2011(***Gillette I***) (Original Arbitration), para. 15; Award, 19 December 2013, para. 135.

22 Distribución Eléctrica Centroamericano, S.A., Consolidated Financial Statements, 14 August 1998 through 31 December 1998, **Exhibit C-1122**, p. 9; Award, 19 December 2013, para. 137.

process, the Consortium offered US$ 520 million for 80 percent of shares of EEGSA, and was declared the winner of the tender.[23] The shareholding of the Consortium in EEGSA was split as follows: Iberdrola 39.64 percent, TPS 24.26 percent, and EDP 17.1 percent. Subsequently, Iberdrola, TPS and EDP set up a second holding company, Distribution Eléctrica Centroamericana Dos S.A. (***DECA II***), which then received the shares in EEGSA, and that would also hold shares in other companies in Guatemala.[24] In April 2006 TGH was constituted and TPS's shareholding in DECA II was transferred to it.

b. Determination of distribution tariffs

(i) The CNEE

27. The LGE established a system in which the electricity distribution tariffs for each distribution company in the country are determined anew every five years. The determination is made through a technical tariff review process directed by the regulatory body of the sector.

28. The regulatory body, which was created by the LGE, is the National Electric Energy Commission (defined above as the CNEE or the Regulator). This is a technical body with functional and budgetary independence for the exercise of its powers and functions.[25] The CNEE is composed of a board of three members, which is renewed every five years (the ***Board of Directors*** or the ***Board***). The three members are appointed by the Government from among the candidates proposed by the deans of the universities in the country, the MEM and the representatives of the wholesale market.[26] The renewal of the Board of Directors every five years guarantees that each five-year tariff review takes place under a new Board of the CNEE and is independent from the previous review.

---

23 Gillette I (Original Arbitration), para. 16; Notarized Minutes of the Award, 30 July 1998, **Exhibit C-1011**; Award, 19 December 2013, para. 138.

24 Gillette I (Original Arbitration), para. 16; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up, July 1999, **Exhibit C-1010**; Award, 19 December 2013, para. 140. *See* also para. 184 below.

25 Its scope of application was extended to the activities of generation, transmission, distribution and marketing of electricity. LGE, 16 October 1996, **Exhibit R-1008**, art. 4; RLGE, 21 March 1997, **Exhibit R-1010**, art. 29; Award, 19 December 2013, paras. 96-97; Report of the Congressional Committee of Energy and Mines, 26 September 1996, **Exhibit R-1007**, p. 7.

26 LGE, 16 October 1996, **Exhibit R-1008**, art. 5.

(ii) Technical and economic criteria: the VAD

29. As already mentioned, the LGE regulates the determination of the electricity distribution tariffs for users on the basis of technical and economic criteria. According to Article 71 of the LGE, the distribution tariffs are made up mainly of two components: the cost of the electricity that the distributor purchases (average price of all the electricity purchases of the distributor); and the so-called Value Added for Distribution (***VAD***).[27] The first component, the cost of the electricity purchases, does not in itself constitute a source of remuneration for the distributor. This is because the amount that the distributor pays to purchase electricity is transferred directly to the tariff that the consumer pays. This mechanism is known as the "*pass-through*" system.[28] The second component, the VAD, reflects the compensation received by the distributor, through the tariff, to cover distribution costs and earn a profit. Therefore, the VAD is the actual remuneration to the distributor for its services. The five-year tariff reviews or tariff determinations have the purpose of essentially determining the VAD for each distributor.

30. To calculate the VAD, the LGE adopted the "benchmark efficient company" system,[29] also known as the system of "model company". This system establishes the remuneration for the distributor, not on the basis of the actual costs it incurs, but on the basis of the costs that a hypothetical efficient company would incur in offering the same distribution service, with a network of the same size and servicing the same distribution area of the actual or real company. The actual company must then try to be as efficient as possible and adjust its costs to those of the model company in order to be profitable.[30] The model company is completely redefined every five years in the tariff review. The technical guide for this purpose is published by the CNEE prior to each review process, in the so called terms of reference.[31]

---

27 *Ibid*, art. 71.

28 Witness statement of Mr Miguel Antonio Santizo Pacheco, 2 de febrero de 2018 (***Santizo***), para. 23.

29 LGE, 16 October 1996, **Exhibit R-1008**, art. 71.

30 Santizo, para. 15; Award, 19 December 2013, para. 100.

31 RLGE, 21 March 1997, **Exhibit R-1010**, art. 98; Award, 19 December 2013, para. 115.

31. According to Article 71 of the LGE, the VAD results from the addition of the following three elements:

(a) "Costs associated with the user";

(b) "Average distribution losses"; and

(c) "Costs of capital, operation and maintenance associated with distribution".[32]

32. Costs associated with the user include costs such as user management, customer service, marketing and debt collection.[33] Distribution losses refer to the costs of electricity that is lost through technical faults in the network, theft or other causes, and which the distributor has the right to recover through the VAD.[34] Costs of capital, operation and maintenance are those associated with actual distribution. Amongst the latter, the costs of operation and maintenance (which are also called the "operating" costs) are the resources that a distributor requires to efficiently carry out the function of distribution and commercialisation of electricity, as well as operation and maintenance of the network.[35] The cost of capital, in turn, is comprised of two elements: the replacement of the capital invested by the distributor and the return on that capital.[36]

33. In the model company system of the LGE, the calculation of the cost of capital requires an elaborate technical procedure and is the main purpose of the VAD calculation process in each tariff review. First, it requires establishing the value of the capital base for a hypothetical "model" company, i.e. calculating the capital necessary to construct a network which would provide the service in the defined distribution area in the most efficient manner. In this context, the combinations of installations, labour, transportation and equipment which are used to construct the distribution network are referred to as "construction units".[37] Once the construction units that make up the distribution network

---

32 LGE, 16 October 1996, **Exhibit R-1008**, arts. 71, 72.

33 Santizo, para. 24(i).

34 *Ibid*, para. 24(ii).

35 *Ibid*, para. 24(iv).

36 *Ibid*, para. 24(iii).

37 *Ibid*, para. 26.

are identified, these must be "optimised"[38], i.e., only those construction units which are economically justified in terms of quantity and quality to provide the service should form part of the capital base to be remunerated to the distributor. For example, it must be decided whether, for the service provided, it is best to have posts made of wood or concrete, and whether distributors should install transformers with greater or lesser power. Similarly, the optimum quantity of constructive units must be determined, e.g. whether 100 transformers are needed to cover the area or whether 80 would be sufficient. In this manner, and nowadays with the assistance of computer models and electricity distribution engineering, the efficient network of the model company is determined.

34. A value is then assigned to the efficient network for the model company which has been determined and optimised. This value, which constitutes the capital base[39], arises from the sum of the replacement value for each of the assets (materials, equipment and labour) that form the respective construction units. This calculation uses the market price of the asset which best fulfils the intended function. The sum of the value of the construction units which constitute the capital base of the model company is what the LGE calls the "New Replacement Value" (***VNR***, from its name in Spanish, "Valor Nuevo de Reemplazo") of the network.[40]

35. Once the VNR has been determined, the remuneration of the distributor is calculated. To that end, the VNR is incorporated into a formula called the Capital Recovery Factor (***FRC***, from its name in Spanish, "Factor de Recuperación del Capital"), from which two values are obtained: (i) the replacement of the capital, i.e. *depreciation*, which is an amount which allows the investor to replace the invested capital, establishing a reserve fund which may be used to replace assets once their useful life has come to an end - this value is calculated on the gross value of the capital base; and (ii) *the return*, which is the amount that compensates the investor for the opportunity cost of their invested capital, through profits, and which is calculated on the non-depreciated value of the capital

---

38 *Ibid*, para. 27.

39 *Ibid*, para. 28.

40 *Ibid*, para. 28; Award, 19 December 2013, para. 102.

base.[41] According to the LGE, the rate of return must be set by the Regulator between 7 and 13 percent.[42]

36. In summary, the VAD is an amount of money which is credited to the distributor through the tariffs to cover the three cost components listed in Article 71 of the LGE. These are the costs of providing the distribution service, enabling the distributor to recover its investment and obtain a profit. Each distribution company has its own VAD, depending on the model company which is constructed, taking into account the characteristics of the network and the distribution area serviced by the distributor in question. The VAD, added to the distributor's average purchase price of electricity, and the distribution losses,[43] constitute, for each distributor in Guatemala, the electricity distribution tariff charged to customers.

(iii) The procedure

37. The distribution tariffs for each distribution company are reviewed and determined by the CNEE every five years and remain in force for that period.[44] In this document, the terms tariff "determination" and "review" are used indistinctly to refer to the process by which the tariff is established every five years. As explained above,[45] the fundamental question in each five-year determination of the tariffs is the setting of the VAD. The other component of the tariff is the purchase price of the electricity paid by the distributor, which is directly passed through to the tariff and is an objective value. Therefore, even if we refer to the review and determination of tariffs, in reality the process concerns the five-year review and calculation of the VAD. Consequently, in this brief the words VAD and tariff are used without distinction. The procedure for the five-year calculation of the VAD is set out in Chapter III of Title IV of the LGE and in Articles 97 to 99 of the RLGE.

---

41 Santizo, para. 30.

42 LGE, 16 October 1996, **Exhibit R-1008**, art. 79; Award, 19 December 2013, para. 105.

43 *See* paras. 31, 32 above.

44 LGE, 16 October 1996, **Exhibit R-1008**, art. 77; Award, 19 December 2013, para. 112.

45 *See* para. 29 above.

38. The process starts with the approval of "the methodology for calculating the tariffs",[46] i.e., the "terms of reference",[47] by means of a resolution passed by the CNEE at least eleven months before the date for the entry into force of the new tariffs.[48] The terms of reference constitute the technical guidelines for calculating the VAD, defining the fundamental parameters of the model company.[49] In the first instance, the VAD calculation is carried out by the distributor. For this purpose, the distributor contracts an external consultant from a list of consultants pre-qualified by the CNEE. The consultant prepares the so-called "tariff study", i.e. the calculation of the VAD, in accordance with the parameters provided in the terms of reference.[50] If the distributor considers that the terms of reference do not comply with the criteria set out by the LGE or the RLGE, it may challenge the resolution that contains those terms of reference, through administrative and judicial actions.

39. The tariff study, or VAD study, is an extensive and complex document which includes various Excel spreadsheets with numerical data on prices and quantities of various materials, assets and services used by the model company. It is essential that the data have cross references and links between them so that the Regulator can reconstruct and analyse the calculations and results.[51] The term "traceability" of the study refers to this, which is essential in order for the study to be "audited" by the Regulator.

40. The tariff study is made up of different progress reports or stage reports, that the distributor must deliver to the CNEE in accordance with a schedule previously

---

46 LGE, 16 October 1996, **Exhibit R-1008**, arts. 4(c), 77.

47 RLGE, 21 March 1997, **Exhibit R-1010**, art. 98.

48 LGE, 16 October 1996, **Exhibit R-1008**, art. 77; RLGE, 21 March 1997, **Exhibit R-1010**, art. 98; Award, 19 December 2013, paras. 114, 115. The original time period of eleven months was extended to twelve months by the amendments to the RLGE in 2007. RLGE, Consolidated Text, 2 March 2007, **Exhibit R-1016**.

49 RLGE, 21 March 1997, **Exhibit R-1010**, arts. 86-92 and 97; Award, 19 December 2013, para. 114.

50 LGE, 16 October 1996, **Exhibit R-1008**, art. 74; RLGE, 21 March 1997, **Exhibit R-1010**, art. 97; Award, 19 December 2013, paras. 107-108.

51 For example, the cells that show the result of multiplying the prices by the quantities, size of the network, users, etc., should be linked to the cells that contain the underlying data which is being factored into the calculation, thus making it possible to track such information and analyse whether it is correct.

established in the terms of reference.[52] The CNEE is responsible for supervising the progress of the distributor's tariff study[53] and must, since 2007, carry out a parallel and independent tariff study, for which it may hire its own pre-qualified technical consultant.[54] This enables the Regulator to have the technical and independent advice necessary to ensure effective supervision of the tariff study presented by the distributor.[55] The CNEE makes comments on each stage report prepared by the distributor, so that the distributor's consultant may incorporate those comments in the ongoing tariff study.[56]

41. The RLGE provides that once all of the stage reports have been delivered by the distributor, it shall present its complete tariff study to the CNEE.[57] The CNEE then has one month to approve the study, or reject it providing its observations.[58] Within fifteen days, the distributor must analyse the observations, make any relevant corrections and send the corrected study to the CNEE.[59] If the CNEE finds that its observations have been implemented in the revised study, it approves the resulting tariffs and publishes them in the Official Gazette.[60] If, however, disagreements persist, Article 75 of the LGE provides that the CNEE and the distributor shall agree on the appointment of an expert commission of three members whose task it is to pronounce itself on those disagreements within 60 days.[61]

---

52 Santizo, para. 42.

53 LGE, 16 October 1996, **Exhibit R-1008**, art. 74; RLGE, 21 March 1997, **Exhibit R-1010**, art. 97.

54 RLGE, Consolidated Text, 2 March 2007, **Exhibit R-1016**, art. 98; Santizo, para. 47.

55 Expert Report of Mario Damonte, January 2012 (***Damonte I***) (Original Arbitration), para. 94.

56 Santizo, paras. 41-42.

57 RLGE, 21 March 1997, **Exhibit R-1010**, art. 98. In accordance with article 98 of the RLGE, this process should take place within a maximum period of three months from the issue of the terms of reference. With the amendments to the RLGE in 2007, this period was extended to 4 months. RLGE, Consolidated Text, 2 March 2007, **Exhibit R-1016**; Award, 19 December 2013, para. 116.

58 RLGE, 21 March 1997, **Exhibit R-1010**, art. 98. With the amendment to the RLGE in 2007, this period was extended to 2 months. RLGE, Consolidated Text, 2 March 2007, **Exhibit R-1016**; Award, 19 December 2013, para. 117.

59 RLGE, 21 March 1997, **Exhibit R-1010**, art. 98.

60 Award, 19 December 2013, paras. 116-119, 224.

61 *Ibid*, paras. 110, 119; LGE, 16 October 1996, **Exhibit R-1008**, art. 75.

42. The role of the expert commission, and in particular the effect of its pronouncement pursuant to Article 75 of the LGE, was widely debated by the parties in the first arbitration. The Original Tribunal found that “the conclusions of the Expert Commission were not binding” but that “the CNEE nevertheless had the duty, under the regulatory framework, to give them serious consideration”.[62] In other words, “the Expert Commission had no adjudicatory powers and although its report was […] technically “*informative*”[63], and the CNEE could “provide valid reasons in case it decided to depart from” its conclusions,[64] but could not do so “without providing any reason” or without “provid[ing] its reasons in case it would decide to disregard them”.[65]

43. Once the expert commission’s report is issued, the regulatory framework establishes that the CNEE must establish the VAD and the tariffs.[66]

2. The determination of VAD for EEGSA for the 2008-2013 period

44. In this section, Guatemala summarises the process for EEGSA’s tariff review for the 2008-2013 period, and corrects certain misstatements made by TGH in its Memorial in describing the facts.

a. The modification of Article 98 of the RLGE

45. In March 2007, shortly before the process for the determination of the tariffs for electricity distributors in Guatemala for the 2008-2013 period started, the CNEE proposed (and the MEM approved) a modification to various articles of the RLGE.[67] The aim was to update the RLGE in the light of the experience gained over the ten years since it had entered into force. This included the amendment of Article 98 to “require” the CNEE to “issue and publish” the tariff schedule “based on an independent tariff study

62 Award, 19 December 2013, para. 565. *See also*, paras. 582, 588 and 670; *See* Claimant’s Memorial, 1 September 2017, para. 108.

63 Award, 19 December 2013, para. 582 (emphasis in the original).

64 *Ibid*, paras. 565, 670.

65 *Ibid*, paras 583 and 588. *See also*, paras. 565, 584, 589 and 670.

66 LGE, 16 October 1996, **Exhibit R-1008**, arts. 4(c), 60, 61, 71, 73 and 76; RLGE, 21 March 1997, **Exhibit R-1010**, arts. 82, 83, 92, 98 and 99.

67 RLGE, Consolidated Text, 2 March 2007, **Exhibit R-1016**; Award, 19 December 2013, para. 121.

conducted by [it]", when the distributor does not submit its tariff study or does not correct it in accordance with the observations of the CNEE.[68]

46. This modification was proposed by the Board of Directors of the CNEE that was in office prior to the Board that thereafter would be responsible for the tariff review of EEGSA in 2008. The reform sought to align Article 98 with Article 99 of the RLGE, which had been amended in 2003 and which stated that the CNEE would have to immediately "issue and put into effect" a tariff schedule for any distributor that did not have any applicable schedule.[69]

47. In its Memorial, TGH stated that the reform in question "subverted the requirement in LGE Article 74 that the distributor calculate the VAD through its own consultant".[70] In this respect, it should be noted that in the Original Arbitration, a 2010 internal document from the Board of Directors of EEGSA came to light, in which TGH and its partners in EEGSA considered challenging the amendment of Article 98 of the RLGE (something they finally did not do). In that document, the Board of Directors of EEGSA recommended using political influence on the judicial authorities of Guatemala "to obtain a favourable decision".[71]

48. In any event, the Original Tribunal confirmed the legality of the amendment of Article 98, stating that the tribunal "does not find it objectionable that […] the regulator could decide to use its own independent study".[72] The Original Tribunal concluded that it "does not find the amendment to Article 98 RLGE to be unfair or arbitrary".[73] It therefore

---

68 RLGE, Consolidated Text, 2 March 2007, **Exhibit R-1016**; art. 98; Award, 19 December 2013, para. 121.

69 Award, 19 December 2013, paras. 122, 123. Until this reform, article 98 stipulated that if the distributor failed to submit its tariff study or to make the necessary corrections, the tariff scheme then in force would continue to apply, in contradiction with article 99 amended in 2003.

70 Claimant's Memorial, 1 September2017, paras. 18, 19.

71 *See* Management Presentation by DECA II 2009, 14 January 2010, **Exhibit R-1050**, p. 45. The presentation in question states:

> We have concluded that the challenge is feasible. We are already working on arguments, and <u>we suggest the participation of 3 politically powerful attorneys in order to obtain a favorable decision</u>. (emphasis added)

72 Award, 19 December 2013, para. 633.

73 *Ibid*, para. 630.

"reject[ed] [the] Claimant's arguments related to the abuse of the State's powers with respect to the amendments to Article 98 of the RLGE".[74] Consequently, TGH cannot raise this issue here again as if it had not been decided already, as it does in its Memorial.

b. The Terms of Reference

49. In accordance with the legal procedure described above, on 30 April 2007 the CNEE sent to EEGSA the terms of reference for the tariff review for the period 2008-2013 (the ***Terms of Reference***).[75] EEGSA considered that certain aspects of the Terms of Reference did not conform with the provisions of the LGE, and challenged them administratively and judicially by means of a *recurso de amparo*, an action for protection of constitutional rights.[76] Initially, the court ruled provisionally in favour of EEGSA, but the dispute was thereafter resolved through a settlement between the parties. EEGSA thus withdrew its appeal and the court did not address the merits of its claim.[77] Among other things, it was agreed to include an Article 1.10 in the Terms of Reference. According to this provision, EEGSA's consultant could, under exceptional circumstances, depart from the Terms of Reference, provided that it had justified reasons to do so, which reasons had to be explained by the consultant to the CNEE.[78] The amended Terms of Reference were approved by the CNEE on 9 October 2007.[79]

50. In its Memorial, as it did in the Original Arbitration, TGH criticises the conduct of the CNEE with regard to the Terms of Reference.[80] However, TGH's complaints were rejected by the Original Tribunal, holding that they were "irrelevant".[81]

---

74 *Ibid*, para. 638.

75 Letter No. CNEE-13680-2007 from the CNEE to EEGSA, attaching CNEE's Terms of Reference, 30 April 2007, **Exhibit R-1017**.

76 EEGSA's Administrative Appeal against the CNEE's Terms of Reference, 8 May 2007, **Exhibit R-1018**; Award, 19 December 2013, para. 155.

77 Withdrawal by EEGSA of Amparo C2-2007-4329, 6 August 2007, **Exhibit R-1021**; Award, 19 December 2013, paras. 159, 170.

78 Resolution No. CNEE 124-2007, 9 October 2007, **Exhibit C-1048**; Award, 19 December 2013, para. 169.

79 Resolution No. CNEE 124-2007, 9 October 2007, **Exhibit C-1048**; Award, 19 December 2013, para. 170.

80 Claimant's Memorial, 1 September2017, para. 20.

81 Award, 19 December 2013, paras. 640 and 641 where it states:

51. One issue of particular importance under the revised Terms of Reference was the calculation of the capital base to be remunerated to the distributor in the determination of the VAD. In accordance with the regulatory framework and basic economic principles, the return of the investor should be calculated on the depreciated capital base, i.e., net of depreciation (replacements of capital) already perceived by the investor. Otherwise, the investor would be remunerated for capital not made available to the concession, or in other words, already recovered. Considering that the CNEE did not hold the accounting or financial information necessary to determine with precision the level of depreciation applicable to the assets base of EEGSA (information which is normally in possession of the distributor), the Terms of Reference adopted a working assumption by which the capital base of EEGSA was depreciated by 50 percent, therefore applying a depreciation factor or divider "2" in the formula for recovery of capital[82] (previously defined as FRC). Obviously, Article 1.10 of the Terms of Reference allowed the distributor's consultant to offer a different value, if properly justified, by presenting sufficient supporting financial and accounting documentation in its possession.

52. Here again, TGH attacks the FRC formula proposed in the Terms of Reference, as it did in the Original Arbitration, alleging that it was designed with the purpose of "achieving the lowest tariff" and was allegedly in breach of the provisions of the LGE.[83] However,

---

> As to the argument relating to the attempt by the CNEE to include a new Article 1.9 in the Terms of Reference, it is undisputed that the CNEE agreed to replace the proposed new Article 1.9 with the current Article 1.8 of the Terms of Reference, which has not been objected by the Claimant. As a consequence, Claimant's Article 1.9 argument is irrelevant.
>
> [TGH] makes a series of other allegations according to which the Terms of Reference "contained provisions that predetermine the results of the VAD study, in violation of LGE Article 74." However, the Claimant also submits that, as a consequence of the introduction of such provisions, the Parties agreed on Article 1.10 of the Terms of Reference as a safeguard, and EEGSA withdrew its amparo. As a consequence, such allegations are also irrelevant.

82 The divider 2 was introduced in the capital recovery factor formula through CNEE's Resolution No. 05-2008, which amended the Terms of Reference. Resolution CNEE-05-2008, 17 January 2008, **Exhibit C-1135**. Again, on 17 January 2008, the CNEE issued Resolution No. 04-2008, which set the annual discount rate for the determination of the distribution tariffs at 7 percent. Resolution CNEE-04-2008, 17 January 2008, **Exhibit C-1086**.

83 Claimant's Memorial, 1 September 2017, para. 21.

the Original Tribunal already rejected this allegation concluding that "it is inconsistent with […] flexibility in Article 1.10".[84]

53. TGH's complaint in its Memorial about the FRC formula included in the Terms of Reference also hides an attempt to justify the irresponsible decision of Mr Leonardo Giacchino, from Bates White, who was the consultant for EEGSA in the review of 2008, to ignore the divider 2 in the FRC formula. As TGH explains in its Memorial, "[u]nderstandably, believing that there must have been a typographical error in the CNEE's formula, EEGSA's prequalified consultant, Bates White […] applied the FRC formula disregarding a "2" that appeared in the denominator".[85] In other words, in his tariff study, Mr Giacchino simply decided to ignore the divider 2 (which EEGSA had not objected to in the Terms of Reference) and not to apply any depreciation to the capital base of EEGSA, without offering any justification for doing so.[86] As was subsequently confirmed by the Expert Commission, the decision not to depreciate the asset base of EEGSA was wrong; a divider which reflected depreciation should have been applied.[87]

54. It is noteworthy that, as described below, in the tariff reviews of EEGSA, DEORSA and DEOCSA which have taken place in Guatemala since 2008 (i.e. the reviews of 2013 and 2018), the CNEE has continued to propose the divider 2 as a working assumption in the FRC formula, subject to changing it in the event that the distributors could demonstrate a different depreciation factor for the relevant assets in that period.[88] None of the distributors (including EEGSA) has ever challenged the FRC formula administratively or judicially. Furthermore, whenever they have considered it appropriate, the distributors' consultants have provided justifications to support the use of a different depreciation

84 Award, 19 December 2013, paras. 641-643.

85 Claimant's Memorial, 1 September 2017, para. 21.

86 Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., corrected, 5 May 2008, **Exhibit R-1035**, p. 481.

87 Report of the Expert Commission, 25 July 2008, **Exhibit R-1038**, pp. 312-314.

88 *See* paras. 218-223 below.

factor, and the CNEE has always agreed to review (reduce) the divider in the FRC formula[89], as was provided for also in the 2008Terms of Reference of 2008.[90]

c. The Bates White tariff study

55. Once the Terms of Reference were set, EEGSA's consultant, Bates White, set out to prepare the tariff study. EEGSA was supposed to deliver that study to the CNEE in nine stage reports (identified with the letters A to I) for the CNEE to provide its comments on each of them.[91]

56. In its Memorial, as it already did in the Original Arbitration, TGH makes comments on the alleged lack of collaboration from the CNEE in this process.[92] However, the Original Tribunal already rejected those allegations, stating that "[t]he Arbitral Tribunal does not find support in the record for such a submission. Quite to the contrary, the facts show that the regulator had continuous and intensive contacts with the distributor".[93]

57. Once the stage reports had been submitted by the consultant and the comments from the CNEE had been delivered, on 31 March 2008, EEGSA presented the first version of its full tariff study (the ***Study of 31 March***). This study resulted in a VNR of US$ 1,695 million which, as the Original Tribunal pointed out, was "almost three times the value of US$583.68 million calculated [for EEGSA's tariff] in 2003". This resulted in an increase

89 Santizo, paras. 60-66.

90 Resolution CNEE-124-2007, 9 October 2007, **Exhibit C-1048**, art. 1.10. This possibility was also provided for in subsequent reviews in an even more specific way: under the 2013 terms of reference, art. 4.9 and under the 2018 terms of reference, art. 4.10. *See* Resolution CNEE-161-2012, 23 July 2012, **Exhibit R-1073**, art. 4.9; Resolution CNEE-176-2011, 27 July 2017, **Exhibit R-1086**, art. 4.10; Santizo, paras. 64, 72.

91 Terms of Reference for the Performance of the Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., Resolution CNEE-124-2007, January 2008, **Exhibit R-1024**, art. 1.4.

92 Claimant's Memorial, 1 September 2017, para. 22.

93 Award, 19 December 2013, para. 644. *See also*, paras. 176, 180, 182, 183. EEGSA presented its report on Stage B on 25 January 2008, together with that of Stage A, which the CNEE declared inadmissible a few weeks later. *See* Letter from M Calleja to C Colom, No. GG-08-2008, and Letter from L Giacchino to C Colom and M Calleja, attaching Bates White Report: Reference Prices, 25 January 2008, **Exhibit R-1027**; Letter No. 15597-2008 from C Colom to L Maté, 12 February 2008, **Exhibit R-1028**, p. 24. On 14 March 2008, the CNEE sent its comments to EEGSA's Stage C and Stage D studies. *See* Letter No. 16207-2008 from C Colom to L Maté, 14 March 2008, **Exhibit R-1029**; Letter No. 16208-2008 from C Colom to L Maté, 14 March 2008, **Exhibit R-1030**. On 25 March 2008, the CNEE sent its comments to EEGSA's Stage E and Stage F studies. *See* Letter No. 16232-2008 from C Colom to L Maté, 25 March 2008, **Exhibit R-1032**; Letter No. 16230-2008 from C Colom to L Maté, 25 March 2008, **Exhibit R-1031**.

in the VAD of 245 percent compared to the VAD in force at the time.[94] Not only was the VNR unreasonable but Bates White's Study of 31 March also contained serious errors.[95] It could not be audited or "traced" by the CNEE since it lacked the technical and documentary support necessary to allow an objective review of the proposed tariffs by the Regulator.[96] The most obvious errors in the study included the use of non-optimal (or inefficient) construction units which resulted in a substantial increase in the VNR.[97] As a result, the CNEE declared the Study of 31 March "inadmissible", because it did not conform with the Terms of Reference. In accordance with Article 98 of the LGE,[98] the CNEE ordered EEGSA to make the corresponding corrections and re-submit it.[99]

58. On 22 April 2008, just three weeks after the Study of 31 March had been submitted, and while EEGSA's consultant was working on the revised version of such study, a surprising event took place. On that day, Mr Gonzalo Pérez, then President of EEGSA, arrived at the CNEE for a meeting (which he had requested) with the Board of Directors. At the meeting, Mr Pérez proposed to the CNEE an arrangement "disregarding the study", seeking an increase in the VAD of only 10 percent.[100] In the Original Arbitration, TGH

---

94 Award, 19 December 2013, paras. 185 and 187.

95 Witness statement of Mr Carlos Eduardo Colom Bickford, 24 January 2012 (***Colom I***) (Original Arbitration), paras. 96-100.

96 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, para. 332.

97 *Ibid*, para. 334.

98 RLGE, 21 March 1997, **Exhibit R-1010**.

99 Award, 19 December 2013, para. 186; Resolution CNEE 63-2008, 11 April 2008, **Exhibit R-1033**.

100 Colom I (Original Arbitration), paras. 101, 102. Mr Colom relates what happened as follows:

> A few days after we submitted our comments to the March 31 study, EEGA – I believe through its General Manager – requested a meeting of the CNEE's directors with Mr. Gonzalo Pérez, President of Iberdrola for Latin America and of EEGSA. While meetings with local representatives of EEGSA were normal throughout the tariff review process, I recall finding this request particularly unusual because Mr. Pérez was based in Mexico and had not been directly involved in EEGSA's tariff review process. At the CNEE, we agreed to meet with him on April 22, 2008.
>
> Thus took place the meeting with Mr. Pérez (I believe in the afternoon of the 22nd), on the 14th floor of the CNEE's office building. He appeared with Mr. Luis Maté, General Manager of EEGSA, and on our part, the three CNEE directors were present. At the beginning of the meeting, Mr. Pérez distributed a paper copy of a PowerPoint presentation that included a

did not deny that this event took place. In the Award, the Original Tribunal itself described it as follows:

> On April 22, 2008, a meeting was held between the directors of the CNEE and the chairman of the Board of EEGSA, Mr. Gonzalo Pérez. At the meeting, Mr. Pérez gave a presentation on the possibility of increasing the VAD but reducing the tariff component of energy costs, so that the VAD increase would not affect tariffs. In the presentation, EEGSA proposed a VAD increase of 10 percent, rather than the increase of 100 percent that would result from its consultant's study as corrected on the basis of the CNEE comments. The CNEE did not respond to such proposal.[101]

59. EEGSA's "proposal" entailed an increase of 10 percent in the VAD, compared to the 245 percent that resulted from Bates White' Study of 31 March,[102] and to the 184 percent (instead of the 100 percent that Mr Pérez incorrectly estimated at the meeting) that would result from the corrected study that Bates White presented a few days after this meeting.[103] This attempt to reach an agreement outside of the procedure envisaged for the tariff review was not only illegal, but also featured such a great difference in the proposed VAD that it deprived the Bates White tariff studies of any technical credibility.

60. As the Original Tribunal indicated, Mr Pérez's proposal was of course ignored by the CNEE.[104] Thus, on 5 May 2008, EEGSA presented the corrected Bates White study (the ***Study of 5 May***). The Study of 5 May implemented only some of the observations made

---

> proposal for EEGSA and the CNEE to reach a negotiated settlement on a new tariff sch\edule for the company (something not provided for by the Electricity Law). In this presentation, Mr. Pérez explained why he thought a 10 percent increase in EEGSA's VAD was justified (Exhibit R-65) and asked that the CNEE accept this increase in "disregard […] of the study;" a clear violation of the Electricity Law. Strangely, the presentation distributed by Pérez made no reference whatsoever to "EEGSA" or "Iberdrola" by name.

101 Award, 19 December 2013, para. 187 (emphasis added).

102 Colom I (Original Arbitration), para. 103.

103 *Ibid*, para. 105. As Mr Colom explained in the Original Arbitration, the VAD increase submitted by Bates White on 5 May amounted to 184 percent (*see* Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., corrected, 5 May 2008, **Exhibit R-1035**, p. 514), i.e., almost twice the 100 percent increase that Mr Pérez had anticipated during the meeting with the CNEE (*see* Iberdrola's Presentation on Tariff Study Revenue Requirements, 22 April 2008, **Exhibit R-1034**, p. 24).

104 Award, 19 December 2013, para. 187.

by the CNEE to the Study of 31 March, while rejecting the majority of them and arriving at a VNR of roughly US$ 1,300 million.[105] Among the corrections that were not incorporated were those related to the aforementioned issues of the lack of traceability of the models, the failure to justify the prices of materials and equipment, and the use of non-optimal construction units.[106]

61. Thus, within only a few weeks EEGSA and Bates White had "calculated" an increase in VAD of 245 percent (Study of 31 March, equivalent to a VNR of US$ 1,695 million), 10 percent (the Pérez proposal) and 184 percent (Study of 5 May, equivalent to a VNR of US$ 1,300 million). It was in the context of this lack of technical credibility from Bates White, and EEGSA's lack of respect for the regulatory framework, that the CNEE initiated the procedure set out under Article 75 of the LGE in order to appoint an expert commission.

d. The establishment of the Expert Commission

62. On 15 May 2008, the CNEE issued Resolution No. 96-2008 ordering the establishment of an expert commission (the ***Expert Commission***) and referring to it the disagreements between the CNEE and EEGSA regarding the tariff study. In particular, the CNEE identified nine categories of issues on which the Expert Commission was requested to issue a pronouncement.[107]

63. EEGSA appointed Mr Leonardo Giacchino, its consultant from Bates White, to represent it on the Expert Commission. The CNEE appointed Mr Riubrugent, a consultant from the company Mercados Energéticos.[108] However, the process was then paralysed because the parties could not reach an agreement on the appointment of the third member of the Expert Commission.[109] That was in fact the first time (and to date, the only time) that an

---

105 *Ibid*, paras. 188-189.

106 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 390-410.

107 Resolution CNEE-96-2008, 15 May 2008, **Exhibit C-1040**.

108 Award, 19 December 2013, para. 194.

109 *Ibid*, paras. 195-207.

expert commission was formed, and the RLGE presented a practical problem since it did not provide a solution for a situation where the parties could not reach an agreement on the third member of the commission. In this context, the CNEE proposed a modification to the RLGE incorporating Article 98 Bis, which provides that if the parties are unable to reach an agreement on the third member of the expert commission, this member shall be appointed by the MEM from among the candidates proposed by the parties (those candidates must in turn meet certain requirements of suitability and independence). EEGSA, however, rejected this solution, and the CNEE accepted that Article 98 Bis would not apply to the ongoing process of constituting the Expert Commission.[110] Finally, the CNEE proposed Mr Carlos Bastos as the third member of the Expert Commission, and the proposal was accepted by EEGSA. On 6 June 2008, both parties signed the Expert Commission's certificate of appointment.[111]

64. In its Memorial, TGH complains again, as in the Original Arbitration, about the introduction of Article 98 Bis.[112] However, this complaint was already rejected by the Original Tribunal.[113]

65. On the other hand, in parallel with the discussions regarding the third member of the Expert Commission, the parties discussed the possibility of adopting a set of administrative rules to regulate its functioning (the ***Operating Rules***).[114] The question of whether the Operating Rules were agreed among the parties was intensely debated in the Original Arbitration. This issue was relevant because one of the rules proposed by EEGSA stipulated that the Expert Commission itself would verify the correct incorporation of its pronouncements into the tariff study in order to set the tariffs, when this was actually within the competence of the CNEE. In its Memorial, TGH states once more that there was an "agreement on the operating rules between CNEE and

---

110 *Ibid*, paras. 195, 196.

111 *Ibid*, paras. 203-207.

112 Claimant's Memorial, 1 September 2017, para. 19.

113 Award, 19 December 2013, para. 636.

114 *Ibid*, paras. 197-202.

EEGSA".[115] The Original Tribunal, however, ruled that "[t]he Arbitral Tribunal finds no evidence in the record that Operating Rules were ever agreed between the regulator and the distributor",[116] concluding that "the Arbitral Tribunal therefore rejects the Claimant's arguments that the CNEE arbitrarily disavowed the agreed Operating Rules".[117]

66. Moreover, in its Memorial, TGH complains that the member appointed by the CNEE to the Expert Commission, Mr Riubrugent, engaged in *ex parte* communications with the CNEE, and supposedly disclosed the content of the Expert Commission's deliberations.[118] This argument was also presented in the Original Arbitration, and the Original Tribunal concluded that "[t]he Arbitration Tribunal is not convinced that, in communicating with Mr. Riubrugent, the regulator acted improperly".[119]

e. The report of the Expert Commission and its dissolution

67. After requesting an extension of the original deadline for its report to be issued, the Expert Commission finally issued it on 25 July 2008.[120] This was just three working days before the date on which the new tariffs were supposed to enter into force.

68. Contrary to what TGH claims in its Memorial,[121] the Expert Commission decided in favour of the CNEE on the majority of the disagreements referred to it.[122] It determined that (i) the Bates White studies were not auditable and hence did not meet the requirements of traceability, an objection which had been reiterated by the CNEE;[123] (ii) Bates White and EEGSA had not yet presented the comparisons of national and

---

115 Claimant's Memorial, 1 September 2017, para. 27, quote extracted and translated from Spanish version of TGH's Memorial, the English version says "after discussing the operating rules". *See also* para. 33.

116 Award, 19 December 2013, para. 649.

117 *Ibid*, para. 650.

118 Claimant's Memorial, 1 September 2017, para. 27.

119 Award, 19 December 2013, para. 652.

120 Report of the Expert Commission, 25 July 2008, **Exhibit R-1038**.

121 Claimant's Memorial, 1 September 2017, para. 29.

122 *See* Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 390-410.

123 Report of the Expert Commission, 25 July 2008, **Exhibit R-1038**, pp. 224-226.

international prices needed for the CNEE to verify the efficiency of the prices included in the model, nor the price database or benchmarking study that would allow an audit of the prices presented;[124] (iii) the divider 2 in the formula for calculating the return of the distribution company was not a typo and the depreciation had to be taken into account, contrary to EEGSA's assertions (although the Expert Commission proposed a lower divider than that proposed by the CNEE);[125] and (iv) that many of the construction units employed by Bates White to design the model company were not optimal.[126]

69. On 28 July 2008, pursuant to the legal framework, the CNEE notified to EEGSA its Resolution CNEE no. 3121, through which the CNEE dissolved the Expert Commission.[127] The CNEE understood that, having rendered its decision, the Expert Commission had concluded its mandate, and therefore the CNEE had the right to dissolve it.[128] In its Memorial, TGH criticises the dissolution of the Expert Commission by the CNEE[129] and the fact that the CNEE had objected to the participation of Mr Riubrugent in subsequent meetings of the (then already dissolved) Expert Commission.[130] TGH made this same criticism in the Original Arbitration where the Original Tribunal rejected it, holding that "the Arbitral Tribunal finds that the CNEE was entitled, once its report had been submitted, to dissolve the Expert Commission".[131]

70. Also on 28 July 2008, EEGSA sent to the CNEE its revised tariff study, allegedly incorporating the pronouncement of the Expert Commission (the ***Study of 28 July*** or the ***Bates White Study***). This study calculated a VNR for EEGSA of US$ 1,053 million.[132]

124 *Ibid*, pp. 242-244, 248, 249.

125 *Ibid*, pp. 312-314.

126 *Ibid*, p. 291 (regarding underground networks), p. 302 (on low-voltage connections) and pp. 278, 279 (regarding the number of outputs per transformation centre).

127 Award, 19 December 2013, para. 213.

128 *Ibid*, para. 657.

129 Claimant's Memorial, 1 September 2017, para. 34.

130 *Ibid*, para. 35.

131 Award, 19 December 2013, para. 657.

132 *Ibid*, para. 212.

f. The fixing of tariffs for the period 2008-2013

71. On 29 July 2008, the CNEE issued Resolution 144-2008, which noted that the Expert Commission had confirmed that the Bates White Study had not incorporated all of the CNEE's observations. Hence, the Resolution established that the CNEE had the authority to fix the tariffs based on the VAD study prepared for the CNEE by its independent pre-qualified consultant Sigla (the ***Sigla Study***).[133] As explained below, the decision of the CNEE to adopt the Sigla Study and reject the Bates White Study, without verifying whether that study incorporated the pronouncement of the Expert Commission, is the only aspect of the CNEE's conduct during EEGSA's 2008 tariff review that the Original Tribunal considered to be contrary to the Treaty, because (in the opinion of the Original Tribunal) the CNEE had failed to adequately justify these measures.[134]

72. On 30 July 2008, the CNEE issued two resolutions, Resolutions CNEE No. 145-2008 and No. 146-2008,[135] which fixed EEGSA's tariffs on the basis of the Sigla Study. Since the CNEE noticed that EEGSA had not submitted accounting and financial information on the depreciation of its asset base[136], this study adopted the FRC formula that had been established in the Terms of Reference, including the depreciation factor of the asset base equal to 50 percent.[137] The resulting VNR was roughly US$ 465.3 million and implied an annual VAD for EEGSA of approximately US$ 98 million.[138]

---

133 Resolution CNEE-144-2008, 29 July 2008, **Exhibit R-1041**.

134 *See* Section III.B.3 below.

135 Award, 19 December 2013, paras. 223, 224; Resolution CNEE-145-2008, 30 July 2008, **Exhibit C-1069**; Resolution CNEE-146-2008, 30 July 2008, **Exhibit C-1070**.

136 Colom I (Original Arbitration), paras. 148, 149; Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 418-420.

137 Award, 19 December 2013, para. 225.

138 *Ibid*, para. 226.

g. Local appeals filed by EEGSA

73. EEGSA filed local appeals against the decisions of the CNEE, and in particular against Resolution CNEE 144-2008, which had rejected the Bates White Study.[139]

74. The proceedings reached the highest court in Guatemala, the Constitutional Court, which issued two rulings rejecting EEGSA's position, and confirming the legality of the CNEE's conduct during the tariff review process.[140]

75. In its ruling dated 18 November 2009,[141] which focused on Resolution 144-2008,[142] the Constitutional Court decided that the report of the Expert Commission was not binding. The Constitutional Court also considered that the CNEE had acted within its powers. This was because it "*had to follow the process regulated by law*" during EEGSA's tariff review process, and that included deciding which of the VAD studies, either the Bates White Study or the Sigla Study, should be used to set the tariff.[143]

76. In its ruling of 24 February 2010, the Constitutional Court also ruled that the procedure followed by the CNEE during the tariff review had been proper and in compliance with the regulatory framework. This included the CNEE's decision to approve the VAD study prepared by Sigla.[144] The Constitutional Court indicated that the Expert Commission had issued a non-binding report and that, once it had done so, the CNEE was entitled to proceed to use the VAD study that it considered suitable for the purpose of fixing the tariff.[145]

---

139 *Ibid*, para. 231.

140 Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2006, 18 November 2009, **Exhibit R-1049**; Decision of the Constitutional Court, Case File 3831-2009, 24 February 2010, **Exhibit R-1051**.

141 Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2006t, 18 November 2009, **Exhibit R-1049**.

142 Resolution CNEE-144-2008, 29 July 2008, **Exhibit R-1041**.

143 Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2006, 18 November 2009, **Exhibit R-1049**, pp. 72-75, 78-82 (emphasis added).

144 Decision of the Constitutional Court, Case File 3831-2009, 24 February 2010, **Exhibit R-1051**, pp. 70-72.

145 *Ibid*, pp. 73-78.

3. The sale of EEGSA to EPM in October 2010

77. Towards mid-2010, the Colombian company Empresas Públicas de Medellín E.S.P. (***EPM***) contacted Iberdrola, the majority shareholder and operator of EEGSA, to communicate its interest in purchasing EEGSA. Together with Iberdrola, TGH and EDP entered into a negotiation process with EPM which resulted in a formal binding offer by EPM of US$ 605 million for the totality of the shares in DECA II (which, as explained above, included EEGSA and other assets in Guatemala).[146] The sale was concluded at this price on 21 October 2010.[147] No contemporary valuation of EEGSA, made either by the buyer or by the sellers for the purpose of the sale, was ever presented in the Original Arbitration. The portion of the price paid by EPM to acquire DECA II that accounted for EEGSA's shares was estimated, for the purposes of the Original Arbitration, by TGH's expert, Mr Kaczmarek, in approximately US$ 562.4 million.[148]

78. One year and nine months before closing the sale of its stake in EEGSA, on 9 January 2009, TGH had sent a letter to Guatemala notifying it of a dispute under the Treaty (the ***Notice of Intent***).[149] Later, on 20 October 2010 (i.e. the day before selling its stake in EEGSA to EPM), TGH presented the Notice of Arbitration and indicated that its losses in EEGSA as a result of the tariff review totalled approximately US$ 285 million.[150] A few months later, in the course of the Original Arbitration, TGH reduced its claim to US$ 249.5 million, once the effect of the sale of its stake to EPM had been taken into account.[151]

---

146 Letter from EPM to Iberdrola, TPS and EDP, 6 October 2010, **Exhibit C-1082**; Award, 19 December 2013, para. 236. The share corresponding to TGH's stake was US$ 181.5 million.

147 Stock Purchase Agreement between Iberdrola Energía S.A., TPS de Ultramar Guatemala S.A., Electricidade de Portugal and EPM, 21 October 2010, **Exhibit R-1059**; Award, 19 December 2013, para. 237.

148 Award, 19 December 2013, para. 750.

149 Notice of intent to submit a dispute to arbitration, 9 January 2009, **Exhibit R-1044**.

150 Notice of Arbitration (Original Arbitration), 20 October 2010, p. 24.

151 Claimant's Memorial (Original Arbitration), 23 September 2011, para. 312. The claim was later reduced to US$ 243.6 million according to the Reply presented by TGH. *See* Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, para. 321.2.

79. By way of comparison, TGH's damages claim contrasts strongly, by reason of its elevated value, with the claim lodged by its partner Iberdrola in its parallel ICSID arbitration, which the latter had initiated in March 2009 under the treaty between Spain and Guatemala. That arbitration related to Iberdrola's stake in EEGSA, and was based on the same measures that formed the basis of TGH's claim.[152] Iberdrola's original claim was for US$ 336 million, which was later reduced to US$ 181 million once the sale of its stake in EEGSA was concluded.[153] As stated, in the case of TGH the claim was much higher (US$ 249.5 million after the sale). It is worth recalling that TGH held a much smaller stake in EEGSA than Iberdrola: 24.26 percent, as compared to Iberdrola's 39.64 percent. This evidences the disproportionate nature of TGH's claim.

80. It is curious that in its Notice of Intent of 9 January 2009, TGH alleged that its investment in Guatemala was "severely jeopardize[d] " and had *de facto* been expropriated,[154] and in its Notice of Arbitration in the Original Arbitration, on 20 October 2010, TGH said that Guatemala's conduct "jeopardizes long-term sustainability" of EEGSA and that its "operational viability" had been "severely undermined".[155] Just a day later, the sale of EEGSA to EPM for more than US$ 500 million took place.[156] Moreover, during the sale process in September 2010, EEGSA's shareholders, including TGH, presented this company to the buyer as "EEGSA, one of the best and most solid companies in the country".[157] Thus, EEGSA neither lacked viability nor was it severely undermined, nor was it in serious danger, nor, as TGH affirmed in its Memorial in the Original

---

152 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID case no. ARB/09/5), Award, 17 August 2012, **Exhibit RL-1019**, Section II.

153 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID case no. ARB/09/5), Decision on Annulment, 13 January 2015, **Exhibit RL-1024**, para. 36. During the Original Arbitration, TGH objected the presentation of this information to the Original Tribunal, arguing that TGH did not have access to the record of the Iberdrola case. However, after the publication of the annulment decision in the *Iberdrol*a case, in January 2015, the amounts claimed by Iberdrola are public knowledge.

154 Notice of Intent, 9 January 2009, **Exhibit R-1044**, para. 28.

155 Notice of Arbitration (Original Arbitration), 20 October 2010, para. 69.

156 Stock Purchase Agreement between Iberdrola Energía S.A., TPS de Ultramar Guatemala S.A., Electricidade de Portugal and EPM, 21 October 2010, **Exhibit R-1059**; Award, 19 December 2013, para. 237.

157 Deca II – Management Submission, September 2010, **Exhibit C-1139**, p. 26.

Arbitration, was the tariff approved by the CNEE in 2008 "[e]conomically [d]evastating for EEGSA".[158]

81. On the other hand, in its Memorial, TGH indicates that the decision to seek a buyer for EEGSA was made by "TECO and its partners" as a result of the tariff review for 2008-2013.[159] However, as explained below, during the document production phase, when Guatemala requested that TGH submited evidence of its alleged search for a buyer, not a single page was produced.[160] In fact, all of the evidence that has been presented in this arbitration and in the Original Arbitration shows that it was Iberdrola who prompted the sale of EEGSA for its own commercial reasons. In her cross-examination during the hearing of the Original Arbitration, Ms Callahan, the Chief Executive Officer of TECO Energy, Inc., admitted that after the tariff review, EEGSA had continued to generate profits and that TGH had not made any attempt to sell its shares.[161] Therefore, it is not

158 Claimant's Memorial (Original Arbitration), 23 September 2011, Section II.F.7.

159 Claimant's Memorial, 1 September 2017, para. 44.

160 *Redfern Schedule*, 20 October 2017, Respondent's document production request No. 2:

> A. Documents or category of documents requested
>
> Any document that reflects TECO's search for a purchaser of EEGSA or its interest in EEGSA from the date of the fixing of the 2008-2013 tariff (1 August 2008) until the date of EPM's non-binding offer (26 July 2010).
>
> […]
>
> C. Summary of objections by disputing Party to production of requested documents
>
> […] Claimant confirms that it does not have any documents responsive to this request in its possession, custody, or control.

See also paras. 145, 146, 169, 172 and 173 below.

161 Respondent's Post Hearing Brief (Original Arbitration), 10 June 2013, para. 357; Hearing Transcript (English) (Original Arbitration), Day Two, 580:20-584:18, Callahan, and specifically, 584:12-18:

> Q: […] Why is that? TECO Energy is a sophisticated energy company. Why wouldn't it be in a position to identify potential buyers of an asset such as this?
>
> A: Not necessarily.
>
> Q: But it didn't even try, did it?
>
> A: No, we did not put -- we did not put our piece up to be marketed.

Hearing Transcript (English) (Original Arbitration), Day Two, 577:22-578:4 Callahan:

true that the tariff approved by the CNEE for EEGSA in 2008 prompted TGH to sell its shares. TGH only considered the possibility of selling its stake at a much later stage, and it did so because its partner Iberdrola (the operator of the company) indicated its intention to sell to EPM.[162]

82. In fact, evidence from the time of the sale demonstrates that Iberdrola, TGH and EDP made the decision to sell based on corporate strategies that were not related to EEGSA's tariff review of 2008. None of the partners referred to the supposed decrease in tariffs for the period 2008-2013 to justify the sale of their interests in EEGSA. Iberdrola explained to its shareholders that the sale was due to the need to ensure available capital to finance investments in Mexico and Brazil.[163] TGH, in turn, explained that its core business continued to be local energy supply in the United States, and that the sale would allow it to also focus its activity on the two energy production plants in Guatemala in which it held a stake.[164] Further, other documentary evidence presented by Guatemala indicated that TGH continued to consider Guatemala a stable country for investments.[165] Finally, EDP explained that the sale was in keeping with its strategy of divestment in non-strategic assets in which the company could not exercise control.[166]

83. Even more significantly, as further explained below, TGH never presented evidence (either in the Original Arbitration or in this arbitration) demonstrating that the tariffs fixed for the five-year period 2008-2013 had any impact on the sale price of EEGSA to

---

> Q: […] You spend some time in your Statement explaining the negative effect of those tariffs on EEGSA's income. But is it right that, notwithstanding the reduced VAD, EEGSA did remain in positive income after you did that analysis?
>
> A: They did, yes.

162 Hearing Transcript (English) (Original Arbitration), Day Two, 581:8-584:18, Callahan; Respondent's Post-Hearing Brief (Original Arbitration), 10 June 2013, para. 357.

163 *See* Iberdrola Energía S.A. Press Release, "Iberdrola sells its stake in four Guatemalan electrical companies", 22 October 2010, **Exhibit R-1062**.

164 *See* Teco Press Release, "TECO Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company", 21 October 2010, **Exhibit R-1061**.

165 "Price lowered on Tampa contract", *Prensa Libre*, 12 July 2010, **Exhibit R-1055**; Teco Press Release, "TECO Energy reports third quarter results", 28 October 2010, **Exhibit R-1064**.

166 *See* EDP press release, "EDP sells its stake in DECA II", 21 October 2010, **Exhibit R-1060**.

EPM. In this respect, the Original Tribunal concluded that there was insufficient evidence as to how the tariffs had affected the sale price, as well as to the assumption that the tariffs would remain unaltered beyond 2013, and indefinitely in the future.[167]

4. The evolution of EEGSA after 2013

84. In its Memorial, TGH argues that EEGSA's 2008 tariff led to financial losses for the company and to the downgrading of EEGSA by the credit rating agencies Standard & Poor's and Moody's. What TGH fails to mention, however, is that in subsequent years, without any change in EEGSA's tariff, nor any changes in the methodology underlying the setting of its tariffs, the company maintained its growth patterns.[168] It also continued to generate profits for its shareholders[169] and its ratings from the same credit rating agencies improved considerably.

85. In fact, as early as 2010, Moody's emphasised the negative impact of the high degree of the litigiousness of Iberdrola and TGH in managing EEGSA, and improved the rating of EEGSA's outlook from "negative" to "stable".[170] According to Moody's, this was the result of the "expected harmony" between the company and the CNEE, in particular "given the litigant relationship between EEGSA's former owners and the regulatory body".[171]In 2012, Moody's upgraded the rating of EEGSA's outlook to "positive", indicating that the improvement "is underpinned by EEGSA's ability to generate robust cash flows and record solid credit metrics despite the reduction of the Value Added for

167 Award, 19 December 2013, para. 755. As explained below (*see* Section III.B.4 below), it should be noted that the Decision on Annulment does not contradict this determination. In fact, the Committee's criticism regarding the Original Tribunal's decision to reject EEGSA's claim for alleged future damages focused on the lack of sufficient reasoning behind the Original Tribunal's conclusion, and not on the conclusion itself. Given that the regulatory framework establishes *de novo* tariff reviews every five years, it is utterly speculative to assert that EEGSA's distribution tariffs would remain unchanged forever.

168 EEGSA's annual reports reflect that, after the sale to EPM: "From an economic, accounting perspective, continued growth remained stable, with a result of Q236.9 million in 2010 increasing to Q307.2 in 2011, representing 29.7% growth from 2010 to 2011." EEGSA Annual Report for 2011, 21 March 2012, **Exhibit R-1071**, p. 39.

169 Hearing Transcript (English) (Original Arbitration), Day Two, 577:22-578:4 Callahan.

170 "Moody's advierte mejor relación entre EEGSA y regulador", *Business News Americas*, 14 December 2010, **Exhibit R-1065**.

171 *Ibid*.

Distribution tariffs (VAD) in August 2008".[172] That same year, Moody's indicated that "an upgrade of EEGSA's ratings could be triggered by a reasonable outcome of the 2013 VAD review that maintains EEGSA's ability to generate robust cash flows" .[173]

86. The details of EEGSA's tariff review for the period 2013-2018 are discussed below in this Counter-Memorial.[174] It suffices to indicate here that, as explained by Mr Santizo, that review, as is the case with all five-year tariff revisions, was a process autonomous and independent from prior reviews. The review took place in a climate of complete normality and the issues encountered in the previous tariff review (2008-2013) had no impact on the process.[175] The tariff review was concluded with an increase of 19 percent in the low voltage tariffs of EEGSA.[176] That increase was based on an annual VAD of US$ 114.87 million, an increase of US$ 16.6 million with respect to the VAD that resulted from the previous review.[177] As it had predicted in its report of 2012, Moody's improved EEGSA's credit rating in 2013 as a result of that year's tariff review, and then went on to further improve the rating in 2014.[178]

172 "Moody's affirms ratings of EPM and EEGSA following acquisition of DECA II", *Moody's Investors Service*, 22 October 2010, **Exhibit R-1063**; "Moody's affirms EEGSA's ratings; Outlook changed to positive", *Moody's Investors Service*, 17 September 2012, **Exhibit R-1074**; "Moody's upgrades EEGSA's ratings; outlook remains positive", *Moody's Investors Service*, 22 August 2013, **Exhibit R-1081**; "Moody's upgrades EEGSA's ratings; outlook stable", *Moody's Investors Service*, 25 August 2014, **Exhibit R-1082**.

173 "Moody's affirms EEGSA's ratings; Outlook changed to positive", *Moody's Investors Service*, 17 September 2012, **Exhibit R-1074**; "Moody's affirms ratings of EPM and EEGSA following acquisition of DECA II", *Moody's Investors Service*, 22 October 2010, 22 October 2010, **Exhibit R-1063**.

174 *See* Section IV.C.3 below.

175 Santizo, paras. 45-68.

176 *See ibid*, para. 68.

177 *See ibid*.

178 "Moody's affirms EEGSA's ratings; Outlook changed to positive", *Moody's Investors Service*, 17 September 2012, **Exhibit R-1074**; "Moody's upgrades EEGSA's ratings; outlook remains positive", *Moody's Investors Service*, 22 August 2013, **Exhibit R-1081**; "Moody's upgrades EEGSA's ratings; outlook stable", *Moody's Investors Service*, 25 August 2014, **Exhibit R-1082**.

B. THE ORIGINAL ARBITRATION BETWEEN THE PARTIES

1. TGH's claim

87. In the Original Arbitration, TGH maintained that the conduct of Guatemala in the context of the 2008-2013 tariff review of EEGSA had been arbitrary and had frustrated its legitimate expectations. It argued that this breached the international minimum standard of fair and equitable treatment set out in Article 10.5 of the Treaty. TGH made the following claims:

(a) that Guatemala had materially amended the regulatory framework in place at the time it made its investment, contrary to the legitimate expectations of TGH[179] (this concerns the amendment of Article 98 of the RLGE as described above[180]);

(b) that the Terms of Reference for the 2008 review had been formulated by the CNEE with the intention of reducing the VAD and interfering in the preparation of the tariff study;[181]

(c) that the CNEE had not collaborated with EEGSA and its consultant during the tariff review;[182]

(d) that the CNEE manipulated the operation of the Expert Commission;[183]

---

179 Claimant's Memorial (Original Arbitration), 23 September 2011, para. 90, 264; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, paras. 100, 214-215; Claimant's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 25 September 2012, paras. 15, 20 and 23; Claimant's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 106-110; Award, 19 December 2013, paras. 270-279.

180 *See* Section III.A.2.a above.

181 *See* Section III.A.2.b above; Claimant's Memorial (Original Arbitration), 23 September 2011, paras. 99, 106-107; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, paras. 107-109 and 23; Claimant's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 130-135; Award, 19 December 2013, paras. 301-303.

182 *See* Section III.A.2.c above; Claimant's Memorial (Original Arbitration), 23 September 2011, paras. 108-122; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, paras. 117-132 and 23; Claimant's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 136-138; Award, 19 December 2013, paras. 304-306.

183 *See* Section III.A.2.d above; Claimant's Memorial (Original Arbitration), 23 September 2011, paras. 137-142 and 267; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, paras. 4, 139-140 and 249; Award, 19 December 2013, paras. 307-313.

(e) that Guatemala prematurely and arbitrarily dissolved the Expert Commission, without allowing it to perform its functions as set forth in the supposedly agreed Operating Rules;[184]

(f) that the CNEE acted arbitrarily in not approving the tariffs on the basis of the Bates White Study and instead approving them on the basis of the Sigla Study, and had failed to incorporate the conclusions of the Expert Commission;[185] and

(g) that Guatemala had harassed the directors of EEGSA after its tariffs had been fixed, forcing them to leave Guatemala.[186]

88. TGH filed a claim for damages against Guatemala for (i) "historical damages", i.e. lost cash flows which would have been generated by its investment had EEGSA been able to collect the VAD due to it between August 2008 (when the tariffs entered into force) and 21 October 2010, the date in which TGH sold its stake in EEGSA[187] and (ii) for "loss of value" or "future damages", for the alleged loss sustained by TGH represented by the difference between the market value of the shares TGH held in EEGSA in October 2010 in the actual scenario, and the value they would have had on that date but for the measures implemented by Guatemala which, according to TGH, violated the Treaty, i.e. had the CNEE adopted the 2008 tariff based on the Bates White Study, and not Sigla.[188]

---

184 *See* Section III.A.2.e above; Claimant's Memorial (Original Arbitration), 23 September 2011, para. 268; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, paras. 217-219; Award, 19 December 2013, paras. 314-317. TGH added that the Constitutional Court also erred in its interpretation of the regulatory framework and that its decisions were politically motivated.

185 *See* Section III.A.2.f above; Claimant's Memorial (Original Arbitration), 23 September 2011, paras. 189-198; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, para. 181; Claimant's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 153-164; Award, 19 December 2013, para. 660.

186 Claimant's Memorial (Original Arbitration), 23 September 2011, para. 205-206; Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, paras. 208-216; Award, 19 December 2013, paras. 318-320.

187 Claimant's expert calculated that EEGSA's effective loss of cash flows for that period would have been US$ 87 million. Considering its stake of 24.3 percent, TGH's loss came close to US$ 21.1 million. Claimant's Memorial (Original Arbitration), paras. 284-286; Second Expert Report of Mr Brent C Kaczmarek, 24 May 2012 (***Kaczmarek II***) (Original Arbitration), charts 3 and 14; Award, 19 December 2013, paras. 335-336.

188 TGH's expert concluded that the loss in value of the TGH shares in EEGSA came to approximately US$ 222.4 million. That figure emerges from the difference between the values of the shares held by TGH in the real scenario and the counterfactual one (US$ 337.7 million, equivalent to 24.3% of US$ 1,479.3 million,

TGH also claimed compound interest before and after the award, calculated at an annual rate of 8.8 percent.[189]

2. Arguments of Guatemala

89. Guatemala raised an objection to jurisdiction *ratione materiae*, but suggested that for the sake of efficiency and speed of the proceedings there should be no bifurcation; the objection could be resolved together with the merits in the final award, as it was the case.[190] The objection was based on the fact that the claim was actually the same dispute over a question of domestic law which had already been resolved by the Constitutional Court of Guatemala.[191] According to Article 10.16 of the Treaty,[192] the Tribunal only had jurisdiction over claims that genuinely dealt with Guatemala's breach of one of the investment protections in the Treaty. However, the claim brought by TGH merely referred to the correct interpretation and application of the regulatory framework, which had already been analysed and resolved by the local courts. Under international law it is well established that a mere allegation of an infringement of internal law cannot give rise to breach of the treaty, and even more so when, as occurs in this case, the local courts have already decided on the issue and no claim of denial of justice is made. In the

---

the value calculated by EEGSA in the counterfactual scenario). Claimant's Memorial (Original Arbitration), 23 September 2011, par. 283-286 and 296; Kaczmarek II (Original Arbitration), pars. 140-141; Award, 19 December 2013, par. 337-340.

189 Claimant's Memorial (Original Arbitration), 23 September 2011, para. 283; Award, 19 December 2013, paras. 352-359.

190 Award, 19 December 2013.

191 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 47-131; Respondent's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 25 September 2012, paras. 31-78.

192 Specifically, article 10.16 sets forth that:

> In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> that the respondent has breached
>
> an obligation under Section A […].

Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR), 5 August 2004, **Exhibit CL-1005**, art. 10.16.1(a)(i)(A).

Iberdrola v. Guatemala case, which concerned this same dispute, the tribunal denied jurisdiction precisely for the reasons briefly described in this paragraph.[193]

90. Guatemala also opposed TGH's arguments on the merits. In this respect, it rejected the notion that there had been any infringement of TGH's legitimate expectations or that the tariff review had been conducted in an arbitrary or unlawful manner. It argued:

(a) that the regulatory framework under which TGH had made its investment remained in force, and that it had not been substantially altered or amended, for political reasons or otherwise;[194]

(b) that the Terms of Reference were agreed with EEGSA and the FRC formula had not been challenged by EEGSA or TGH;[195]

(c) that the CNEE actively collaborated in the tariff review process and that it was EEGSA, its shareholders and Bates White who had tried to manipulate and abuse the process, including by (1) proposing absolutely senseless VNR and VADs; (2) Mr Pérez's visit; and (3) the 432 times that Bates White departed from the Terms of Reference, including to justify the failure to present information in an auditable format;[196]

---

193 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, **Exhibit RL-1019**.

194 *See* Section III.A.2.a above. Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 260-285 and 541-590; Respondent's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 25 September 2012, paras. 79-213; Respondent's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 79-213; Award, 19 December 2013, paras. 368 and 373-376. Guatemala also rejected the notion that TGH had fromed expectations at the time of the privatization of EEGSA since it did not even exist as a company at the time, *see* Award, 19 December 2013, para. 370.

195 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, para. 399; Respondent's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 25 September 2012, paras. 330 and 447; Award, 19 December 2013, paras. 377-378.

196 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 325-350; Award, 19 December 2013, paras. 393-400.

(d) that the sole purpose for adopting Article 98 Bis of the RLGE was to fill an existing legislative gap, and the Article was nonetheless ultimately not applied in this case;[197]

(e) that the Expert Commission's report was not binding[198] and that the alleged Operative Rules were never agreed upon;[199]

(f) that there had been no interference by the CNEE in the operation of the Expert Commission;[200]

(g) that the Bates White Study of 28 July had not incorporated all of the Expert Commission's pronouncements and the CNEE felt that it was not reliable; consequently, exercising its powers and duties under the law, it had to reject it and use the Sigla Study to set the tariff;[201] and

(h) that Guatemala had never harassed the directors of EEGSA.[202]

91. Without prejudice to its defence arguments over jurisdiction and the merits, Guatemala addressed the reports made by TGH's technical and valuation experts, and provided the

---

197 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 353-357; Award, 19 December 2013, paras. 401-403.

198 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 501-504; Award, 19 December 2013, paras. 381-384 and 404. Guatemala added that in any event these questions referred to interpretation of the applicable domestic law, over which the Constitutional Court had already ruled against TGH. *See* Award, 19 December 2013, paras. 386-387.

199 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 363, 366 and 371; Award, 19 December 2013, paras. 404-407.

200 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 501-504; Respondent's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 25 September 2012, para. 432; Respondent's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 161-166; Award, 19 December 2013, paras. 379-387.

201 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 428-434 and 511-517; Award, 19 December 2013, para. 399 and 400.

202 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 456 and 459; Respondent's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 25 September 2012, para. 488; Award, 19 December 2013, paras. 410-412.

Original Tribunal with an alternative damages valuation. Apart from this, with regard for the "future damages" claimed by TGH, Guatemala argued as follows:

(a) that despite Guatemala's repeated requests, TGH never provided direct evidence to show how the value of its shares in EEGSA had been calculated, for the purposes of the sale to EPM. In particular, TGH never showed whether that value had been influenced by the outcome of the tariff review for the 2008-2013 period. Consequently, there was no means to assess the loss (if any) sustained by TGH in the period after the sale of EEGSA, i.e. from 21 October 2010 onwards;[203] and

(b) that, in particular, given the benchmark efficient company system set out by the LGE, which provides for a new tariff review "from scratch" every five years, it was incorrect to assume that the values established in the tariff review for 2008-2013 would remain unchanged in perpetuity in future quinquennial reviews of EEGSA.[204]

92. As for the interest calimed by TGH, Guatemala accepted that if the Original Tribunal was to award any of the damages claimed, the so-called historical damages should accrue interest using a discount rate based on the capital cost of EEGSA, i.e. the WACC.[205] As for any future damages, the applicable interest rate should be a risk-free rate because, after the sale of its stake to EPM, TGH would no longer be exposed to the risk of operating EEGSA.[206]

3. The Award of the Original Tribunal

93. The final award in the Original Arbitration was issued on 19 December 2013.[207] In the award, the Original Tribunal established it had jurisdiction over the dispute. It also

203 Respondent's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 357-362.

204 Respondent's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 354-356; Respondent's Reply Post Hearing Brief (Original Arbitration), 8 July 2013, paras. 161-162.

205 Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, para. 624; Award, 19 December 2013, para. 432.

206 Respondent's Post Hearing Brief (Original Arbitration), 8 July 2013, para. 175; Award, 19 December 2013, para. 433.

207 Award, 19 December 2013.

concluded that one specific aspect of the CNEE's conduct in establishing the tariffs for 2008-2013 had been arbitrary and amounted to a denial of due process in breach of the minimum standard of treatment provided by the Treaty.

94. First, in a succinct section of the Award only 4 pages long,[208] the Tribunal affirmed its jurisdiction *ratione materiae* over TGH's claim, in clear contradiction with the decision issued in the *Iberdrola* case.

95. As for the merits, the Original Tribunal decided:

(a) that no substantial amendments had been made to the regulatory framework, and that the case did not give rise to any breach of the investor's legitimate expectations;[209]

(b) that the CNEE had not manipulated the Terms of Reference nor had it failed to collaborate with EEGSA in the tariff review process;[210]

(c) that the CNEE had acted in accordance with the regulatory framework when it decided to dissolve the Expert Commission, since the commission had already carried out its task;[211]

(d) that the alleged Operating Rules were never agreed upon by the parties;[212]

(e) that the allegation of reprisals or harassment by Guatemala against directors of EEGSA was unfounded;[213]

---

208 *Ibid*, pp. 97-101, Sections VIII.A.2, VIII.A.3 and VIII.A.4 of the part on "[J]urisdiction", addressing the objections raised by Guatemala, as set forth by the Tribunal Original in para. 442 of the Award.

209 Alternatively, it also determined that the documentation provided by TGH in support of its allegations did not include specific declarations in which Guatemala had affirmed that the regulatory framework would not be modified. In any event, it concluded that the amendments that were adopted did not alter the framework's core principles. Consequently, TGH's argument was rejected. *See* Award, 19 December 2013, paras. 611-622.

210 Award, 19 December 2013, paras. 596-610 and 639-652.

211 *Ibid*, paras. 653-657.

212 *Ibid*, paras. 649-650.

213 *Ibid*, paras. 712-715.

(f) that according to the regulatory framework, the report of the distributor (in this case, the Bates White Study) was not binding on the CNEE;[214]

(g) that neither was the report of the Expert Commission binding on the CNEE, but was rather consultative;[215] and

(h) that, however, the CNEE should have taken the Expert Commission's report into consideration and, when applicable, should have expressed the motives and reasons for disregarding it, as well as disregarding the Bates White Study of 28 July, before approving the tariffs based on the Sigla Study.[216]

96. The Original Tribunal's determination that Guatemala had breached the international minimum standard of fair and equitable treatment provided for in the Treaty is exclusively based on this latter point. That is, that the CNEE, and specifically its Resolution CNEE-144-2008, did not provide sufficient reasons for what the Original Tribunal considered to be a "disregard" of the Expert Commission's report, and as a consequence a disregard also of the Bates White Study supposedly incorporating that report. In other words, the breach consisted in that the CNEE had not given sufficient reasons to explain why it decided not to give deference to the Expert Commission's report and, specifically, why it should not be used as a guide to correct the Bates White Study rather than resorting directly to the Sigla Study. In the words of the Tribunal:

> The Arbitral Tribunal disagrees with the Respondent for the reasons that will be explained below. In the Arbitral Tribunal's view, 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 arbitrarily and in violation of fundamental principles of due process in regulatory matters.
>
> […]
>
> The CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD

214 *Ibid*, para. 531.

215 *Ibid*, paras. 559, 565 and 588.

216 *Ibid*, para. 680.

> 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. However, no such reasons were provided.[217]

97. With regard to damages, the Original Tribunal accepted TGH's claim for historical damages of US$ 21,100,552, i.e. the losses between the date of approval of the new tariffs in August 2008 and the date of sale of EEGSA in October 2010.[218] This calculation was based on the difference in EEGSA's cash flows during that period. It compared the cash flows obtained in the application of the tariff approved by the CNEE (the actual scenario) with the higher cash flows EEGSA would have received had the tariff resulting from the Bates White Study of 28 July been applied (the but-for scenario).[219] This decision of the Original Tribunal entailed a contradiction because, on numerous occasions throughout the Award, the Original Tribunal indicates that the CNEE was not bound by the report of the Expert Commission or by the Bates White Study,[220] and that the infringement of the Treaty only arose from the CNEE's lack of sufficiently explanation of the reasons for rejecting them.[221] Nevertheless, historical damages were calculated on the basis of the contrary assumption that the CNEE should have accepted the report and study.[222] This basically implies that Guatemala has to face the consequences of an action that was determined not to be in breach of the Treaty. In other words, on the basis of the conclusion reached on liability, the Tribunal could never have quantified the damages on the basis of the Bates White Study.

---

217 *Ibid*, paras. 664 and 683.

218 *Ibid*, para. 742.

219 *Ibid*, para. 742.

220 *Ibid*, paras. 531, 533, 542, 545, 563, 565, 588.

221 *Ibid*, para. 690. The Original Tribunal explained that:

> [B]oth 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. The "preliminary review" that the CNEE performed in less than one day was clearly insufficient to discharge that obligation. The Arbitral Tribunal can find no justification, other than its desire to reject the Bates White study in favor of the more favorable Sigla's study, for such a behavior.

222 *Ibid*, paras. 724-728.

98. Regarding the claim for loss of value, the Original Tribunal rejected this claim due to lack of evidence: "the Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale";[223] "[t]here is however 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";[224] "there [is] no evidence in the record of how the transaction has been determined";[225] the "Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent".[226]

99. The Original Tribunal also concluded that it "finds 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".[227] Consequently, the claim was considered "speculative",[228] since "there was nothing preventing the distributor from seeking an increase of the tariffs at the end of the 2008-2013 tariff period".[229] The Original Tribunal maintained that "[a]s a consequence, the Arbitral Tribunal cannot accept that the sale price to EPM was based on the assumption that tariffs would remain forever unchanged post-2013".[230] Thus, the Original Tribunal did not find sufficient proof of the existence and scope of the losses claimed by TGH for the period after 2010. There was no evidence that the sale price of EEGSA to EPM was reduced to account for the impact of the tariff review for the period underway at the time; nor that it reflected any assumption that the tariffs would remain unchanged in subsequent tariff reviews.

223 *Ibid*, para. 749 (emphasis added).

224 *Ibid*, para. 754 (emphasis added).

225 *Ibid*.

226 *Ibid*.

227 *Ibid*, para. 755 (emphasis added).

228 *Ibid*, para. 757.

229 *Ibid*, para. 758.

230 *Ibid*, para. 760.

100. In relation to interest on historical damages, the Original Tribunal determined that such interest would start to accrue after the sale of EEGSA's shares in October 2010.[231] The Original Tribunal rejected awarding interest in the period prior to the sale because, it held, the cash flows relating to the period 2008-2010 had not been discounted. As a result, awarding interest would have resulted in an unjust enrichment for TGH.[232]

101. Regarding the applicable interest rate, the Tribunal rejected TGH's claim that it should be 8.8 percent, i.e. the WACC of EEGSA, and adopted the United States preferential interest rate plus an extra 2 percent, compounded on an annual basis.[233]

4. The Annulment Decision

102. On 5 April 2016, the ICSID Annulment Committee (defined above as the Committee) issued its decision on the respective applications for annulment submitted by the parties (the ***Decision***).[234] The Committee annulled the decision of the Original Tribunal rejecting TGH's claim for future damages resulting from the loss of value of the shares of EEGSA following its sale to EPM in October 2010[235], as well as the decision not to award interest on historical damages[236] for the period prior to the sale of EEGSA in October 2010.[237] The Committee also decided to annul the Original Tribunal's decision with respect to the costs of the arbitration.[238]

---

231 *Ibid*, paras. 762-728.

232 *Ibid*, para. 765.

233 *Ibid*, paras. 767-768.

234 Decision on Annulment, 5 April 2016.

235 *Ibid*, paras. 123-139.

236 The arguments of Guatemala regarding TGH's claims in this arbitration are without prejudice of its arguments in the confirmation and enforcement proceedings of the Award before the United States District Court for the District of Columbia. Guatemala makes express an reservation that nothing in this brief or any other pleading submitted to this Tribunal shall be interpreted, fully or partly, as a waiver of the arguments, objections and positions taken by Guatemala before any competent courts.

237 Award, 19 December 2013, paras. 176-198.

238 *Ibid*, paras. 358-362.

a. The annulment by the Committee of the decision by the Original Tribunal over future damages or loss of value

103. TGH requested the annulment of the decision rejecting the claim for future damages or loss of value on the basis of five different grounds.[239]

104. In its Decision, the Committee only referred to two of these grounds for annulment. The Committee rejected the ground for annulment invoked by TGH, under Article 52(1)(e) of the ICSID Convention, alleging contradiction between the Original Tribunal's decision to reject the claim for future damages for lack of sufficient evidence, and the decision to award historical damages for the 2008-2010 period.[240] As the Committee explained, no real contradiction could be discerned in the analysis made by the Original Tribunal.[241] The Committee understood there was no contradiction in the decision of the Original Tribunal because, according to the Committee, the evidence presented was insufficient to prove the existence and extent of the loss of value alleged by TGH.[242] There was insufficient evidence regarding how the price of the transaction had been set. As a consequence, the Original Tribunal could not determine with certainty if an increase in EEGSA's cash flows would have been reflected in the sale price, and to what extent.[243] The Committee also clarified that although the two situations (historical damages and future damages) were similar, they differed in that the claim for loss of value (future

239 TGH sought the annulment of that determination because it considered that (i) the reasoning of the Original Tribunal over the loss of value could not be reconciled with its other conclusions; (ii) the Original Tribunal had failed to take into consideration the documentary and expert evidence regarding the loss of value, (iii) the Original Tribunal had imposed an excessive burden of proof on TGH; (iv) TGH had been deprived of its right to present its case because of the Original Tribunal's consideration of the evidence and, in particular, of an untranslated portion of a press interview given by Mr Restrepo, the executive director of EPM at the time of EEGSA's purchase; and (v) the Original Tribunal had ruled over issues that were not put before it and had, therefore, manifestly exceeded its powers, since the parties allegedly agreed over the existence of future losses if Guatemala was found liable. *See* Claimant's Memorial on Partial Annulment, 17 October 2014, Sections IV.A.1 to IV.A.5.

240 *Ibid*, Section IV.A.1.

241 Decision on Annulment, 5 April 2016, para. 103.

242 *Ibid*, para. 107.

243 *Ibid*, paras. 105-106.

damages) depended on the sale price of EEGSA, whereas the claim for historical damages did not.[244]

105. As for the ground for annulment under Article 52(1)(e) of the ICSID Convention, based on alleged lack of reasoning, the Committee held that the Original Tribunal's decision "d[id] not satisfy the reasoning requirements" of that Article.[245] According to the Committee, the Original Tribunal had not given sufficient explanation in relation to the evidentiary value of (i) the experts' reports on valuation;[246] (ii) certain documents in the record regarding how the price of EEGSA's shares had been determined, namely the letter containing the non-binding offer dated 26 July 2010, in which EPM offered to buy DECA II for US$ 597,000,000 (the ***Non-Binding Offer Letter***) and the opinion of Citigroup dated 14 October 2010 (***Citigroup Opinion***);[247] and (iii) the terms of reference for the 2013-2018 review,[248] since the Original Tribunal had concluded, erroneously according to the Committee, that no evidence had been provided on the establishment of the tariffs for the 2013-2018 period.

106. Having decided to annul the Original Tribunal's decision on future damages on the basis of a failure to state reasons, the Committee did not consider it necessary to address the other grounds for annulment alleged by TGH.[249]

b. Other annulments ordered by the Committee

107. The Committee also annulled the Original Tribunal's decision to reject TGH's claim for interest on historical damages for the period of 2008-2010.[250] The Committee concluded that the decision of the Original Tribunal to reject that interest on the grounds that it amounted to unjust enrichment constituted a serious departure from a fundamental rule of

244 *Ibid*, para. 107.

245 *Ibid*, para. 138.

246 *Ibid*, paras. 130-132.

247 *Ibid*, para. 133; Non-Binding Offer Letter, 26 July 2010, **Exhibit C-1081**; Citigroup Fairness Opinion, 14 October 2010, **Exhibit C-1083**.

248 Decision on Annulment, 5 April 2016, para. 134.

249 *Ibid*, paras. 150, 159 and 167.

250 Regarding TGH's claim for historic damages, *see* Section III.B.5 below and, in particular, para. 112.

procedure. As such, it held that the decision had to be annulled under Article 52(1)(d) of the ICSID Convention. According to the Committee, the Original Tribunal did not give the parties an opportunity to be heard in connection with the legal concept of "unjust enrichment".[251]

108. Finally, the Committee decided that the Original Tribunal's decision on costs could not survive in the light of the annulment of certain sections of the Award and, therefore, had to be annulled as well.[252]

5. State of the process of acknowledging and enforcing the Award.

109. On 16 January 2017, TGH filed a petition for the confirmation of the Award before the United States District Court for the District of Columbia.[253]

110. On 5 April 2017, Guatemala was declared in default as it had not appeared in the proceedings.[254] However, at the request of Guatemala, the competent judge revoked that decision on 27 April 2017, finding that TGH had not properly notified Guatemala of the proceedings to confirm the Award.

111. Once properly notified, Guatemala presented its defence and objections in the proceedings.[255] These defences, and any others that may be submitted in those proceedings, are pending before the District Court.

112. Consequently, the proceedings for the confirmation and enforcement of the Award are currently pending. Guatemala's responses to TGH's claims in this arbitration are without prejudice to its arguments in those proceedings. Guatemala expressly reserves that nothing indicated in this document or any others that are submitted to this Tribunal shall

---

251 Decision on Annulment, paras. 183-198.

252 *Ibid*, paras. 358-362.

253 *See* Petition to confirm arbitral award, 16 January 2017, **Exhibit R-1084**.

254 *See* Order of the United States District and Bankruptcy Courts for the District of Columbia, 5 April 2017, **Exhibit R-1085**.

255 Memorandum in Support of the Motion to Dismiss presented by the Republic of Guatemala before the United States District Court for the District of Columbia, 8 November 2017, **Exhibit R-1087**, Executive Summary.

be interpreted, in whole or in part, as a waiver of Guatemala's arguments, objections and claims before any competent courts.

IV. TGH'S CLAIM FOR FUTURE DAMAGES OR "LOSS OF VALUE" IS GROUNDLESS

113. TGH's claim includes two categories of damages it allegedly sustained, namely: (i) damages between 21 October 2010, the date it sold its stake in EEGSA to EPM, and 31 July 2013, the date on which the tariffs object of this arbitration ceased to apply; and (ii) damages sustained from 1 August 2013 onwards.

114. As explained above,[256] the Original Tribunal rejected this claim entirely on the grounds that TGH had not provided sufficient evidence of the existence of damages in either of the two scenarios following the sale of its interest in EEGSA. Although this conclusion was then overturned by the Committee on the basis of scarcity of reasoning, the Committee clarified that its determination did not turn on the pertinence or relevance of the evidence submitted by TGH in the Original Arbitration allegedly supporting such damages.[257] Consequently, the Committee's only conclusion was that the Original Tribunal had not sufficiently explained its treatment of the evidence; the Committee did not decide (nor could it decide, given the limited scope of its jurisdiction under Article 52 of the ICSID Convention) that the conclusions of the Original Tribunal were erroneous.[258] As explained below, even if it could be considered that the Award was not adequately reasoned on this point, the evidence presented by TGH in support of the alleged future damages was, and continues to be, insufficient, and the claim was, and continues to be, speculative.

115. As explained in the sections below, in this arbitration TGH not only continues to fail to satisfy the burden of proof but also fails to prove the causal relationship between the violation of the Treaty and the alleged future damages it claims. Without prejudice to this, as the economic experts from Compass Lexecon presented by Guatemala explain,

256 *See* paras. 98, 99 above.

257 Decision on Annulment, 5 April 2016, paras. 126, 131 and 133; *See* para. 105 above.

258 *Ibid*, paras. 126, 131 and 133.

even if it were decided that TGH is entitled to receive any damages (which Guatemala denies), the calculation provided by TGH in its Memorial is incorrect.

A. THE CONTEXT OF TGH'S CLAIM

116. The relevant context for TGH's claim is as follows:

(a) TGH presents the same claim which has already been rejected by the Original Tribunal holding that TGH did not provide enough evidence to support its claim. TGH is not presenting any additional evidence, but just the same submitted in the Original Arbitration.

(b) TGH cannot argue that the decision of the Original Tribunal to award compensation for historical damages, while denying it with regard to future damages, is contradictory. Therefore, it must provide concrete and specific evidence of damages for loss of value or future damages. However, it does not do so.

(c) Although the Annulment Committee annulled the decision of the Original Tribunal on the grounds that it had not given sufficient reasons for its decision, TGH's lack of evidence with respect to its claim for loss of value was, and continues to be, manifest.

117. We will briefly analyse each of these points in turn.

1. TGH presents the same claim and the same evidence that was already rejected by the Original Tribunal

118. TGH makes exactly the same claim for future losses or loss of value that was presented in the Original Arbitration. TGH is again claiming the alleged losses suffered from October 2010 onwards, which it defined, and continues to define, as "damages for loss in value".[259] TGH calculated, and continues to calculate, these losses by comparing: (i) the value of its shares in EEGSA in the "actual scenario", i.e. their value as of October 2010, considering the cash flows that EEGSA would generate until the end of the concession in

---

259 Claimant's Memorial, 1 September 2017, Section III.

2049 based on the tariff approved by the CNEE in 2008 (the value which would be reflected in the price at which it sold its shares in EEGSA); and (ii) the value of its shares in EEGSA in the but-for scenario, that is, their value on the same date as in (i) above, but taking into account the increased cash flows EEGSA would have generated in the same period applying the higher tariffs calculated on the basis of the Bates White Study of 28 July, which TGH considered to be the correct tariffs.[260] The difference between the two scenarios supposedly demonstrates that the value of TGH's shares in EEGSA decreased by US$ 222,484,783,[261] the same amount which TGH also claimed as compensation in the Original Arbitration.[262]

119. As it is apparent from the above, TGH's claim for loss of value depended, and continues to depend, on many fundamental issues in respect of which TGH simply did not provide sufficient evidence in the Original Arbitration, and on which it also fails to provide sufficient evidence in this arbitration, in particular:

(a) What was the actual price at which TGH sold its shares in EEGSA to EPM? The sale price is a key issue for TGH, given its view that that price allegedly demonstrated and crystallised TGH's losses in relation to the decreased value of EEGSA.[263] However, TGH has only revealed the price that EPM paid for DECA II. In order to establish the price received by TGH in relation to EEGSA, TGH relies on the damages calculation provided by its valuation expert in the Original Arbitration, i.e. a calculation made exclusively for the purposes of litigation.

(b) How was that price negotiated and calculated? This question is important in order to determine: (i) whether the price that TGH received for EEGSA was affected by

---

260 Claimant's Memorial on Partial Annulment of the Award, 17 October 2014, paras. 36-37; First Expert Report of Mr Brent C. Kaczmarek, 21 September 2011 (***Kaczmarek I***) (Original Arbitration), paras. 129, 153-156 and Chapter IX; Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), 24 January 2012, paras. 591-598; Claimant's Memorial, 1 September 2017, paras. 165-166.

261 Claimant's Memorial, 1 September 2017, para. 219.

262 Claimant's Post Hearing Brief (Original Arbitration), 10 June 2013, paras. 333-360; Respondent's Reply Post Hearing Brief (Original Arbitration), 8 July 2013, paras. 161-172; Kaczmarek II (Original Arbitration), para. 141 (Table 14); Claimant's Memorial, 1 September 2017, paras. 219-225.

263 Claimant's Reply Post Hearing Brief (Original Arbitration), 8 July 2013, para. 125.

the 2008 tariff and, if so, the extent of this impact; (ii) whether any other factors could also have had an effect on the price; and (iii) whether higher tariffs would have resulted in a higher price, as TGH alleges, and, if so, the extent to which the price would have been increased by higher tariffs.

(c) How does TGH provide evidence of the alleged existence of future damages, both for the period between 21 October 2010 and 31 July 2013 and for subsequent periods (from August 2013 onwards)? In particular, given that TGH cannot argue that it is contradictory that the Original Tribunal awarded compensation for historical damages (losses incurred before 21 October 2010) but denied it with regard to future damages (after 21 October 2010), TGH must prove these latter damages specifically, something which it has not done.[264]

(d) How could TGH assume in 2010 that the 2008 tariffs would remain unchanged for the remainder of the concession, when in fact those tariffs would be reviewed in 2013 and every five years thereafter until the end of the concession? The problem with TGH's claim is that the measure that it attacks – the tariff set by the CNEE in 2008 – lasted for only five years, and could not therefore have had permanent effects. This is an issue of causation.[265]

120. Despite the insistence of the Original Tribunal[266] and of Guatemala[267] in the Original Arbitration, TGH did not provide any document which showed the actual value assigned to EEGSA by the sellers and the buyer at the time of the sale, nor how the price was negotiated, in accordance with points (a) and (b) above. Nor did TGH clarify, despite the questions from the Original Tribunal,[268] how it supported its claim for future damages

---

264 *See* section IV.A.2 below.

265 *See* Section IV.C.3 below.

266 Procedural Order No. 1 (Original Arbitration), 16 December 2011: Respondent's document production request, Annex A, Tribunal's decision column; Hearing Transcript (Spanish), Day 2, 223:24-27, Mourre; Letter of the Original Tribunal to the Parties, 11 March 2013, **Exhibit R-1077**, p. 2.

267 Letter from N Blackaby (Freshfields Bruckhaus Deringer) to A Menaker (White & Case) on document production, 7 November 2011, **Exhibit R-1069**, p. 15; Letter from N Blackaby (Freshfields Bruckhaus Deringer) to A Menaker (White & Case) on document production, 21 November 2011, **Exhibit R-1070**, p. 1-2.

268 Hearing Transcript (Spanish), Day 2, 223:11-23, Mourre. Letter of the Original Tribunal to the Parties, 11 March 2013, **Exhibit R-1077**, p. 2.

and, in particular, how it could predict that the 2008 tariffs would remain unchanged in future tariff periods, given that tariffs are reviewed every five years.

121. Given these shortcomings in TGH's claim, it is logical that the Original Tribunal rejected the claim for loss of value for lack of evidence:

(a) "[T]he Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale".[269]

(b) "There is however 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".[270]

(c) "[T]here [is] no evidence in the record of how the transaction price has been determined. The Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent".[271]

(d) "The Arbitral Tribunal also finds 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. […] The Arbitral Tribunal agrees with the Respondent that the claim is in this respect speculative. The Respondent rightly points out that '*it is actually impossible to know what will happen with the tariffs in the future*'".[272]

122. The Original Tribunal's reasoning is clear: it simply considered that there was no evidence of the loss suffered by TGH as a consequence of the sale, or of what that loss consisted of.

---

269 Award, 19 December 2013, para. 749.

270 *Ibíd*, para. 754.

271 *Ibíd*.

272 *Ibíd*, paras. 755, 757 (enphasis in the original).

123. TGH continues to make the same claim based on the same supposed evidence.

2. TGH cannot claim that the decision of the Original Tribunal to award historical damages while denying future damages is contradictory

124. In its Memorial, TGH describes the Decision of the Committee. However, its account surprisingly omits any mention of the fact that the Committee rejected the argument that there was a contradiction between the decision of the Original Tribunal to deny future damages, and the decision to award historical damages as a consequence of the 2008-2013 tariff review. In the words of the Committee:

> The Committee finds no contradiction within the Tribunal's reasoning. The Tribunal never found that an increase in revenues due to higher tariffs would not have resulted in an increase in the transaction price, as TECO appears to believe. The Tribunal dismissed the loss of value claim on evidentiary grounds. The Tribunal stated that it had no evidence on how the transaction price had been determined and that it could not be certain that an increase in revenues "would have been reflected in the purchase price and to what extent".
>
> Equally, the Committee finds no contradiction between, on the one hand, the Tribunal's decision awarding TECO historical damages, and, on the other hand, the Tribunal holding that it could not award future losses because it had not been presented with sufficient evidence to determine whether TECO had suffered a loss of value and its amount. Indeed, the two situations, although similar, are distinguished by the fact that the loss of value claim depended on the sale price of EEGSA, while the historical damages claim did not. This was not contested by the Parties and was explicitly stated within the Award. Because the Tribunal found that it had not been presented with evidence on how the sale price of EEGSA had been determined, the loss of value claim was dismissed.[273]

125. This is very significant. It confirms that, contrary to what TGH argues in its Memorial,[274] the existence of historical damages for the period up to the sale of the shares in EEGSA to EPM (August 2008 to October 2010), which the Original Tribunal accepted, does not automatically mean that there may be claimable losses for the remainder of the tariff

273 Decision on Annulment, 5 April 2016, paras. 106-107.

274 Claimant's Memorial, 1 September 2017, paras. 171-172.

period (October 2010 to July 2013), let alone in subsequent tariff periods (August 2013 and thereafter).

126. In other words, the premise on which TGH bases its claim, that "the award of the former [historical damages] leaves no doubt that TECO is entitled to recovery for the latter", the latter being the damages for the reduction in value, is incorrect.[275] TGH must prove said alleged losses independently, because as the Committee indicated in the passage cited above, TGH's claim for loss of value or future damages involves questions different from those underlying the claim for historical losses. However, TGH does not undertake this task. TGH openly acknowledges that its expert, Mr Kaczmarek, "used the same integrated model to calculate the loss of cash flow portion of damages and the loss of value portion of damages", and that "the assumptions underlying the former […] are the same as those used to calculate the latter".[276] In short, TGH makes the mistake of not recognising the specificity of its claim for loss of value and the corresponding evidentiary requirements.

3. Although the Committee annulled the Original Tribunal's decision for not providing enough reasoning, the insufficiency of the evidence of TGH's claim was manifest

127. As stated above,[277] having rejected TGH's annulment request based on an alleged contradiction in the reasoning of the Original Tribunal, the Committee nevertheless annulled the decision on future damages for failure to state reasons. In particular, the Committee decided that the Original Tribunal had not provided sufficient motivation as to why it considered: (i) that the expert reports from the parties were unsatisfactory and did not constitute "sufficient proof";[278] (ii) that two pieces of evidence on the sale, the Non-Binding Offer Letter from EPM dated 26 July 2010[279] and the Citigroup Opinion of 14

275 *Ibid*, para. 167.

276 *Ibid*.

277 *See* paras. 103-105 above.

278 Decision on Annulment, 5 April 2016, para. 130.

279 Non-Binding Offer Letter, 26 July 2010, **Exhibit C-1081**.

October 2010,[280] did not constitute sufficient proof of the sale price;[281] and (iii) that there was no "information" in the record with regard to the 2013-2018 tariff review, when the terms of reference for that review, dated 23 July 2012, were in the record.[282]

128. Although Guatemala does not seek to reopen the Decision of the Committee on this matter, it is worth highlighting some aspects of that Decision with which Guatemala disagrees. As Guatemala explained in its briefs in the annulment proceedings, in the Award the Original Tribunal did identify and analyse the evidence but simply considered that it was not "sufficiently" convincing to justify an award for future damages.[283] In fact, the actual reason for the decision of the Original Tribunal was that it "finds no <u>sufficient</u> evidence of the existence and quantum of the losses".[284] Indeed, the sufficiency (or insufficiency) of the evidence is a concept which appears in all paragraphs of the Award criticised by the Committee. For example, together with the statement from the Original Tribunal that "there [was] no evidence in the record of how the transaction price has been determined", the same paragraph holds in that respect that "[t]here is however no sufficient evidence" and "cannot conclude with sufficient certainty".[285]

129. For clarification, as will be explained below, the expert reports prepared by the parties and produced between September 2011 and October 2012 could hardly constitute contemporaneous evidence of how the price paid by EPM for EEGSA was determined in October 2010. In fact, only two of the documents to which the Committee refers are contemporaneous with the sale of EEGSA to EPM. Therefore, those documents (the Non-Binding Offer Letter from EPM dated 26 July 2010 and the Citigroup Opinion of 14

280 Citigroup Fairness Opinion, 14 October 2010, **Exhibit C-1083**.

281 Decision on Annulment, 5 April 2016, para. 133.

282 *Ibid*, para. 134.

283 Award, 19 December 2013, para. 749. *See* Respondent's Counter-Memorial on Partial Annulment (Original Arbitration), 9 February 2015, Section IV.B; Respondent's Rejoinder on Partial Annulment (Original Arbitration), 14 August 2015, Section IV.C and IV.D.

284 Award, 19 December 2013, para. 749 (emphasis added).

285 *Ibid*, para. 754.

October 2010[286]) were the only evidence which could have revealed how the sale price took into account the impact of the tariffs for the 2008-2013 period. As will be explained below, neither of these documents support TGH's claim for future damages.[287] However, what is important here is that, reading the Award, one cannot conclude that the Original Tribunal disregarded the existence of these two documents.

130. Indeed, the Original Tribunal referred to these documents on at least three occasions in the Award,[288] but it clearly understood that their evidentiary weight was insufficient (as demonstrated by the fact that TGH never cited these documents to prove its future damages in the Original Arbitration[289]). Thus, the reference of the Original Tribunal to the absence of evidence in the record on these questions must be understood as the lack of evidentiary value of the few documents invoked by TGH, and not necessarily to the non-existence of those documents as such.

131. In any case, this Tribunal must review the same evidence, since TGH has not provided any new evidence in this case, and decide whether TGH has discharged its burden of proof with regard to the future damages it claims. As we will see below, this analysis leads inevitably to the same conclusion that was reached by the Original Tribunal: TGH has not discharged its burden of proving the impact of the 2008-2013 tariff on the sale price and, therefore, TGH's claim for future damages must be rejected.

132. The Committee made the same interpretative mistake when it criticised the statement of the Original Tribunal regarding the alleged lack of information on the establishment of tariffs for the period 2013-2018.[290] The Original Tribunal, knowing that the 2013-2018 tariff review process of EEGSA was underway, stated that "there is no indication <u>that the distributor will be prevented from seeking a change in the tariffs in 2018</u>"[291] and that "the

---

286 Non-Binding Offer Letter, 26 July 2010, **Exhibit C-1081;** Citigroup Fairness Opinion, 14 October 2010, **Exhibit C-1083**.

287 *See* Section IV.B.2 below.

288 Award, 19 December 2013, paras. 236, 424, 426.

289 *See* para. 152 below.

290 Award, 19 December 2013, para. 758.

291 *Ibid* (emphasis added).

claim is […] speculative" and "it is actually impossible to know what will happen with the tariffs in the future".[292] It cannot be assumed that the Original Tribunal ignored the terms of reference of the 2013 tariff review. Rather, given that such terms of reference are the initial document of the review process (and which, as discussed below, granted the parties sufficient flexibility such that it would be impossible to anticipate the result of the tariff review on the basis of the terms of reference alone[293]), the Original Tribunal understood that such document did not provide it with the necessary certainty on the but-for scenario proposed by TGH in order to claim hundreds of millions of dollars. That is so apparent that even the Committee felt the need to clarify what it believed the Original Tribunal had meant: "The Committee is inclined to think that the Tribunal dismissed the loss of value claim because EEGSA's but for value could not be determined with sufficient certainty".[294]

133. In any case, it is indisputable that the decision of the Original Tribunal on future damages was annulled by the Committee solely on the basis of what the Committee considered to be a lack of reasoning, and not because it had a substantial disagreement with that decision or because it was contradictory with other decisions of the Original Tribunal in the Award. As the Committee noted on several occasions in explaining the context of that annulment decision, it was not the responsibility of the Committee to carry out a reassessment of the record[295] or to draw conclusions on the relevance of certain evidence.[296] The reality is that the evidence presented by TGH to support its claim for loss of value was, and continues to be, manifestly insufficient.

B. IN THIS ARBITRATION TGH CONTINUES TO FAIL TO DISCHARGE ITS BURDEN OF PROOF WITH REGARD TO THE DAMAGES THAT IT CLAIMS

134. The same lack of evidence identified by the Original Tribunal in respect of the future damages sought by TGH is apparent in this arbitration, where TGH has not presented any

292 *Ibid*, para. 757 (emphasis added).

293 *See* paras. 222-226 below.

294 Decision on Annulment, 5 April 2016, para. 137.

295 *Ibid*, paras. 126, 131.

296 *Ibid*, para. 133.

additional evidence on this issue. Essentially, TGH is asking this Tribunal for a second opportunity to present its arguments in the hope that, this time, they may be successful. But, as will be explained below, beyond any alleged defect in its reasoning, the decision of the Original Tribunal was the correct one. As in the Original Arbitration, it is not possible here to award TGH damages that it has not proven and that, in fact, do not exist.

1. The burden and the standard of proof on damages under international law

135. In its Memorial, TGH stated that, unlike in cases of legal expropriation, the Treaty does not deal with the calculation of damages for breach of fair and equitable treatment.[297] Therefore, TGH claims that international law should be applied, particularly the principle that States have the obligation to provide full compensation for damage caused by internationally wrongful acts.[298] On this basis, TGH argues that any compensation must restore the situation which would have existed immediately prior to the illegal act, compensated for any additional damage.[299]

136. Guatemala does not object to the standard of compensation for damages under international law. However, it does question TGH's interpretation of the standard of proof applicable to damages. According to TGH, that standard of proof should not be different from the one that applies to the assessment of the facts of the case. The appropriate amount of damages, therefore, should be established according to a balance of probabilities[300] that would enable the level of uncertainty inherent in any valuation of a but-for scenario to be compensated for.[301] As explained below, TGH's analysis confuses the different elements which must be proved as part of any analysis of damages.

---

297 Claimant's Memorial, 1 September 2017, para. 150.

298 *Ibid*, para. 150.

299 *Ibid*, para. 153.

300 *Ibid*, para. 158.

301 *Ibid*.

137. To start with, it must be noted that the *onus probandi* (burden of proof) of the existence and (if applicable) the extent of damages falls on the party claiming those damages.[302] This principle has been confirmed by numerous investment tribunals, including some cited by TGH.[303] Furthermore, as regards the threshold of proof required, i.e. how much proof is required to determine a particular issue, it is important to differentiate between (i) proof of the existence of damage; and (ii) proof of the extent or amount of such damage. Indeed, while, depending on the circumstances of each case, tribunals enjoy a certain level of discretion in accepting reasonably reliable estimates of damages,[304] this discretion is clearly limited by the prior requirement that the claimant must prove that the damage has in fact occurred. As held by the tribunal in *Amoco v Iran*, tribunals are not authorised to accept claims for speculative or uncertain losses:

302 *Victor Pey Casado and President Allende Foundation v The Republic of Chile* (ICSID Case No. ARB/98/2), Award, 13 September 2016, **Exhibit RL-1032**, para. 205 ("It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss […]"); *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v The Government of Mongolia and MonAtom LLC* (PCA Case No. 2011-09) (***Khan Resources v Mongolia*** or ***Khan Resource***), Award on the Merits, 2 March 2015, **Exhibit RL-1025**, para. 375 ("The burden of proof falls on the Claimants to show that they have suffered the loss they claim."); *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award, 29 May 2003, **Exhibit RL-1006**, para. 190 ("[…] the burden to prove the investment's market value alleged by the Claimant is on the Claimant").

303 *Crystallex Int'l Corp. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) (***Crystallex v Venezuela*** o ***Crystallex***), Award, 4 April 2016, **Exhibit CL-1019**, para. 864 ("[…] it is clear that it is the Claimant that bears the burden of proof in relation to the fact and the amount of loss."); *Joseph Charles Lemire and others v Ukraine* (ICSID Case No. ARB/06/18) (***Lemire v Ukraine*** or ***Lemire***), Award, 28 March 2008, **Exhibit CL-1013**, para. 155 ("[…] injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct […]"); *Impregilo S.p.A. v The Argentine Republic* (ICSID Case No. ARB/07/17), Award, 21 June 2011, **Exhibit CL-1025**, para. 371 ("it is incumbent on [the claimant] to prove that it suffered the damage for which it asks to be compensated."); *Achmea B.V. v The Republic of Slovakia* (UNCITRAL, Case CPA No. 2008-13) (formerly *Eureko B.V. v The Republic of Slovakia*), Award, 7 December 2012, **Exhibit CL-1026**, para. 323 ("It is for Claimant to prove its case regarding the 'damage caused'."); *Ioannis Kardassopoulos and others v The Republic of Georgia* (ICSID Case No. ARB/05/18), Award, 3 March 2010, **Exhibit CL-1027**, para. 224 ("the Claimants bear the initial burden of proving their claims"); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v The United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4), Award, 16 June 2010, **Exhibit CL-1021**, para. 12.56 ("[…] the Claimants bear the overall burden of proving the loss founding their claims for compensation."); *Hrvatska Elektroprivreda d.d. v The Republic of Slovenia* (ICSID Case No. ARB/05/24) (***Hrvatska v Slovenia*** or ***Hrvatska***), Award, 17 December 2015, **Exhibit CL-1029**, para. 175 ("[…] the burden of proof falls on the Claimant to show it suffered loss.").

304 *Gold Reserve Inc. v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) (***Gold Reserve v Venezuela*** or ***Gold Reserve***), Award, 22 September 2014, **Exhibit CL-1017**, para. 686 ("[…] the tribunal exercises its judgment in a reasoned manner so as to discern an appropriate damages sum which results in compensation […]").

> One of the best settled rules in the law of the international responsibility of states is that no reparation for speculative or uncertain damage can be awarded.[305]

138. Other tribunals have adopted the same position.[306] Indeed, granting compensation for a loss the existence of which has not been proven would go against the principle of full compensation on which TGH has based its argument. According to this principle compensation must extend to all losses caused (but obviously, only those losses that can be established). Some of the decisions cited by TGH itself reflect this idea: when the losses claimed are "too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent".[307]

139. Various international tribunals have confirmed that there is no flexibility in the evidence threshold applicable to the existence of damages, and that this existence must be established with certainty. This very principle arises from the same cases cited by TGH, including *Crystallex v Venezuela*, in which the tribunal, in its analysis on the standard of proof for damages, mad reference to the "sufficient certainty" with which "the fact" of

---

305 *Amoco Int'l Finance Corp v The Islamic Republic of Iran* (Iran-US Claims, 1987 No. 310-56-3) (***Amoco v Iran*** or ***Amoco***), Partial Award, 14 July 1987, **Exhibit RL-1002**, para. 238.

306 *BG Group Plc. v The Argentine Republic* (UNCITRAL) (***BG Group v Argentina*** or ***BG Group***), Final Award, 24 December 2007, **Exhibit RL-1013**, para. 428 ("Damages that are 'too indirect, remote, and uncertain to be appraised are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles."); *S.D. Myers, Inc. v The Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **Exhibit RL-1004**, para. 173 ("[…] a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote."); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States* (ICSID Case No. ARB(AF)/04/05) (***ADM v México*** or ***ADM***), Award, 21 November 2007, **Exhibit RL-1012**, para. 285 ("[…] lost profits are allowable insofar as the Claimants prove that the alleged damage is not speculative or uncertain, i.e., that the profits anticipated were probable or reasonably anticipated and not merely possible."); *Gold Reserve v Venezuela*, Award, 22 September 2014, **Exhibit CL-1017**, para. 685 ("[…] damages cannot be speculative or merely 'possible' […])"; *ADM v México*, Decision on the Request for Correction, Supplementary Decision and Interpretation, 10 July 2008, **Exhibit RL-1014**, para. 39 ("[…] the tribunal must avoid speculative benefits in its damages calculation."); *Khan Resources v Mongolia*, Award on the Merits, 2 March 2015, **Exhibit RL-1025**, para. 375 ("[…] damages cannot be speculative or uncertain.").

307 *Gemplus v* México, Award, 16 June 2010, **Exhibit CL-1021**, para. 12.56; *See also*, *Murphy Exploration and Production Company International v The Republic of Ecuador* (UNCITRAL, PCA Case No. 2012-16) (***Murphy v Ecuador*** or ***Murphy***), Partial Final Award, 6 May 2016, **Exhibit CL-1023**, para. 487 ("[…] any compensable damage must not be too speculative, remote, or uncertain."); *Hrvatska v Slovenia*, Award, 17 December 2015, **Exhibit CL-1029**, para. 175 ("The standard of proof required is the balance of probabilities and damages cannot be speculative or uncertain.").

the loss must be proved, in contrast with the flexibility applicable to its "quantification".[308] The tribunal concluded as follows:

> [T]he fact (i.e., the existence) of the damage needs to be proven with certainty. In that sense, there is no reason to apply any different standard of proof than that which is applied to any other issue of merits (e.g., liability).[309]

140. The same conclusion was reached by the tribunal in *Gold Reserve v Venezuela*, highlighting the distinction between "proven" and merely speculative damages.[310]

141. The contrast between the requirement to determine with certainty the existence of the alleged damages, and the relative margin of discretion (which does not permit conjecture or speculation) regarding its quantification, was set out by the tribunal in *Al-Bahloul v Tajikistan:*

> While, on the one hand, total certainty should not be required in order to assess damages if the existence of damages has been established, on the other hand, the assessment of damages cannot be based on conjecture or speculation. A persuasive factual basis for the assessment must be shown.[311]

142. In any case and without prejudice to what is indicated below, TGH's analysis is deficient both: (i) with respect to the existence of the damages claimed; and (ii) as regards the extent or amount of those damages. Indeed, the contemporaneous evidence provided by TGH in support of its claim regarding the impact of the tariff review on the sale price (the alleged "loss of value" starting from 2010) does not make it possible to establish with any degree of certainty the "persuasive factual basis", using the language of the tribunal in *Al-Bahloul*, for the existence of such damages, or their amount. In particular, TGH has not

---

308 *Crystallex v Venezuela*, Award, 4 April 2016, **Exhibit CL-1019**, paras. 868-876.

309 *Ibid*, para. 867 (emphasis in the original).

310 *Gold Reserve v Venezuela*, Award, 22 September 2014, **Exhibit CL-1017**, para. 685 ("[…] all of the authorities cited by the Parties – including by Respondent in relation to its claim that a degree of certainty is required – accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently. In particular, those cases that discuss the requirement for 'certainty' do so in the context of distinguishing 'proven' damages from speculative damages, rather than suggesting that a higher degree of proof is applied to damages than to liability.").

311 *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan* (SCC Case No. V(064/2008) ***(Al-Bahloul v Tajikistan),*** Final Award, June 8, 2010, **Exhibit RL-1018**, para. 39.

been able to show the reasons why it decided to sell its stake in EEGSA to EPM. Nor has it been able to demonstrate how the sale price was determined in that transaction, or the effect that the tariff for the period 2008-2013 may have had on said price. Therefore, the future damages claimed by TGH are inherently speculative.

2. TGH has not proven the alleged damage for "loss of value" of its stake in EEGSA as a result of the 2008 tariff review

143. TGH has not discharged the burden or standard of proof for the existence and amount of the future damages it claims, either in the Original Arbitration or in the present proceedings. In particular, there is no contemporaneous evidence (that is, evidence from the time of the sale of EEGSA to EPM in October 2010) in the record of this arbitration that makes it possible to determine the reasons that led TGH to sell its stake in EEGSA, the manner in which the final price for that stake was determined, nor the impact that the VAD fixed for the period 2008-2013 could have had on that price.

a. The absence of evidence from the record

144. As already explained, the Original Tribunal considered that the evidence presented by TGH in the Original Arbitration did not provide a response to any of the questions cited in the preceding paragraph.[312] Although this conclusion was later annulled by the Committee due to a failure of the Original Tribunal to adequately state its reasons,[313] TGH has not presented in this arbitration additional evidence to answer these questions.[314] In fact, despite being the central issue that led to the rejection of its original claim, TGH does not offer any response or concrete evidence to the questions raised by the Original Tribunal concerning the reasons for the sale of its stake in EEGSA, nor with respect to how the price of that transaction was determined.

(i) Absence of proof concerning the reasons for the sale

145. TGH in its Memorial maintains that the sale of its stake in EEGSA took place "in view of the significant damage that the CNEE's unlawful conduct inflicted upon TECO's

312 *See* paras. 98-99 above.

313 *See* paras. 128-133 above.

314 Award, 19 December 2013, paras. 754, 755.

investment"[315]. In support for this assertion TGH cites paragraph 748 of the Award where the Original Tribunal stated that "[t]he Arbitral Tribunal has no reasons to doubt that, as reflected in the minutes, the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework".[316]

146. However, TGH omits the observation that the Original Tribunal made, in the same paragraph, that "[i]t is also true that other considerations might have come into play, such as Iberdrola's own business decisions".[317] In other words, the Original Tribunal clearly emphasised the existence of a reasonable doubt regarding the reasons behind TGH's decision to sell its stake in EEGSA. Furthermore, as already stated above, the evidence contemporaneous to the sale shows that the sale was not motivated by the tariff fixed by the CNEE in 2008.[318]

(ii) Absence of proof on the determination of the price: EPM's Non-Binding Offer Letter and the Citigroup Opinion

147. The absence of evidence is even clearer with reference to the question marks that the price paid by EPM for EEGSA's shares poses, and the possible impact of the 2008-2013 tariffs on that price. In its Memorial, TGH asserts the following:

> All parties to that transaction—the DECA II shareholders and EPM—assumed that, following Guatemala's unlawful actions in setting EEGSA's VAD for the 2008-2013 tariff period, the VAD in future tariff periods would continue to be calculated off on an asset base (VNR) that would not increase in value by any significant extent from the VNR that had been calculated by Sigla, and that the CNEE would continue to apply the same FRC formula that it had used to set the 2008 VAD, which calculated EEGSA's return on an asset base that has been depreciated by half.[319]

315 Claimant's Memorial, 1 September 2017, para. 163.

316 Award, 19 December 2013, para. 748.

317 *Ibid*.

318 *See Section* III.A.3 above.

319 Claimant's Memorial, 1 September 2017, para. 163.

148. However, as explained below, this statement lacks any evidentiary support. It is wholly insufficient to base a claim for more than US$220 million on assertions regarding what the parties to a private transaction allegedly "assumed", as TGH argues in this passage.

149. In support of its position, TGH refers to three documents, whose evidentiary value in establishing the future damages was already dismissed by the Original Tribunal, since they do not say what TGH wants them to say. First, TGH cites EPM's Non-Binding Offer Letter of July 26, 2010, in which EPM offered to buy DECA II for US$ 597 million.[320] Although this letter does not contain any purchase price for EEGSA (as opposed to DECA II, which, as already noted, included other assets), TGH argues that it shows that EPM had performed a valuation analysis of EEGSA's discounted cash flows (***DCF***) and that this analysis was conducted on the assumption that there would be no increase in tariffs in 2013 and 2014.[321] However, on the one hand, TGH has never submitted this DCF analysis, and, on the other hand, TGH fails to mention that the Non-Binding Offer Letter also states that this analysis would be subject to an appropriate due diligence process by EPM: "the approval of the final offer price by the Board of Directors of EPM […][is] subject to on-site due diligence".[322] Hence, not only does EPM's Non-Binding Offer Letter fail to indicate a sale price for EEGSA, but it does not provide any reliable indication of how such a sale price would be calculated, in particular whether tariff increases in 2013 and beyond would be taken into account. In fact, EPM expressly states in the letter in question that it would carry out a due diligence process before providing a "binding offer". This binding offer, in turn, would be used for the final sale.[323] Presumably, the due diligence documents would have included the analysis of the possible tariff increases in 2013 and beyond, and exchanges with TGH and its partners would have provided details on these specific assumptions. However, TGH did not

320 Non-Binding Offer Letter, 26 July, 2010, **Exhibit C-1081.**

321 Claimant's Memorial, 1 September, 2017, paras. 45, 66.

322 Non-Binding Offer Letter, July 26, 2010, **Exhibit C-1081**, p. 1.

323 *Ibid*, p. 4 "Access to Information, Due Diligence."

produce this documentation in the course of the Original Arbitration,[324] nor has it done so in these proceedings.[325]

150. In any case, at most, the Non-Binding Offer Letter from EPM could demonstrate the conservative expectations of the buyer regarding the tariff review of 2013. The Non-Binding Offer Letter obviously could not constitute evidence that there would not be any tariff increase in 2013, or five years later in 2018, or in any subsequent tariff review. In fact, as we have explained regarding the 2013 review, a substantial tariff increase of 19 percent was applied for EEGSA.[326] Therefore, the Non-Binding Offer Letter from EPM simply confirms how unrealistic it is to consider that the sale price reflected some damage caused by the 2008 tariffs, since the tariffs would be revised and could increase in 2013 (as in fact happened).[327]

151. Moreover, in its Memorial, TGH relies on the Citigroup Opinion of 14 October 2010.[328] According to TGH, this document would show that the price paid by EPM for EEGSA's shares was fair, taking into account the tariff approved by the CNEE in 2008.[329] However, the document: (i) does not provide any proof of the sale price for EEGSA, since it refers to DECA II; (ii) does not offer any evidence about the way in which the 2008 tariffs affected the sale price, or were taken into account for the determination of said value; and, above all (iii) does not provide any proof that higher tariffs would have resulted in a higher sale price. In addition (iv) as explained by Guatemala's valuation experts, Dr Manuel Abdala and Mr Julian Delamer from Compass Lexecon, the Citigroup Opinion does not necessarily reflect the expectations that the buyer and seller had in agreeing on the price, but rather is an analysis subsequent to the fixing of the sale price.[330]

---

324 Procedural Order No. 1 (Original Arbitration), 19 December 2011, Redfern Schedule attached, Respondent's Production Requests Nos. C-1, C-2, C-3 and C-4, pp. 17-31.

325 Redfern Schedule, 20 October 2017, Respondent's Response to Claimant's Objections.

326 *See* Section III.A.4 above, and in particular para. 86.

327 *See* para. 86 above.

328 Citigroup Fairness Opinion, 14 October 2010, **Exhibit C-1083**.

329 Claimant's Memorial, 1 September, 2017, para. 45.

330 Expert Report of M Abdala and J Delamer, 2 February 2017, para. 118 and fn. 100.

Messrs Abdala and Delamer point out that the Citigroup Opinion contains a very simplified analysis of EEGSA's business. This is shown particularly by the absence of any analysis of Guatemala's regulatory framework and the simple assumption that the VAD would remain constant throughout the projection period, in clear contradiction with the regulatory framework that provided for reviews every five years.[331]

152. Particularly revealing of the lack of evidentiary force of the Non-Binding Offer Letter and the Citigroup Opinion for the purpose of proving the alleged future damages of TGH, is the fact that, in the Original Arbitration, TGH never invoked these documents for this purpose. Both documents were only disclosed in the Original Arbitration in response to Guatemala's request for documents regarding the sale . Indeed, TGH had to produce them under an order of the Original Tribunal.[332] Moreover, during the proceedings TGH made virtually no mention of these documents to support its arguments and, when it did, it referred to these documents only in connection with matters other than the determination of the sale price of its shares in EEGSA.[333]

153. In short, a claim against a State for hundreds of millions of dollars cannot be substantiated by two brief documents that simply mention the fact that the purchase price of DECA II, not even that of EEGSA, was calculated based on a DCF method, without providing any information on this alleged calculation.

(iii) Absence of evidence concerning the determination of the price: the interview of Mr Restrepo

154. Finally, in alleged support of its future damages claim, TGH refers to the press interview of 23 October 2010 with the CEO of EPM, Federico Restrepo, stating that Mr Restrepo

---

331 *Ibid*. Which, as indicated in Section IV.C.3, did not occur in the 2013-2018 tariff review.

332 Procedural Order No. 1 (Original Arbitration), 19 December 2011, Redfern Schedule attached, Respondent's Production Requests Nos. C-1, C-2, C-3 and C-4, pp. 17-31.

333 TGH reffered to the Citigroup Fairness Opinion to justify the real value of EEGSA and the reasonableness of the analysis of TGH comparable companies (*see* Claimant's Memorial, September 1, 2017, fn. 161), while it mentioned the Non-Binding Offer Letter only once in all the briefs it submitted in the Original Arbitration, and it only did so to justify the reasonableness of the analysis of TGH comparable companies, to respond to Guatemala's argument that there were no companies comparable to EEGSA (*see* Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May, 2012, para. 293, fn. 1427).

"reportedly stat[ed] in an interview that '[EPM] bought on the basis that the current tariff model and layout is the one that exists' and its 'final valuation' of EEGSA '*had no expectation that* [the tariff model] *would be modified or changed*'".[334] However, as we explain below, TGH distorts Mr Restrepo's statements. Mr Restrepo in fact mentions, only as a possibility, that the tariff would remain stable, and that with higher tariffs the sale price of EEGSA could have been higher.

155. Indeed, as the Original Tribunal pointed out, far from supporting the idea that the purchase price of EEGSA's shares was necessarily affected by the 2008 tariff review, Mr Restrepo's interview indicates that the scenario in which the tariffs would not change in future tariff periods was only one of "various scenarios" considered by the buyer.[335] Likewise, as the Original Tribunal stated:

> There is however 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. The interview of Mr. Restrepo only mentions as a "possibility" that with a higher VAD for the rest of the tariff period, the transaction price would have been higher.[336]

156. Oddly enough, although on the one hand in its Memorial TGH seeks to rely on Mr Restrepo's interview (though citing it only in part and in a misleading way), TGH dedicates no less than seven pages of the same Memorial to trying to discredit it. In addition, TGH criticises the Original Tribunal at length and without justification for, in its view, having based its decision to deny future damages to TGH on Mr Restrepo's statements in that interview.[337]

157. To start with, TGH qualifies the interview as "hearsay" that would have "limited probative value".[338] Naturally, this is difficult to reconcile with its repeated references to

334 Claimant's Memorial, 1 September 2017, fn. 524 (emphais in the original); "We won't wave a flag. We respect people's roots", *Prensa Libre*, 23 October 2010, **Exhibit C-1268**.

335 Award, 19 December 2013, para. 756.

336 *Ibid*, para. 754.

337 Claimant's Memorial, 1 September 2017, paras. 226-236.

338 *Ibid*, para. 227.

the interview in support of its arguments.[339] In addition, the interview quotes verbatim Mr Restrepo's interview (it does not paraphrase it), and neither Mr Restrepo nor anyone else has suggested that the interview did not accurately reflect what Mr Restrepo said. Also, TGH has never expressed any doubt about its veracity. In any event, in international arbitration, the rules of hearsay are not strictly applied and, in contrast, tribunals usually adopt a pragmatic approach to such evidence, based on an evaluation of the evidence offered, and with discretion to assess its credibility and relevance.[340]

158. Further, TGH cites the cases of *Bureau Veritas v Paraguay* and *Military and Paramilitary Activities in and against Nicaragua* as examples of circumstances in which tribunals have observed the limited probative value of newspaper articles as evidence on which to base their decisions.[341] However, the circumstances of those cases are completely different from the present one. The tribunal in *Bureau Veritas* was presented

---

339 For example, TGH relies on Mr Restrepo's interview to support its argument about the calculation methodology applicable in reviews subsequent to 2008 and the alleged expectations that the parties involved in the sale of EEGSA shares had about it (*see* Claimant's Memorial, September 1, 2017, fn. 524 and para. 189). As explained in Section IV.C.3 of this Memorial, TGH's argument is irrational and this is further highlighted by the fact that this argument is based on evidence that the Claimant itself seeks to discredit only a few sections later in its Memorial.

340 D V Sandifer, *Evidence Before International Tribunals*, 1975, **Exhibit RL-1001**, p. 12. The author explains that:

> It seems self-evident that the approach of international tribunals to hearsay may be expected to be more comparable to that of the civil law. They are unlikely, in light of general international practice, to apply technical rules of admissibility. <u>Their concern is relevance, credibility, and evaluation, taking account the absence of personal observation by the witness</u>. (emphasis added)

See also R Pietrowski, "Evidence in International Arbitration" (2006), Arbitration International, Vol. 22, No. 3, **Exhibit RL-1008**, p. 23. Similarly, Pietrowski explains that:

> International procedure does not preclude the admission of 'hearsay' evidence, i.e., evidence not based on the personal observation of the witness. As with other kinds of evidence, the issue is usually one of evaluation rather than admissibility. International tribunals will generally admit hearsay evidence, but the weight given such evidence will depend upon the circumstances of the case, including other evidence which either confirms or refutes the hearsay evidence.

341 Claimant's Memorial, 1 September 2017, paras. 227, 228; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v The Republic of Paraguay* (ICSID Case No. ARB/07/9) (***Bureau Veritas v Paraguay*** or ***Bureau Veritas***), Further Decision on Objections to the Jurisdiction, 9 October 2012, **Exhibit CL-1031**; *Military and Paramilitary Activities in and against Nicaragua*, ICJ reports 1986 (Judgment of 27 June 1986) (***Nicaragua v United States of America*** or ***Nicaragua***), **Exhibit CL-1036**.

with various types of direct evidence on relevant issues on which it could base its decision, which made the use of press articles unnecessary.[342] Here TGH claims that the tariffs fixed in 2008 affected the sale price of its shares in EEGSA, but does not provide any direct evidence to corroborate this; then, however, TGH wants this Tribunal to ignore the only testimony that is relevant to this issue. On the other hand, in the *Nicaragua* case, contrary to what TGH indicates, the International Court of Justice in fact relied on several press releases to corroborate the facts reported in the witness statements on which it relied to determine the responsibility of the United States.[343]

159. Indeed, references to press articles are a common practice for investment tribunals. For example, the tribunals in *Quirobrax*,[344] *Achmea II*[345] and *Gemplus*[346] used press articles to corroborate important facts on which they based their decisions. Even the Claimant itself included several references to press articles in its exhibits during the Original Arbitration.[347]

---

342 *Bureau Veritas v Paraguay*, Further Decision on Objections to Jurisdiction, 9 October 2012, **Exhibit CL-1031**, para. 237. In determining the central issue of the dispute (the non-payment of certain invoices by the Government), the tribunal concluded that:

> "Having carefully examined each and every act that is complained of by the Claimant – <u>from Minister Zayas' letter of 14 June 1999 to Decree No.10485 adopted by the Ministry of the Interior on 22 June 2007</u> – the Tribunal concludes that each act is essentially about the failure to make the payment that is owed." (emphasis added)

343 *Nicaragua v United States of America*, **Exhibit CL-1036**, paras. 75-86, 227.

344 *Quiborax S.A. and Non Metallic Minerals S.A. v The Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) (***Quiborax v Bolivia*** or ***Quiborax***), Award, 16 September 2015, **Exhibit CL-1049**, paras. 26 and 250.

345 *Achmea B.V. v The Slovak Republic [II]* (PCA Case No. 2013-12) (***Achmea v Slovakia II*** or ***Achmea II***), Award on Jurisdiction and Admissibility, 20 May 2014, **Exhibit RL-1023**, paras. 48, 51, 66, 87-89.

346 *Gemplus S.A and others v The United Mexican States* (ICSID Case No. ARB(AF)/04/3) (***Gemplus v Mexico*** or ***Gemplus***), Award, 16 June 2010, **Exhibit CL-1021**, paras. 4-84.

347 For example, TGH used press articles in the Original Arbitration to support its arguments regarding: the appointment of an expert commission to resolve disputes about the VAD in July 2008 (*see* Claimant's Memorial (Original Arbitration), 1 de septiembre de 2017, paras. 152 and 153, **Exhibit R-1036** and **Exhibit R-1037**); the creation process of the CNEE (*see* Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, para. 21, **Exhibit R-1005** and **Exhibit R-1006**); the temporary suspension of EEGSA's tariffs in 2003 (*see* Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (Original Arbitration), 24 May 2012, **Exhibit R-1014** and **Exhibit R-1015**); the testimony of Mr Colom on the amendments made to Article 98 in 2007 (Claimant's Post-Hearing Brief (Original Arbitration), para. 109, **Exhibit R-1042**); and the alleged

160. In any event, there is no reason to assert that Mr Restrepo's interview lacks relevance or credibility. The interview was conducted by one of Guatemala's leading newspapers and took place immediately after the sale of EEGSA. Mr Restrepo, CEO of the buying company, had personal knowledge of the facts on which he was being interviewed. It is reasonable to assume that his words reflected EPM's position at the date of sale.[348] Therefore, TGH's *post facto* attempts to attack the reliability of the interview or discredit Mr Restrepo's responses, through a partial and out-of-context analysis of those responses, should be rejected.[349]

161. Finally, it should be noted that TGH's criticism of the Original Tribunal for relying on Mr Restrepo's interview actually conceals its own inability to prove the damages it claims.[350] Indeed, the conclusion reached by the Original Tribunal after analysing Mr Restrepo's words was that "there is no evidence in the record of how the transaction price has been determined".[351] We have already indicated that TGH was responsible for producing this

---

motivation of the CNEE to set lower tariffs (Claimant's Post-Hearing Brief (Original Arbitration), para. 159, **Exhibit R-1043**).

348 D V Sandifer, *Evidence Before International Tribunals*, 1975, **Exhibit RL-1001**, p. 12. Sandifer warns that:

> In implicit recognition of the foregoing principles, questions raised concerning hearsay evidence before international tribunals have been directed, in the main, to its value rather than to its admission. However, in some cases tribunals have refused to base awards on the second-hand statements of witnesses <u>who had no opportunity to observe the events about which they testified</u>. (emphasis added).

Mr Restrepo, however, in his capacity of CEO of the buying company, was directly involved in the events on which he was being interviewed on 23 October 2010, only a few days after the acquisition of one of the main assets of his company.

349 TGH presents its own line-by-line analysis of Mr Restrepo's interview, on the basis of which it seeks to disprove Mr Restrepo's unequivocal comment that a scenario in which tariffs would remain unchanged in future tariff periods was "just one on the scenarios considered by the buyer". *See* Claimant's Memorial, 1 September 2017, paras. 232-235.

350 Claimant's Memorial, 1 September 2017, para. 230. In its Memorial, TGH indicates that:

> "By denying TECO's claim for loss of value damages <u>on account of Mr. Restrepo's interview</u>, from which the Original Tribunal determined it could not conclude with certainty that EPM would have paid more for EEGSA absent the breach, the Original Tribunal dismissed TECO's claim for failure to meet an impossibly high burden of providing evidence that does not exist." (emphasis added)

351 Award, 19 December 2013, para. 754.

evidence. However, it did not do so and for this reason the Original Tribunal, in its own words, 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".[352]

162. Therefore, it is not true that Mr Restrepo's interview, on its own, led the Original Tribunal to reject TGH's claim. On the contrary, this interview, in which the CEO of the buying company was deliberately vague when referring to the impact of the 2008 review on the sale price of EEGSA, simply confirmed the Original Tribunal's conclusion that TGH had not presented sufficient evidence as to how the sale price was established.[353]

b. The document production phase confirmed the absence of proof

163. Obviously, it is not credible that a sophisticated company such as TGH would make an important decision such as selling a stake in a subsidiary for almost US$ 200 million, without a careful analysis of the different factors that would be affected by that sale. This includes internal factors (such as the company's objectives and strategies, costs and business organisation), as well as external factors (such as market and demand, competition, environmental factors and the buyer's identity). It is logical to assume that sellers of a company such as EEGSA evaluated precisely the different possible future tariff scenarios in order to determine the appropriate sale price. This is even more likely to be the case in light of the existence of this dispute and in light of the importance that the valuation of EEGSA would have had in the arbitration.

164. Among the documents that would normally be produced by the seller in the context of a transaction of this type, one would expect to find:

(a) the seller's valuation model, either drafted internally or produced by an external consultant, which would give the minimum price at which the seller would be willing to sell;

352 *Ibid*.

353 In concluding that there was insufficient evidence to determine whether an increase in tariffs had been reflected in the sale price, the Original Tribunal differentiated between Mr Restrepo's interview, and "on the other hand" the lack of evidence regarding the determination of the transaction price. *See* Award, 19 December 2013, para. 754. Quote extracted and translated from Spanish version of the Award, the English version says "[a]nd".

(b) correspondence between buyer and seller, containing references to the representations that the seller might have made to the buyer;

(c) business plans or acquisition plans provided to potential buyers;

(d) reports from the parties' consultants;

(e) corporate documents, such as minutes of the board of directors and minutes of the negotiation meetings; and

(f) other documents available in the data room/disclosure schedule, including financial information, contracts and records used in the determination of offers.

165. In the light of this, Guatemala asked TGH, during the document production stage of this arbitration, to disclose information regarding: (i) how the sale price of EEGSA's shares was determined,[354] and (ii) the alleged search by "TGH and its partners" for a buyer for its shares as of the date on which the tariffs for the 2008-2013 period were determined.[355] However, TGH did not produce any new documents.[356]

166. Regarding the determination of the sale price, TGH referred to the three documents already discussed in the preceding section, namely the Non-Binding Offer Letter, the Citigroup Opinion, and the newspaper interview with Mr Restrepo.[357] As we have already explained, none of these documents provide evidence of the damages that TGH claims. In addition to these documents, in its response TGH also made reference to other documents

354 Given that it had already made a similar request in the Original Arbitration, Guatemala asked TGH for "[a]ny document relating to the determination of the sale price of DECA II (or to the sale price of TECO's participation in DECA II) to Empresas Públicas de Medellín (EPM), including: (i) any preparatory or final reports discussing financial and valuation matters of DECA II or Empresa Eléctrica de Guatemala SA ("EEGSA") or (ii) any contemporaneous document that demonstrates an impact on the sale price of the 2008-2013 tariff beyond 2013 that entered into TECO's possession, custody or power subsequent to its response to the Respondent's document request C1 in the original arbitration." Redfern Schedule, 20 October 2017, Respondent's request for production of documents No. 1. *See also,* Procedural Order No. 1 (Original Arbitration), 19 December 2011, Redfern Schedule attached, Respondent's production request No. C-1, pp. 17-24.

355 Redfern Schedule, 20 October 2017, Respondent's request for production of documents No. 2. Guatemala asked TGH to provide "[a]ny document that reflects TECO's search for a purchaser of EEGSA or its interest in EEGSA from the date of the fixing of the 2008-2013 tariff (1 August 2008) until the date of EPM's non-binding offer (26 July 2010)."

356 *See* Redfern Schedule, 20 October 2017, Claimant's objections to the Respondent's document production requests Nos. 1, 2.

357 *Ibid*, Claimant's objections to the Respondent's document production request No. 1.

already in the record, EPM's binding offer letter to Iberdrola, TPS and EDP of 6 October 2010 (***EPM's Binding Offer***),[358] and the [redacted].[359] However, neither EPM's Binding Offer nor the [redacted] are on point, since they do not contain any financial or valuation analysis of DECA II or EEGSA that would explain how the sale price was determined when the transaction was negotiated or concluded. Moreover, they do not reflect the alleged impact on the sale price of the 2008-2013 tariff, or indicate whether the price would have been higher with a higher tariff for that period, nor do they contain any estimates of subsequent tariffs.

167. EPM's Binding Offer is limited to the breakdown of the value attributed to the stake of each of the DECA II shareholders[360] and makes no reference to either the valuation of each one of the companies in the portfolio, including EEGSA, or to the tariffs applied by the CNEE.

168. [redacted],[361] but do not answer the question of how the sale price was determined. In addition, these Minutes were drafted by TGH after it sent its Notice of Intent on 9 January 2009, and just before the Original Arbitration was initiated on 20 October 2010. Therefore the Minutes already anticipate the arguments that TGH would put forward in the arbitration. On the other hand, as indicated above, contrary to what is indicated in the Minutes, TGH announced the sale of its stake in EEGSA to the market as being motivated by its interest in focusing on its domestic market and on its electricity generation assets (rather than on

358 Letter from EPM to Iberdrola, TPS and EDP, 6 October 2010, **Exhibit C-1082**.

359 [redacted]

360 Letter from EPM to Iberdrola, TPS and EDP, 6 October 2010, **Exhibit C-1082**, p. 11.

361 [redacted]

distribution assets like EEGSA), and not as a consequence of the alleged arbitrary measures adopted by the CNEE.[362]

169. In the same vein, the partners of TGH, Iberdrola and EDP confirmed to their shareholders that the sale of EEGSA related exclusively to corporate strategies unrelated to EEGSA's tariff review process of 2008.[363] Indeed, as we have indicated above, the record confirms that it was Iberdrola that promoted the sale of EEGSA for reasons of commercial strategy. TGH simply took the opportunity to concentrate its interests and resources on its domestic activity and on the management of two power generation plants it also owned in Guatemala.[364]

170. In short, as Guatemala indicated during the document production process when responding to TGH, the documents that TGH refers to do not contain any financial or valuation analysis of DECA II or EEGSA that would explain how the price paid to TGH for its stake in EEGSA was determined at the time the transaction was negotiated. Nor do the documents reflect the impact (if any) of the 2008-2013 tariff on the sale price. Rather, the documents simply show that a certain price was proposed by the buyer and accepted by the seller, and that said price was considered fair by an external consultant.[365]

171. As summarised by Messrs Abdala and Delamer:

> [n]o contemporaneous 118.documents that explicitly reflect what the parties anticipated in respect of the result of the 2013 and subsequent tariff review had been presented.[366]
>
> Since the sale price can be affected by several factors, it is not possible to determine what were the assumptions used to

---

362 *See* paras. 81, 82 above.

363 *Ibid*.

364 *See* para. 82 above.

365 Redfern Schedule, 20 October 2017, Respondent's reply to Claimant's objections regarding Respondent's request No. 1.

366 Expert Report of M. Abdala and J. Delamer, 2 February 2017, para. 118.

obtain said sale price without the contemporaneous documentation.[367]

172. Regarding the documents requested by Guatemala from TGH that could provide evidence on TGH's alleged search for a buyer for EEGSA after the determination of the tariffs in 2008, TGH limited itself to indicating that it did not have any documents to support this assertion and labelled the request as irrelevant.[368] However, the relevance of the documents requested is evident since in its Memorial TGH expressly mentions that it tried to find a buyer for its stake in EEGSA, as proof of the negative impact of the 2008-2013 tariff on the value of its investment in EEGSA.[369]

173. Therefore, as already explained above,[370] there is no evidence that TGH sold its stake because of the tariff approved by the CNEE in 2008. As the Chief Financial Officer of TECO Energy, Inc. acknowledged, not only did TGH fail to search for any buyer, but EEGSA also continued to generate profits after 2008,[371] as confirmed by the improved ratings of EEGSA by Moody's in 2013 and 2014.[372]

174. Finally, Guatemala reiterates that it is not appropriate to refer to the expert reports of the parties produced for this arbitration, or the Original Arbitration, as alleged "evidence" of the impact of the 2008 measures on the sale price. These reports do not constitute contemporaneous evidence of the existence of the damages in question, but rather they were produced specifically for the purposes of this litigation. Therefore they cannot constitute evidence of an eminently factual issue, and in any case do not prove the existence of such damages.

---

367 Expert Report of M. Abdala and J. Delamer, 2 February 2017, fn. 100.

368 Redfern Schedule, 20 October 2017, Claimant's objections to Respondent's request No. 2.

369 *See* Claimant's Memorial, 1 September 2017, para. 44.

370 *See* paras. 77-86 above.

371 *See* paras. 84-86 above; Hearing Transcript (English), Day Two, 577: 22-578: 4 Callahan.

372 "Moody's upgrades EEGSA's ratings; outlook remains positive", *Moody's Investors Service*, 22 August 2013, **Exhibit R-1081**; "Moody's upgrades EEGSA's ratings; outlook stable", *Moody's Investors Service*, 25 August 2014, **Exhibit R-1082**.

175. As explained below, the absence of contemporaneous evidence to corroborate TGH's multi-million dollar claim for future damages is further coupled with the absence of any causal link between the measure adopted by Guatemala, that the Original Tribunal considered in breach of the Treaty, and the damages claimed by TGH.

C. THERE IS NO CAUSAL LINK BETWEEN THE MEASURE IN BREACH OF THE TREATY AND THE FUTURE DAMAGES CLAIMED BY TGH

1. The causal link in a claim for damages under international law

176. For a claim for damages to succeed, in addition to demonstrating the existence and quantum of damages, it is necessary to show a sufficient causal relationship between the breach of international law and the damages claimed. Otherwise, the party that suffered the damages cannot be compensated. As the tribunal explained in *BG Group v Argentina*:

> The damage […] must be the consequence or proximate cause of the wrongful act. Damages that are "too indirect, remote, and uncertain to be appraised" are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of "full reparation" under the ILC Draft Articles[373].

177. The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (the ***ILC Articles***) also highlight the need to establish a causal link between an internationally wrongful act and the damage for which compensation is sought. Article 31 states that:

373 *BG Group v Argentina*, Final Award, 24 December 2007, **Exhibit RL-1013**, para. 428 (emphasis in the original). *See also*, *Duke Energy Electroquil Partners & Electroquil S.A. v The Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **Exhibit RL-1015**, para. 468 ("[…] compensation will only be awarded if there is a sufficient causal link between the breach of the BIT and the loss sustained by the Claimants."); *Crystallex v Venezuela*, Award, 4 April 2016, **Exhibit CL-1019**, para. 860 ("[…] compensation for violation of a treaty will only be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant."); *Lemire v Ukraine,* Award, 28 March 2008, **Exhibit CL-1013**, para. 155 ("[t]he duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act."); *ADM v Mexico*, Award, 21 November 2007, **Exhibit RL-1012**, para. 282 ("Any determination of damages under principles of international law require a sufficiently clear direct link. between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury.").

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral. <u>Caused</u> by the internationally wrongful act of n State.[374]

178. Comment 9 to said Article states that:

> It is only "[i]njury. . .caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences tlowing from an internationally wrongful act.[375]

179. In addition, the causal link between the wrongful act and the alleged damage cannot be interrupted by any intervening cause.[376] In short, to be compensated for the damage claimed, a claimant must prove that the breach of international law is the real and direct cause of the damage, and that there are no events that interrupted that causal link.

180. In this case, the measure considered by the Original Tribunal as a violation of the Treaty was the tariff established for EEGSA for the 2008-2013 period. The future damages that TGH claims must, therefore, have been actually and directly caused by the decision, and the tariff, adopted by the CNEE. TGH has failed to establish this causal link, either in relation to the alleged reduction of the sale price of its stake in EEGSA, or in relation to the possibility that the tariff, the duration of which was time-limited to five years, that is until 2013, could have caused damage beyond 2013.

---

374 J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries,* 2001, **Exhibit CL-1011**, Art. 31 (emphasis added).

375 *Ibid*, Art. 31, comment 9.

376 *Ronald S. Lauder v The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **Exhibit RL-1003**, para. 234 ("[i]n order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage."); *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (ICSID Case No. ARB/05/20) (***Micula v Romania*** or ***Micula***), Award, 11 December 2013, **Exhibit RL-1021**, paras. 926, 927.

2. TGH does not prove the causal link between the 2008-2013 tariff and the alleged reduction in the sale price of its stake in EEGSA

181. As explained above,[377] in its Notice of Intent of 9 January 2009, TGH claimed that its investment in Guatemala had been "severely jeopardize[d]",[378] and in its Notice of Arbitration in the Original Arbitration, dated 20 October 2010, TGH claimed that Guatemala's measures "jeopardize[d] long-term sustainability", and that its "operational viability" was "severely undermined".[379] Just one day later, the sale of EEGSA to EPM for more than US$ 500 million took place.[380] TGH received US$ 181.5 million from this sale. In addition, in September 2010, during the process that led to the sale, the shareholders of EEGSA, including TGH, presented EEGSA to the buyer as "one of the best and most solid companies in the country".[381]

182. This evidence in itself already undermines TGH's assertion in its Memorial in the Original Arbitration that the tariff approved by the CNEE in 2008 "[w]as [e]conomically [d]evastating" for EEGSA.[382] The statement of TECO Energy, Inc's Chief Executive Officer in the Original Arbitration,[383] and the positive ratings of Moody's in subsequent years, confirm this.[384] We also note that in July 2010 the Managing Director of TGH in Guatemala, Mr Víctor Urrutia, said, regarding a recent extension of TGH's contracts in the generation sector, that TECO Energy, Inc. had decided to agree to the extension

---

377 *See* paras. 78-80 above.

378 Notice of the intent to submit a claim to arbitration, 9 January 2009, **Exhibit R-1044**, para. 28.

379 Notice of Arbitration (Original Arbitration), 20 October 2010, para. 69.

380 Stock Purchase Agreement between Iberdrola Energía S.A., TPS de Ultramar Guatemala S.A., Electricidade de Portugal and EPM, 21 October 2010, **Exhibit R-1059**; Award, 19 December 2013, para. 237.

381 Deca II - Management Presentation, September 2010, **Exhibit C-1139**, p. 26.

382 *See* paras. 80-83 above; Claimant's Memorial (Original Arbitration), 23 September 2011, Section II.F.7.

383 *See* para. 81 above; Respondent's Post-Hearing Brief, para. 357; Hearing Transcript (English), Day Two, 580: 20-584: 18, Callahan, and specifically, 584: 12-18.

384 *See* paras. 84-86 above; "Moody's affirms ratings of EPM and EEGSA following acquisition of DECA II", *Moody's Investors Service*, 22 October 2010. **Exhibit R-1063**; "Moody's affirms EEGSA's ratings; Outlook changed to positive", *Moody's Investors Service*, 17 September 2012, **Exhibit R-1074**; "Moody's upgrades EEGSA's ratings; outlook remains positive", *Moody's Investors Service*, 22 August 2013, **Exhibit R-1081**; "Moody's upgrades EEGSA's ratings; outlook stable", *Moody's Investors Service*, 25 August 2014, **Exhibit R-1082**.

because "we continue believing that [Guatemala] is a market where there are clear rules and certainty".[385]

183. In addition, as already stated above,[386] TGH fails to demonstrate the negative impact of the tariff through evidence showing, for example, an attempt to sell its stake in EEGSA after the setting of the tariff in July 2008. Likewise it provides no evidence to show that the tariffs set for the 2008-2013 period had a negative impact on the sale price of EEGSA to EPM, nor the extent of such impact, nor that had the tariff been higher the sale price would have also increased.[387]

184. Thus, it is impossible to know, for example, if the price paid by EPM included a discount due to the 2008-2013 tariff, or if any possible negative effect of said tariff was offset, for EPM, by the possible synergies obtained by EPM when purchasing DECA II. In this regard, it is worth recalling that EPM's purchase of DECA II was the initial step in the Colombian company's strategy of becoming a "*multilatina*" with a strong presence in Central America, as EPM itself acknowledged.[388] In fact, DECA II's assets included, in addition to EEGSA, direct holdings in a company supplying materials, a real estate company and an investment company in the energy sector, as well as indirect participations in a transmission company, an energy commercialisation company, an engineering company and a financial company.[389] EPM subsequently acquired the

---

385 "Price lowered on Tampa contract", *Prensa Libre*, 12 July 2010, **Exhibit R- 1055**.

386 *See* paras. 145, 146 above.

387 *See* paras. 147-153 above.

388 *See* "EPM Colombia buys electricity companies in Guatemala", *Reuters*, 21 October 2010, **Exhibit R-1057**, p. 12. EPM's press release is cited as follows:

> As well as diversifying its investment and services portfolio, this move will give tge EPM Group the opportunity to establish a platform in Guatemala for investing in the Central American region, an economy which is showing great dynamism for business exchanges with the rest of the world.

See also, EPM Press Release, "We want to consolidate our position as a leading Corporate Group in Latin America", 5 March 2013, **Exhibit R-1076**.

389 These companies are, respectively, Almacenaje y Manejo de Materiales Eléctricos S.A. (AMESA), Inmobiliaria y Desarrolladora Empresarial de América S.A. (IDEAMSA), Inversiones Eléctricas Centroamericanas, S.A. (INVELCA), Transportista Eléctrica Centroamericana S.A. (TRELEC), Comercializadora Eléctrica de Guatemala S.A. (COMEGSA), Enérgica S.A. (ENÉRGICA), Credieegsa S.A. (CREDIEEGSA). *See* EPM Press Release, "Guatemalan government and EPM sign letter of understanding", **Exhibit R-1091**.

electricity distribution and transmission assets of DELSUR SA in El Salvador and Elektra Noreste SA in Panama (2011),[390] water treatment assets through Tecnología Intercontinental SA in Mexico (2013),[391] participated in the construction of a wind farm in Chile (2013),[392] and purchased the water company Aguas de Antofagasta SA also in Chile.[393]

185. Therefore, EEGSA's sale price may well have been influenced, in one direction or another, by EPM's strategy of expansion into new markets. Nor can we rule out the effect on the price of the fact that TGH wanted to sell in order to concentrate its activity in its domestic market and on the two power generation plants in Guatemala in which it had a stake.[394] Moreover, Iberdrola wished to sell in order to free up capital to make investments in Mexico and Brazil,[395] while EDP was pursuing a strategy of divestment of non-strategic assets over which it could not exercise control.[396] All these factors may have influenced the price.

186. In short, TGH has not proven the causal link between the 2008-2013 tariff and the sale price of its stake in EEGSA. This link is essential because TGH asserts that the sale price was impaired by this tariff, and this assertion requires evidence of the damage suffered. TGH cannot seek compensation for an alleged loss if it is impossible to ascertain whether said loss may have already been recovered or mitigated, and in that case, to what extent, through the sale.

---

390 EPM Press Release, "EPM Becomes the Majority Owner of Power Companies ENSA, of Panama, and Delsur, of Salvador", 2 March 2011, **Exhibit R-1068**.

391 EPM Press Release, "The EPM Group arrives to Mexico. It will be leading TICSA, a company specialized in the construction and operation of water treatment facilities", 21 May 2013, **Exhibit R-1079**.

392 EPM Press Release, "EPM begins work in Chile with the construction of a 110 MW wind farm", 24 April 2013, **Exhibit R-1078**.

393 EPM Press Release, "The EPM Group strengthens its position in Chile with the signing of an agreement to purchase Aguas de Antofagasta", 23 April 2015, **Exhibit R-1083**.

394 *See* Teco Press Release, "TECO Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company", 21 October 2010, **Exhibit R-1061**.

395 *See* Iberdrola Energía S.A. Press Release, "Iberdrola sells its stake in four Guatemalan electrical companies", 22 October 2010, **Exhibit R-1062**.

396 *See* EDP Press Release, "EDP sells its stake in DECA II", 21 October 2010, **Exhibit R-1060**.

187. In any event, even if the buyer and the sellers had agreed a sale price for EEGSA which took into account the alleged impact of the 2008-2013 tariff on its value, such an arrangement cannot be relevant for determining the damages that Guatemala should pay to TGH. The regulatory framework, as was explained above and will be further detailed below, provides for the re-determination of the tariff every five years and this is a circumstance which necessarily affects any valuation of EEGSA. Therefore, the valuation conducted by the parties in the sale of EEGSA could only be estimates of EEGSA's future tariffs; they could not define what would happen in the future, nor replace the CNEE or predetermine the next five-year reviews. A private sale is not the place to fix the future tariffs of an electricity distributor in Guatemala. Therefore, the sale price cannot in any case be definitive evidence of the damages for loss of value claimed by TGH.

3. There can be no causal link between the 2008-2013 tariff and the damage claimed by TGH

188. In its Memorial, TGH explains that its calculation of future damages, or loss of value, is based on the difference in the value of EEGSA in two scenarios: "an actual scenario [...] and a but-for scenario". Hence it compares EEGSA's value with the alleged impact of the measure violating the Treaty (actual scenario) and EEGSA's estimated value without the impact of the measure (but-for or counter-factual scenario).[397] To determine EEGSA's value in each of these scenarios, TGH and its expert essentially rely on a DCF calculation. Hence they compare discounted cash flows that EEGSA would have generated until the end of its concession in those scenarios. The difference in these cash flows is the measure the alleged damage.

189. Thus, the question arises regarding how EEGSA's cash flows up to the end of its concession in year 2049 are determined. TGH explains this clearly: "EEGSA's 'actual' value […] is driven by the expectation that the CNEE would continue to apply Sigla's approach to the VAD",[398] and the "'But-For' value is derived from Bates White's revised

397 Claimant's Memorial, 1 September 2017, para. 165.

398 *Ibid*, title Section III.C.a.

VAD study".[399] That is to say, TGH's "actual" cash flow projections are based on the assumption that the tariff (the VAD) applying to EEGSA would remain the same set by the CNEE in 2008, until 2049; and the projections for the "but-for" cash flows are based on the assumption that the tariff that the CNEE would always apply in the future would be the one provided by the Bates White Study of 28 July 2008.

190. Clearly, these two assumptions made by TGH and its expert Mr Kaczmarek cannot be correct. The results of a five-year tariff review, whatever they may be, cannot be applied indefinitely in the future. The Guatemalan electricity regulatory system provides for the determination of the tariff every five years. Each five-year tariff determination or review starts from scratch, and establishes the VAD and the tariff only for the following five-year period.[400] As confirmed by the EEGSA's tariff reviews for the periods 2013-2018 and 2018-2023, TGH's assertion that the tariffs established in the 2008 review would remain in effect in perpetuity is simply incorrect.[401] Therefore, the 2008 tariff cannot in any case have deprived EEGSA of future cash flows, nor therefore can it have caused permanent future damages to EEGSA or a loss of value attributable to that tariff. In the same way, even if the CNEE had set the 2008 tariff based on the Bates White Study, it can in no way be assumed that this tariff would have been also adopted by the CNEE in future tariff reviews. In summary, the two scenarios on which TGH and its expert rely to calculate damages are not only hypothetical, but speculative and false.

a. The system of five-year tariff reviews provided for in the LGE does not allow for projections on the tariffs that will result from future reviews

191. In the LGE's model company system, each five-year tariff review involves a comprehensive review of the assumptions on which the distributor's tariff is based. As explained by Mr Santizo, engineer and current member of the Board of Directors of the CNEE, in his witness statement, each tariff review is independent of the previous one, since "each five-year review involves a new analysis by the distribution company and the CNEE, which starts from scratch in order to establish what should be considered a

399 *Ibid*, title Section III.C.b.

400 *See* Section IV.C.3.a below.

401 *See* Sections IV.C.3.b and IV.C.3.c below.

benchmark efficient company or a model company, at the time of the tariff review".[402] As we explain below, there are several reasons for this.

192. *First,* although the terms of reference of each review must always conform to the principles defined by the LGE and the RLGE, it is logical that there are variations from one review to another, in order to reflect the evolution of factors such as the number of users, their expected consumption, the prices of materials, and the different geographical distribution of demand, among others.[403] It is therefore incorrect to assume that the terms of reference for a specific tariff period will be repeated without changes in the following tariff periods.

193. *Second,* the design of the model company and the corresponding components of the VAD also evolve from one review to another. In particular, the optimised asset base of the model company evolves to reflect the reality of the distribution company and the distribution activity at the time of each tariff review, taking into account (among other things) technological developments that have taken place.[404] In this way, the components of the so-called "efficient" network are redefined in each review, to also address changes in estimated demand and any changes in prices of materials and equipment, as well as the introduction of new technologies that reduce the cost of the network and increase its productivity. The same considerations apply to operating costs. As Mr Santizo explains, the exercise consists in determining, at the time of the relevant review, the resources required by an efficient distributor to perform its functions of distribution and commercialisation of energy, and to operate and maintain the network, which necessarily evolve over time.[405]

194. That this is the correct description of a tariff review process is confirmed by the conduct of EEGSA itself. Even in presence of the same regulatory framework (in place since 1998 when TGH invested in EEGSA), EEGSA has proposed different VNR values for its

402 Santizo, para. 31.

403 *Ibid*.

404 *Ibid*, paras. 26, 27, 35.

405 *Ibid*, para. 24(iv).

asset base in each five-year review. The table below compares the values proposed by EEGSA in each five-year review to date:

Tariff Review	First VNR proposed by EEGSA
2003	US$ 590.04 million
2008	US$ 1,782 million
2013	US$ 643.16 million
2018	US$ 818.52 million

195. *Third,* the Board of Directors of the CNEE is replaced for each five-year review period. This mechanism assists in preserving the autonomy of each tariff review process and contributes to ensuring the independence of the Regulator. Each Board approaches the tariff review without preconceptions or influences derived from any knowledge that they may have acquired, or positions they may have taken, in the previous review.[406] In the case of EEGSA, the ratings agency Moody's highlighted in 2012 that the improvement in EEGSA's rating was partly due to the fact that "*EEGSA's relationship with the CNEE has improved following* […] *the appointment of the new members of the CNEE's Board* […]".[407]

196. *Fourth,* as we have already noted, the regulatory framework grants some flexibility to the distribution companies and their consultants in the preparation of the tariff study, through a system of exchange of study proposals before a consolidated version of the final study is produced. Likewise, under certain circumstances, the CNEE may accept proposals from distributors that deviate from the terms of reference if there are reasons that justify such deviations.[408] As Mr Santizo explains, although the terms of reference of a certain

406 *Ibid*, para. 36.

407 "Moody's affirms EEGSA's ratings; Outlook changed to positive", *Moody's Investors Service*, 17 September 2012, **Exhibit R-1074**, p. 3.

408 Santizo, para. 38.

review may be similar to those of the previous review, there are numerous factors that make each tariff study different. For example, as explained by Mr Santizo, “it is possible that two distributors that are subject to the same terms of reference will eventually apply different methodologies or mathematical models, since they can be approved by the CNEE based on the supporting material and justifications presented”.[409]

197. *Fifth*, the distributor itself does not always use the same pre-qualified consultant in the preparation of its tariff study for a given five-year review. Indeed, EEGSA has used four different consultants for its different tariff reviews.[410]

198. The constant evolution that results from the application of all these factors in each tariff review, added to the inherent complexity of creating a new model company every five years, results in a process that takes a total of 12 months of intense work for all the parties involved, plus previous additional months of preparatory work internal to the CNEE.[411]

199. To conclude, it is clear that the five-year tariff review system envisaged in the LGE makes it impossible to know beforehand, on the basis of results obtained in previous reviews, the tariffs which will result from future reviews. Mr Kaczmarek himself, the expert from Navigant Consulting presented by TGH, confirmed that point in his reports in the Original Arbitration:

> there is no reason to presume that the VNR and the tariffs ought to follow a consistent historical trend because the VNR and the tariffs were to be established every five years from a fresh study of the new replacement cost of the network. Given the unknown impact of inflation, technology, and commodity

---

409 *Ibid*.

410 For the tariff review of the 2003-2008 period, EEGSA contracted the services of NERA Economic Consulting S.A. to conduct the preparation of its tariff study. Subsequently, in the review for the period 2008-2013 it contracted with Bates White LLC, and in the review for the period 2013-2018, with Synex - Mercados Energéticos, and in the review for the period 2018-2023, with BA Energy Solutions. Note that the procedure for calculating the VAD specified in Chapter III of Title IV of the LGE was not applied to the tariff determination for the first period after privatisation, between the years 1999-2003. *See* Award, 13 December 2012, paras. 141 and 144; Santizo, paras. 47, 73.

411 Santizo, para. 18.

> prices, one could not expect there to be a consistent trend in the tariffs.[412]

200. However and as will be explained below, in clear contradiction with this analysis, Mr Kaczmarek assumes a permanent tariff in his model to calculate the damages suffered by TGH, i.e. that the tariff adopted in the 2008 tariff review would be replicated indefinitely in future tariff reviews.[413] It is also incorrect to assume that, if the Bates White Study had been applied to determine the tariff in 2008, this would necessarily have also been the case in 2013 and in later reviews.

b. EEGSA's 2013 tariff review confirms that it is incorrect to assume that the 2008-2013 tariff would apply indefinitely

201. In July 2012, almost two years after TGH sold its stake in EEGSA, the CNEE commenced the EEGSA tariff review process for the 2013-2018 period by issuing the terms of reference for that review.[414] In contrast with the conflicts which had affected the previous tariff review, Mr Santizo, a current member of the Board of Directors of the CNEE who took part in the 2013-2018 review as Head of the Tariff Adjustments Department of CNEE,[415] explains in his witness statement that "[the review] was carried out without any major issues".[416]

202. Mr Santizo explains that, as the system envisaged in the LGE requires the parties to construct a model company starting "from zero",[417] the events of the 2008 review had no impact on EEGSA's tariff review in 2013. Mr Santizo also notes that the majority of the individuals who had taken part in the 2008 review, both on behalf of EEGSA and the CNEE, had changed by the time the 2013 review was carried out.[418] For EEGSA, this

---

412 Kaczmarek II (Original Arbitration), para. 173.

413 Expert Report of Brent C. Kaczmarek, 1 September 2017 (***Kaczmarek III***), para. 193; *See* Section IV.C.3.b below.

414 Resolution CNEE-161-2012, 23 July 2012, **Exhibit R-1073**.

415 Santizo, para. 40.

416 *Ibid*, para. 45.

417 *Ibid*, para. 17.

418 *Ibid*, paras. 36, 46.

included a change in its pre-qualified external consultant[419] and new company directors following the change of ownership. As for the CNEE, the Board of Directors which was in office during the 2008-2013 review completed its mandate in May 2012 and was replaced by a new Board.[420]

203. Mr Santizo explains that, in contrast to the tariff review of EEGSA in 2008, the tariff review process for the 2013-2018 period reflected greater transparency, cooperation and professionalism from EEGSA vis-à-vis the Regulator. On the one hand, EEGSA did not challenge the terms of reference for the tariff review.[421] On the other hand, the schedule and formalities for the development of the tariff study envisaged in the regulatory framework and agreed between CNEE and EEGSA were respected. Following the delivery of the various stage reports and after having received comments on them from the CNEE, EEGSA submitted its proposal for the final tariff study on 12 June 2013, which was then approved by CNEE.[422]

204. Mr Santizo explains that the 2013-2018 review benefited from the experience and evolution of the regulatory function of the CNEE, gained from the previous tariff review processes.[423] In fact, the 2013-2018 review was preceded by separate tariff reviews for each of the three major distributors (DEORSA, DEOCSA and EEGSA) in 2003 and in 2008, and by the 32 tariff reviews also in 2003 and 2008 for the 16 municipal distributors who supply smaller areas of the country. The experience gained allowed the CNEE to incorporate certain measures into the tariff reviews of 2013 (for EEGSA, as well as for the other distributors) which promoted efficiency and reduced the scope for conflict between the Regulator and the distributors.[424]

---

419 EEGSA contracted with a new pre-qualified consulting company to conduct its tariff study, the Argentinean consortium Synex - Mercados Energéticos. *See* Santizo, para. 47.

420 Official Press Release No. 13 of the Social Communications Department of the President's Office, "New Board of Directors of the CNEE is sworn in", 28 May 2012, **Exhibit R-1072**.

421 Santizo, para. 45.

422 *Ibid*, para. 45; Resolution CNEE-160-2013, 23 July 2013, **Exhibit R-1080**.

423 *Ibid*, para. 49.

424 *See Ibid*, para. 50.

205. For example, the communication protocols between the Regulator and the distributors were improved. Based on the practices of regulators in countries such as the United States and Colombia, the CNEE implemented rules to organise the exchanges between the parties and to ensure their transparency, through a series of technical meetings which constituted the only form of in-person communication between the Regulator and the regulated entity.[425] As Mr Santizo also explained, the topics to be discussed at each meeting were agreed in advance and in writing by the parties and the meetings were recorded.[426] The new regulation also governed the system of public hearings (which EEGSA had rejected in the 2008 review[427]), aimed at subjecting the distributors' tariff study to public scrutiny.

206. Reforms were also introduced regarding the collection of information about the prices of materials and equipment for the model company.[428] This issue had caused serious problems during EEGSA's 2008 review due to the lack of supporting data and information about the prices of materials and equipment presented by EEGSA. This caused the CNEE to question the prices proposed by the company in the calculation of the VNR.[429] As a result of that experience, the CNEE passed Resolution CNEE-50-2011 headed "Information Requirements for the Value Added for Distribution Studies" (***Resolution 50***). This established a mechanism for the creation of a database and a list of

---

425 In 2011, hearing procedures for the preparation of the VAD study were adopted by Resolution CNEE-56-2011 ("*Norma de Audiencias del Estudio del VAD*"). The procedures were based on the terms of reference of the 2013 review. *See* Resolution CNEE-56-2011, 1 March 2011, **Exhibit R-1067**; Santizo, para. 52.

426 Santizo, paras. 52-53.

427 Letter No. GG-038-07 from EEGSA to the CNEE, attaching EEGSA Comments to the Terms of Reference, 11 May 2007, **Exhibit R-1019**, Art. 1.10; Award, 19 December 2013, para. 168; Respondent's Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (Original Arbitration), para. 309.

428 Santizo, para. 55.

429 This issue was referred to the Expert Commission. *See* Report of the Expert Commission, 25 July 2008, **Exhibit R-1038**, pp. 242-245 and 249-250. The CNEE pointed out that, in the Study of May 5, Bates White and EEGSA: (i) had not presented the national and international comparive data necessary to allow the CNEE to corroborate the efficiency of the model's prices; and (ii) had not submitted a database containing systemised price information nor the benchmarking study. *See* Resolution CNEE-63-2008, 11 April 2008, **Exhibit R-1033**, pp. 52-53; Damonte I, (Original Arbitration), Section 4.1.2. Bates White, on the other hand, claimed that it was difficult to obtain comparative data and that the data had been submitted in an acceptable format. *See* Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., corrected, 5 May 2008, **Exhibit R-1035**, pp. 870-872 and 873-878. *See also* Report of the Expert Commission, 25 July 2008, **Exhibit R-1038**, pp. 371-372.

efficient prices based on the distributors' *actual* transactions completed in the previous five-year period, so that this information could be used in tariff review process.[430] As Mr Santizo explains, "the fact that these values came from real transactions involving the materials and equipment necessary to operate the network eliminated any element of discretion in their determination. It also significantly reduced the room for discussion about their suitability for the construction of the efficient company".[431] Apart from reducing the imbalance of information between the Regulator and the distributor, Mr Santizo explains that this allowed the Regulator to "get important information on the amount of materials and equipment necessary for the operation and maintenance of the network operated by the real distributor, that served as a benchmark in evaluating the network operated by the model company."[432]

207. In turn, the periodic technical meetings between EEGSA and CNEE facilitated the resolution of the disagreements among their respective technical teams which emerged during the course of the review. As Mr Santizo explains, in the meetings the parties discussed those differences, and they were reflected in the CNEE's comments to the stage reports. In all cases these differences were fully resolved through the constructive work carried out by the technical teams from EEGSA and the CNEE.[433] A specific example of this was the delicate issue of the FRC formula, which had created problems between EEGSA and CNEE in the previous tariff review. In the 2013 review, although the CNEE maintained an asset depreciation factor of 2 in the terms of reference, it included an

---

430 Resolution CNEE-50-2011, 24 February 2011, **Exhibit R-1066**. Pursuant to Resolution 50, distributors are required to submit to the regulator every six months the invoices of purchases of materials and equipment from the previous semester, acquired through free competition procedures that ensure competitive prices and reflect discounts and economies of scale. The subsequent Resolution CNEE-217-2012 created a procedure to calculate efficient values for the VAD study ("*Procedimiento para el Cálculo de los Valores Eficientes para el Desarrollo del Estudio del VAD*") (***Resolution 217***). It sets out guidelines for the elaboration of the pricing information to be submitted under the terms of Resolution 50, in order to prepare a list of efficient values to be used in the tariff review. *See* Resolution CNEE-217-2012, 28 September 2012, **Exhibit R-1075**; Santizo, para. 56.

431 Santizo, para. 57. In fact, as explained by Mr Santizo, following a disagreement between EEGSA and the CNEE over the calculation of efficient prices published by the CNEE, the latter provided EEGSA with the calculation logs on which the prices had been set. As a result, EEGSA withdrew its challenge to Resolution 50. *See* Santizo, para. 60.

432 Santizo, para. 58.

433 *Ibid*, para. 61.

express provision in Article 4.9 of the terms of reference which allowed the distributor to propose an alternative (and lower) asset depreciation factor in those cases where such a value could adequately be justified by the distributor.[434]

208. Although Article 1.10 of the Terms of Reference for EEGSA's review in 2008 already stipulated that it was generally possible for the consultant to propose changes to those terms when adequately justified, the inclusion of a provision targeted specifically at the FRC formula was the result of the experience gained from the 2008 tariff review of the other two major distributors of Guatemala, DEOCSA and DEORSA. The terms of reference for the reviews of those tariffs in 2008 included, as for those of EEGSA, the FRC formula with divider 2, which provided that those companies' VAD should be calculated on an asset base depreciated by 50 percent.[435] However while EEGSA's consultant had interpreted that provision as a "typo" and simply ignored it[436] the consultants from DEOCSA and DEORSA felt it was necessary to propose changes to divider 2 to reflect the different levels of depreciation of distinct categories of assets in the respective networks depending on their working life. The CNEE agreed to apply to DEOCSA and DEORSA an average asset depreciation factor of 1.73, instead of the 2 originally included in the terms of reference,[437] based on the information that those distributors had provided to it.

209. Unlike what occurred in 2008, in the 2013 review EEGSA's consultants made use of the flexibility granted by Article 4.9 of the terms of reference. Indeed, they submitted information to the CNEE to justify the application of an asset depreciation factor of below 2 which was accepted by the CNEE. As Mr Santizo explains:

> [A]s it had done with DEORSA and DEOCSA in 2008, the CNEE decided to accept a lower asset depreciation factor,

434 *Ibid*, para. 64; Resolution CNEE-161-2012, 23 July 2012, **Exhibit R-1073**, Art. 4.9.

435 Resolution CNEE-06-2008, 22 January 2008, **Exhibit R-1025**, Arts. 1.9 and 8.3 (for DEORSA); Resolution CNEE-07-2008, 22 January 2008, **Exhibit R-1026**, Arts. 1.9 and 8.3 (for DEOCSA). *See* Santizo, paras. 63-65.

436 Bates White, Value-Added for Distribution Study for Empresa Eléctrica de Guatemala, S.A., corrected, 5 May 2008, **Exhibit R-1035**, pp. 879-881.

437 Santizo, para. 63.

> which was established in a range of 1.71 to 1.90 depending on the type of assets. Notably, the terms of reference in article 4.8 state that the CRF should be calculated separately for each group of assets according to their different useful life. Therefore, a different depreciation factor was considered for each block of assets that make up the VNR. EEGSA based this change on a model that provided for the growth of the network from one year to the next, justifying subsequent investments in addition to those necessary to replace existing assets.[438]

210. Mr Santizo confirmed that the tariff review of EEGSA in 2013 resulted in a 19 percent increase in simple, low-voltage tariffs.[439] That increase was based on a VAD of US$ 114.87 million, which constituted an increase of US$ 16.6 million compared to the VAD of the previous review.[440]

211. In short, EEGSA's 2013 tariff review confirms that each tariff review is autonomous and independent, and results in a brand new calculation of the tariff. Moreover, according to the system envisaged in the electricity regulatory framework in force in Guatemala the tariff review is a flexible process and one in constant evolution. It necessarily varies between one review and the next, depending on how multiple factors (both in Guatemala and in the rest of the world) evolve. For that reason it was and still is incorrect to assume that the tariffs determined for EEGSA in the 2008-2013 tariff review would be perpetually maintained in future reviews. Likewise, even if the CNEE had approved the tariff which emerged from the Bates White Study of 28 July, in other words the but-for scenario presented by TGH to calculate its losses, that tariff would not have been applied perpetually either.

c. The 2018 tariff review also confirms that it is incorrect to assume that the tariffs for 2008-2013 will apply perpetually

212. Likewise, EEGSA's tariff review for the five-year period 2018-2023, which is currently underway, was also unaffected by the results of the previous reviews. The review for 2018-2023 started with the approval of the terms of reference by the CNEE with

438 *Ibid*, para. 65.

439 *Ibid*, para. 68.

440 *Ibid*.

Resolution CNEE No. 176 of 27 July 2017.[441] Having published the terms of reference, the CNEE has not received any comments from EEGSA, nor have the terms been challenged administratively or judicially.[442] In fact, Mr Santizo explains that, unlike what occurred in the tariff review of EEGSA in 2008, and in line with the review in 2013, EEGSA's 2018 review is progressing "in a very positive atmosphere of collaboration between the technical teams of both sides."[443]

213. Although the methodology provided for in the terms of reference is in keeping with the previous reviews, Mr Santizo states that efforts are being made to improve certain aspects of the process.[444] For example, in order to ensure greater transparency, the prohibition on the distributor communicating with the CNEE outside the technical meetings has been formalised with even greater precision.[445] Furthermore, the minimum efficiency levels of the model company have also been revalued in order to adapt them to current market needs.[446]

4. TGH's future or loss of value damages are speculative and cannot have been caused by the 2008 tariff

214. To sum up, this dispute revolves around a five-year tariff review in a 50-year concession. There can be no losses based on a permanent or irreversible effect of the 2008-2013 tariff. TGH claims that it is enough to make certain tariff projections or estimates for the

441 Resolution CNEE-176-2011, 27 July 2017, **Exhibit R-1086**; Santizo, para. 69.

442 Santizo, para. 62.

443 *Ibid*, para. 73.

444 *Ibid*, paras. 70, 71.

445 Resolution CNEE-176-2011, 27 July 2017, **Exhibit R-1086**, section 1.6.1. Communications between the Regulator and the distribution companies was one of the aspects tackled by the CNEE to improve the tariff review process. Influenced by practices of public agencies in other countries, the CNEE implemented rules to organize those communications and ensure their transparency, thereby allowing them to be subject to public scrutiny. This initiative began in 2011, as part of the previous review, with the promulgation of Resolution 56. *See* Santizo, paras. 52-54 and 70.

446 Resolution CNEE-176-2011, 27 July 2017, **Exhibit R-1086**, section 1.3.2. The terms of reference provide that the model company's minimum efficiency levels cannot be lower than those of the actual network in the previous five-year tariff period. As Mr Santizo explains, this provision is based on a presumption that "levels of efficiency in the distributor's operations tend to improve over time. This includes factors such as technological progress, the fact that the operator becomes familiar with the operation of the company and gains more experience and the fact that the concentration of demand and the natural growth of the network allow for greater and better economies of scale". Santizo, para. 71.

future in order to determine the alleged future damages. It is obvious that a serious legal and economic analysis cannot rely on estimates of that nature. The issue is extremely simple: by their very definition, the tariffs last for five years and do not have an impact beyond those five years. Neither the tariff which the CNEE fixed in 2008, based on the Sigla Study, nor the one sought by TGH, that would have derived from the Bates White Study of 28 July, would have applied beyond 2013.

215. Consequently, and as explained above, the report of TGH's valuation expert, Mr Kaczmarek, of Navigant Consulting (the ***Kaczmarek Report***) is incorrect since:

(a) In the "actual" scenario, EEGSA's tariffs from 2013 onwards are calculated based on the Sigla Study that was applied in the 2008 tariff review, without any significant changes; and

(b) In the but-for scenario, EEGSA's tariffs are calculated from 2013 onwards based on the Bates White Study of 28 July, without any significant changes.[447]

a. TGH's hypothesis in the actual scenario, that from 2013 onwards the CNEE would continue to apply the parameters of the Sigla Study in subsequent tariff reviews, is incorrect

216. In making its claim for damages following the 2008-2013 tariff period, TGH justifies the use of the parameters of the Sigla Study in the actual scenario based on:

(a) the position taken by the CNEE in the tariff review of EEGSA of 2008, when it calculated the VAD on the asset base of EEGSA, depreciated by 50 percent;[448] and

(b) the fact that the CNEE would have had no incentive to raise the VAD, once TGH and its partners had sold their stakes in EEGSA.[449]

As we explain below, TGH not only fails to provide any evidence to support these arguments but these claims lack any logic.

---

447 Expert Report of M Abdala and J Delamer, para. 114; Kaczmarek III, para. 193.

448 Claimant's Memorial, 1 September 2017, para. 186; Kaczmarek III, para. 195.

449 Claimant's Memorial, 1 September 2017, para. 187.

217. Firstly TGH's argument regarding the amount of depreciation of the distributor's asset base in the FRC formula relies on a mistake of fact: as the Original Tribunal confirmed in the Award, the CNEE never adopted a rigid position to the effect that the distributors' assets should be depreciated by 50 percent.[450] In fact what TGH identifies as the "FRC formula of Sigla"[451] is, in reality, the FRC envisaged in Article 8.3 of the 2008 Terms of Reference.[452] As explained above, the Original Tribunal found that this formula had to be interpreted in conjunction with Article 1.10 of the same Terms of Reference. This Article recognises the right of the distributor's consultant to propose "changes" if there is a reasonable justification for doing so.[453] Consequently, it is wrong to refer solely to the FRC formula contained in the 2008 Terms of Reference without taking into account the flexibility introduced by Article 1.10. Moreover it is equally incorrect to suggest that said FRC formula was unlawful, as TGH alleges.

218. It is true that, in relation to the 2008 tariff review, the Sigla Study adopted the FRC formula with the depreciation of 50 percent as envisaged in the Terms of Reference. However this was because Bates White chose to interpret the divider 2 in the FRC formula as a "typo" and instead used a formula without depreciation for which it offered no justification .[454] In other words, by deviating from the Terms of Reference without giving any sort of justification -where such justification was in fact required by Article 1.10[455] Bates White did not comply with those terms. This compelled Sigla and the CNEE to apply the FRC formula as it was envisaged in the "default position" of Article 8.3 of the Terms of Reference.

219. Later, the Expert Commission confirmed that it was indeed necessary to apply a depreciation factor.[456] Further, the Original Tribunal criticised the CNEE's decision to

450 Award, 19 December 2013, paras. 641-643.

451 Claimant's Memorial, 1 September 2017, para. 186.

452 Terms of Reference for 2007, 17 January 2008, **Exhibit C-1022**, Art. 8.3.

453 *See* para. 52 above; Award, 19 December 2013, paras. 596-610 and 639-652.

454 *See* paras. 51-54 above.

455 Terms of Reference for 2007, 17 January 2008, **Exhibit C-1022**, Art. 1.10.

456 Report of the Expert Commission, 25 July 2008, **Exhibit R-1038**, pp. 312-314.

apply the Sigla Study because it had not provided sufficient justification for rejecting the pronouncement by the Expert Commission.[457] However, what matters is that the 2008 Terms of Reference did not adopt a rigid approach to the FRC formula. As a result, the Terms of Reference would not have allowed a potential buyer in 2010 to assume that a 50 percent depreciation would apply automatically in later tariff reviews. On the contrary, it was the decision of Bates White not to offer any justification for its decision to ignore the FRC formula in the Terms of Reference that led the CNEE to apply that formula.

220. Indeed, the contemporaneous evidence shows that the CNEE was always open to considering alternatives to the 50 percent depreciation adopted as the "default position" in the Terms of Reference.[458] For the sake of comparison, it is worth noting that the terms of reference for the tariff reviews of DEORSA and DEOCSA at the same time also envisaged a 50 percent depreciation of the asset base.[459] Nevertheless, those distributors provided the CNEE with information which justified their decision to deviate from that depreciation factor. As a consequence, the CNEE agreed to modify the FRC formula to reflect a lesser degree of depreciation.[460] Importantly, this occurred in January 2009,[461] almost two years before the sale of TGH's stake in EEGSA.

221. The above demonstrates that it was not a reasonable hypothesis, at the time of the sale of TGH's stake in EEGSA, to assume that the CNEE would apply a FRC formula providing for a depreciation of 50 percent indefinitely in subsequent tariff reviews. On the contrary, as established in the Terms of Reference, and as happened in the cases of DEORSA and DEOCSA in 2009, the Regulator would apply an alternative figure if the distributors presented information to justify it. This was also the interpretation of the regulatory

---

457 Award, 19 December 2013, para. 664.

458 Santizo, paras. 64, 65 and 72.

459 Resolution CNEE-06-2008, 22 January 2008, **Exhibit R-1025**, Art. 8.3 (for DEORSA); Resolution CNEE-07-2008, 22 January 2008, **Exhibit R-1026**, Art. 8.3 (for DEOCSA).

460 Santizo, para. 63; Quantum and Unión Fenosa, Phase Report G: Cost Components of the VAD and Consumer Charges, November 2008, **Exhibit R-1092**, Art 4.1; Witness Statement of Mr Moller (Original Arbitration) (***Moller I***), para. 50.

461 *See* Resolution CNEE-17-2009, 28 January 2009, **Exhibit R-1045** and Resolution CNEE-18-2009, 28 January 2009, **Exhibit R-1046**, which declare admissible and approve the tariff studies of DEOCSA and DEORSA, respectively.

framework which the CNEE adopted consistently in the 2013 tariff reviews of EEGSA, DEORSA and DEOCSA. Although their terms of reference once again envisaged the "default" FRC formula with a depreciation of 50 percent, each of these distributors proposed and justified, to the CNEE's satisfaction, the application of an alternative, lower, depreciation factor.[462]

222. That also demonstrates the inaccuracy of TGH's statement in its Memorial that "the CNEE's [terms of reference] for EEGSA's subsequent 2013-2018 tariff review contained the same FRC formula used to calculate the Sigla VAD".[463] In fact Article 4.9 of the 2013 terms of reference for EEGSA allowed the CNEE to take into consideration a different value proposed by the distributor if the latter could demonstrate that the factor proposed in the terms did not reflect the company's actual circumstances (something which EEGSA eventually managed to establish).[464] It is untenable to claim that the FRC formula with the divider 2 would apply across the board. In other words, in practice Article 4.9 of the 2013 terms of reference created the same flexibility as Article 1.10 in the 2008 Terms of Reference – a flexibility which Bates White decided to ignore when it put forward its own FRC formula in the 2008 review.[465]

223. In the 2018 review, which is currently underway, the terms of reference also proposed a depreciation factor of 2, but with the option to deviate from it in the same circumstances as those of previous reviews.[466]

224. TGH's second argument that the CNEE would have had no incentive to raise the VAD, since TGH and its partners were selling their stakes in EEGSA, is mere unsupported speculation. It also makes no logical sense considering the market and the role of the Regulator.

---

462 Santizo, para. 65.

463 Claimant's Memorial, 1 September 2017, para. 186.

464 Resolution CNEE-161-2012, 23 July 2012, **Exhibit R-1073**, Art. 4.9; *See* Santizo paras. 64, 65.

465 In the case of EEGSA, after having exchanged various proposals with the CNEE, it eventually got the CNEE's Board of Directors to accept its proposal ranging from 1.71 to 1.90, calculated on its model network and including growth. *See* Santizo, paras. 64, 65.

466 Resolution CNEE-176-2017, 27 July 2017, **Exhibit R-1086**, Art. 4.10; *See* Santizo, para. 72.

225. As explained above, the LGE established the CNEE as a technical body entrusted with the power to act as the regulator of the electricity sector.[467] In that capacity, the CNEE has no interest – either political or of any other nature – in preventing distribution tariffs from rising. Its only obligation is to ensure compliance with the LGE and that includes ensuring that the distribution companies are efficient and offer an adequate service to their customers, at fair prices and while achieving a reasonable rate of return.

226. We have already explained that the CNEE was not envisaged by the Guatemalan legal system as a body serving political interests. Two of the three members of its Board of Directors are nominated by the distributors (including EEGSA) and the universities, which begs the question how it would allegedly reflect political interests. In fact, there is strong (and contemporaneous) evidence that neither the CNEE nor the Guatemalan State intervene politically in the fixing of tariffs. For instance, in 2010, the CNEE, under the same Board of Directors which established the tariffs in 2008, approved a quarterly tariff increase in favor of EEGSA, DEORSA and DEOCSA, since that was appropriate according to the terms of the LGE. In the case of EEGSA, the increase was of 9.8 percent in the "non-social" tariff and a notable 30 percent in the social tariff (the subsidised tariff for the lower income population of the country).[468] In that case, the CNEE approved those increases and then actively intervened to defend them in judicial proceedings brought by the Guatemalan Ombudsman for Human Rights.[469] Hence TGH's suggestion that the CNEE may act motivated by any incentive other than to ensure compliance with the regulatory framework is pure speculation. Moreover, contrary to TGH's assumptions

---

467 *See* paras. 27 and 28 above.

468 "[Álvaro] Colom deplores court ruling suspending increase in electricity", *Publimetro*, 12 May 2010, **Exhibit R-1054**:

> The CNEE approved an increase of between six and 30 percent in electricity prices for the May–June–July quarter. It was rejected by broad sectors of the population. Human Rights attorney Sergio Morales filed an appeal against the measure, believing it would increase the cost of the basic goods.

In the case of EEGSA, the increase amounted to 9.8 percent for the non-social tariff (up to 1.94 Q/kWh) and to a notable 30 percent for the social tariff, i.e., the subsidised tariff for the poorer echelons of society (up to 1.68 Q/kWh). *See* "Social electricity tariff rises between 25 and 30 percent starting in May", *Prensa Libre*, 29 April 2010, **Exhibit R-1053**.

469 Decision of the Constitutional Court, Consolidated Case Files 719-2010, 721-2010, 722-2010, 723-2010 and 724-2010, 3 March 2010, **Exhibit R-1052**, p. 10.

in the "actual" scenario, in 2013 the CNEE increased the annual VAD by 19 percent compared to the VAD of the previous review.

b. TGH's hypothesis in the but-for scenario, according to which the CNEE would have applied the parameters of the Bates White Study of 28 July in the tariff reviews following 2013, is also incorrect

227. The but-for scenario presented by TGH and its expert, Mr Kaczmarek, assumes that EEGSA would have proposed (and that the CNEE would have accepted) the parameters of the Bates White Study of 28 July in perpetuity for tariff reviews from 2013 onwards. In its Memorial, TGH tries to disguise that position. Indeed, it maintains that, in reality, Mr Kaczmarek did not assume in his assessment that "EEGSA's tariffs would remain forever unchanged post-2013", as "Mr. Kaczmarek […] 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."[470] It is obvious that this is no more than a rhetorical justification. In reality, those adjustments do no more than stabilize the effect of the tariffs resulting from the Bates White Study over time in real terms. Mr Kaczmarek does not model tariff reviews in 2013, 2018 or in subsequent years, because he would not be able to do so. A tariff review does not simply involve increasing the tariff with inflation and the growth in the number of users. Thus, what the model used by Mr Kaczmarek really does is to assume that these tariffs would continue to apply to EEGSA in perpetuity. Indeed Mr Kaczmarek even acknowledged this in the Original Arbitration.[471]

228. TGH also denies that Mr Kaczmarek projected tariffs in perpetuity, because he projected tariff generated income until 2018 and then gave a terminal value to EEGSA.[472] However, this is another distinction without a difference. The reality is that the terminal value is calculated based on the projection of cash flows in perpetuity. Those cash flows

470 Claimant's Memorial, 1 September 2017, fn. 394.

471 Hearing Transcript (Spanish), Day 6, 1647:15 to 1648:22.

472 Claimant's Memorial, 1 September 2017, fn. 394.

are based, in turn, on the tariff arising from the Bates White Study of 28 July. Therefore, the methodological problem in Mr Kaczmarek's valuation remains.[473]

229. As for the use of the Bates White Study of 28 July in tariff reviews subsequent to 2013 in the but-for scenario, Messrs Abdala and Delamer explain that:

> Also invalid and incorrect is the argument that, in the absence of future information on how a 117.tariff review would be defined in 2013 or in subsequent periods, it is natural for the buyer of an asset or an appraiser to use the tariff levels observed currently or in the past to infer future tariffs without conducting a reasonability analysis of the potential result of the tariff review of 2013 and beyond. On the contrary, […] it is reasonable to consider that a potential buyer would review said assumptions and recommendations in the knowledge that in the next tariff review of 2013 the tariffs would be recalculated, without the values of the previous review having any impact on the new calculation. This implies that even if the July 2008 tariffs had been determined at the level proposed by Bates White in July 2008, a potential buyer would have expected them to be reviewed in the next tariff period, starting in July 2013, as is determined by the General Electricity Law.[474]

230. As Messrs Abdala and Delamer emphasise, the Bates White Study produced completely atypical values compared to EEGSA's accounting base or the values resulting from tariff reviews of other distributors such as DEORSA and DEOCSA.[475] As clarified above, the tariff review for EEGSA of 2013-2018 led to a significant increase in EEGSA's tariffs fixed in the 2008 review. That increase was based on the VNR proposed by EEGSA's own consultant, which was 40 percent *lower* than what had been proposed in the Bates White Study of 28 July.[476] This constitutes additional proof that it is incorrect to assume that a hypothetical buyer would have believed that the parameters of the Bates White Study would have continued to apply after the 2013 tariff review.[477]

---

473 Expert Report of M Abdala and J Delamer, para. 115.

474 *Ibid*, para. 117.

475 *Ibid*, para. 120.

476 *Ibid*, paras. 118-120.

477 *Ibid*, para. 117.

5. The case law cited by TGH is not applicable to this case

231. In its Memorial, TGH refers to various investment arbitration precedents where investors had sold their investments following unlawful measures adopted by the State, and were able to claim for future damages post-sale.[478] According to TGH, those cases support claims for future damages for loss of value in circumstances where "the investor sells or otherwise disposes of its investment as a consequence of a wrongful act of the host State."[479] Without predjudice to the fact that TGH has not proven that it sold its stake in EEGSA as the result of the measure which the Original Tribunal regarded as being in breach of the Treaty, none of the precedents cited by TGH can apply to the present case.

232. TGH cites the *Murphy v Ecuador* case, but in that case the measure being challenged was of a permanent nature. In fact, it was legislation that increased the State's share in the profits derived from participation contracts in the oil sector.[480] In those circumstances it is understandable that the tribunal did not exclude the possibility of calculating damages for the period following the sale of the investment. Conversely, in the present case, the measure challenged by TGH is subject to an express and strict time limitation, namely the 2008-2013 tariff period. Moreover the political and economic context in which Ecuador enacted the measures discussed in *Murphy* was highlighted by the tribunal as an "*increasingly hostile and coercive investment environment*"[481]: this bears no similarity with the environment in Guatemala either during the tariff review of 2008 or afterwards. Finally, as TGH emphasizes, the tribunal in *Murphy* concluded that "[t]here was an undeniable nexus between Ecuador's conduct in passing and implementing Law 42 at 99% and Murphy's decision to sell".[482] However, we have already noted that here TGH has not proved that it was "forced" to sell its stake in EEGSA as a consequence of the tariffs established in 2008.[483] Finally, in *Murphy* the tribunal rejected 93 percent of the

---

478 Claimant's Memorial, 1 September 2017, paras. 154-157.

479 *Ibid*, para. 154.

480 *Ibid*, paras. 154-155; *Murphy v Ecuador*, Partial Final Award, 6 May 2016, **Exhibit CL-1023**.

481 *Murphy v Ecuador*, Final Partial Award, 6 May 2016, **Exhibit CL-1023**, para. 281.

482 *Ibid*, para. 466; Claimant's Memorial, para. 154.

483 *See* paras. 77, 83 above.

claim, including Murphy's claim for loss of value to its stake in the consortium. The tribunal concluded that Murphy had actually benefited from the sale of its shares. As explained, TGH has not presented any evidence in this case regarding the basis for its calculation of the sale price of its stake in EEGSA. Thus, it is not possible to determine whether the sale price was affected by the measures that were considered in breach of the Treaty.[484]

233. TGH also cites the award rendered in *Total v Argentina,* where the measures criticised by the tribunal involved far-reaching legislative changes to the regulatory framework in the electricity sector. Those measures were also of indefinite duration and would have affected both Total and other investors in the future.[485] This contrasts with the present case where the measures do not consist of reforms of the legal framework, but involve an isolated act of the regulator performing a five-year tariff review; and which by definition has an expressly limited duration. The same applies to the case of *EDF v Argentina,* also cited by TGH.[486]

234. In short, this case law shows precisely the opposite of what TGH argues. Its claim is different since it attempts to attribute permanent future effects to a measure of limited duration. There is no causal link between the measure and the consequences that TGH attempts to attribute to it.

---

484 *See* paras. 147-152 above.

485 *See Total S.A. v The Argentine Republic* (ICSID Case No. ARB/04/1) (***Total v Argentina*** or ***Total***), Award, 27 November 2013, **Exhibit CL-1018**, para. 133:

> The alternative scenario cannot be based on a hypothetical tariff as the revenues of the generators were based on a complex system of variable spot prices and capacity payments in which no fixed tariff was applicable.

This contrasts with the tariff review system in Guatemala, where each review is independent, the model company and VAD components are redefined, and therefore it is not possible to anticipate how tariffs will evolve in the future.

486 *EDF Int'l SA and others v The Argentine Republic* (ICSID Case No. ARB/03/23) (***EDF v Argentina*** or ***EDF***), Award, 11 June 2012, **Exhibit CL-1024,** paras. 995-997; Claimant's Memorial, 1 September 2017, para. 157.

D. IN THE ALTERNATIVE, MR KACZMAREK'S CALCULATIONS ARE INCORRECT

235. For the reasons set out above Guatemala's position is that TGH's claim for future losses or for the alleged "loss of value" of EEGSA is unfounded and that TGH cannot be compensated for any loss that has not been proven and that has not occurred.

236. Nevertheless, without predjudice to the above, if the Tribunal were to find that TGH did indeed suffer loss in the sale of its stake in EEGSA as a result of the review of EEGSA's tariffs for 2008-2013, then this loss would necessarily be limited to the remaining five-year tariff period in course when TGH sold its stake in EEGSA, i.e., the period between 21 October 2010 (date of sale of EEGSA to EPM) and 31 July 2013 (when EEGSA's tariffs established in 2008 expired). There is clearly no basis for awarding any damages to TGH with reference to five-year tariff periods after 2013, since in each of those subsequent periods EEGSA's tariff would have been based on a new, autonomous and independent tariff review.

237. TGH's damages claim has been analysed by the Guatemalan experts, Dr Manuel Abdala and Mr Julián Delamer from Compass Lexecon, who have extensive experience in the valuation and quantification of damages, specifically in the electricity sector.[487] In their expert report, Messrs Abdala and Delamer confirm that the quantification by Mr Kaczmarek of EEGSA's alleged damages for the period beginning August 2013 is speculative and unfounded, and they conclude, accordingly, that it is inappropriate to calculate any damages for that period.[488]

238. With regard to the damages for loss of value in the 2010 sale claimed by TGH, and referred to the 2010-2013 period (in the alternative event that the tribunal found that TGH has proven future damages - the ***Alternative Case***), Messrs Abdala and Delamer use the calculation presented by Mr Kaczmarek as a starting point. They then apply a series of corrections to Mr Kaczmarek's calculation that result in a reduction of the amount of

487 Expert Report of M Abdala and J Delamer, Section I.2.\

488 *Ibid*, Section III.1.

those damages to US$ 18.2 million as at 21 October 2010, plus interest calculated at the rate of 2.3 percent up to the date of this Memorial.

1. Mr Kaczmarek's valuation for the 2010-2013 period contains serious errors that result in an overestimation of the extent of the damages allegedly suffered by TGH

239. Messrs Abdala and Delamer agree with Mr Kaczmarek that the damages allegedly suffered by TGH between October 2010 and July 2013 in the Alternative Case should be calculated according to the DCF method.[489] However, as Messrs Abdala and Delamer highlight in their Report, Mr Kaczmarek's assessment contains a series of errors that result in a significant overestimation of the extent of the damages allegedly suffered by TGH:

(a) **Mr Kaczmarek calculates the cash flow differentials at EEGSA's level instead of at the level of its shareholders (in this case TGH), and discounts them at the wrong rate.** Mr Kaczmarek incorrectly assumes that the additional cash flows which would have been generated by EEGSA in the but-for scenario would have been fully available to TGH and the other shareholders in the form of dividends. However, he does not take into account that between October 2010 and July 2013, EEGSA had certain debt payment obligations which would have restricted its ability to distribute dividends to its shareholders.[490] In addition, Mr Kaczmarek incorrectly discounts the cash flows corresponding to TGH by taking into account the risk that is applicable to EEGSA and applying a rate represented by its WACC (8.8 percent), instead of the risk rate applicable to its shareholders, which Mr Kaczmarek himself establishes at 11.9 percent.[491]

(b) **Mr Kaczmarek's operating costs projection is inconsistent with the Bates White Study of 28 July**. As we explained above, operating costs represent an

---

489 *Ibid*, paras. 129-131.

490 *Ibid*, paras. 133.a, 136.

491 *Ibid*, para. 137.

important component in the definition of the distributor's VAD.[492] In projecting these costs in his cash flow model, Mr Kaczmarek ignores the projections contained in the Bates White Study of 28 July. Instead he applies the historical cost information for EEGSA's 2007 financial year and creates a projection by applying the inflation rate to this information.[493] In this projection, Mr Kaczmarek applies significantly lower operating costs than those conferred on the distributor through the tariff resulting from the Bates White Study of 28 July. This results in higher tariffs than those required to cover the distributor's expenses. This in turn translates into a higher return on capital than that allowed by the regulation, and ultimately an artificial increase in the value of EEGSA in the but-for scenario.[494]

(c) **Mr Kaczmarek fails to calculate the effect of the tariff increase on energy demand.** As explained by Messrs Abdala and Delamer, a correct valuation of EEGSA's cash flows should take into account the elasticity of energy demand in relation to its price.[495] Consequently, the correct representation of the demand which EEGSA would encounter in the but-for scenario necessarily requires to factor in an expected decrease in energy demand due to the increased tariffs compared to the previous five-year period. Here too, by failing to take this aspect into account, Mr Kaczmarek overestimates EEGSA's revenues and, therefore, its enterprise value in the but-for scenario.[496]

2. Corrected valuation of the alleged damages suffered by TGH

240. In correcting the above mentioned errors in the assessment of the but-for scenario for the 2010-2013 period, Messrs Abdala and Delamer conclude that:

(a) When the cash flow differential is determined in accordance with the cash flows that correspond to TGH instead of EEGSA, and when these values as at October

---

492 *See* para. 29 above.

493 Expert Report of M Abdala and J Delamer, paras. 133.b, 138, 139.

494 *Ibid*, para. 140.

495 *Ibid*, paras. 133.c, 142-146.

496 *Ibid*, para. 143.

2010 are discounted at the cost of its own equity as calculated by Mr Kaczmarek, i.e., 11.9 percent, instead of the WACC (8.8 percent) applied in Mr Kaczmarek's valuation, the alleged damages suffered by TGH for the period from October 2010 until July 2013 are reduced from US$ 26.8 million to US$ 25.5 million;[497]

(b) When using operating cost projections which are consistent with those set out in the Bates White Study of 28 July, the alleged damages for the period from July 2008 until October 2010 are reduced from US$ 26.8 million to US$ 20. 6 million;[498]

(c) When estimating the impact of the tariffs implemented as from August 2008 on energy demand experienced by EEGSA, thereby introducing the effect of demand elasticity into Mr Kaczmarek's valuation exercise, the alleged future damages suffered by TGH for the 2010-2013 period are reduced by US$ 3.7 million;[499]

(d) In addition, Messrs Abdala and Delamer caution that Mr Kaczmarek does not apply the correct inflation coefficients when moving from constant to nominal currency in the calculations on which the alleged damages are based.[500] The correction of this error by Messrs Abdala and Delamer actually results in an increase in TGH's alleged damages by US $3.8 million.[501]

497 *Ibid*, para. 137.

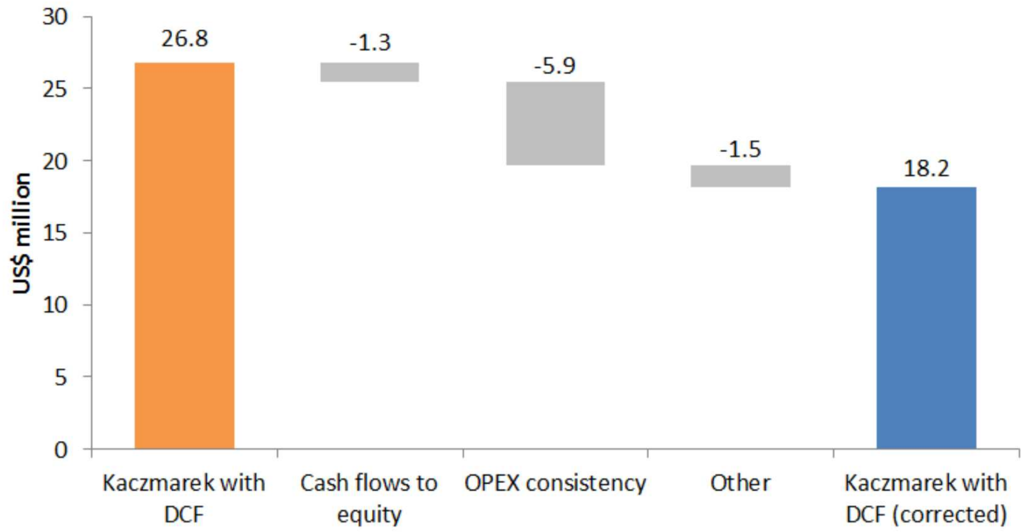
498 *Ibid*, para. 141.

499 *Ibid*, para. 146.

500 *Ibid*, paras. 147-151.

501 *See ibid*, para. 151. Tariff studies are expressed in constant currency which ignores the effect of inflation – for example, the tariff studies for the 2008 EEGSA review are expressed in US$ as of December 2006. To express the VAD in nominal currency in order to determine its present value, therefore, it is necessary to apply the corresponding inflation rates. In performing this exercise, Mr Kaczmarek uses only an American dollar inflation rate and fails to consider that the cost components on which the VAD calculation is based also include purchases made in Guatemalan quetzals. Guatemala's inflation rate, as well as movements in the exchange rate between the Guatemalan quetzal and the American dollar, therefore, must also be taken into account. Using different inflation coefficients is important when, as in this case, the two currencies did not maintain the same purchasing power.

241. In short, once the corrections indicated above are applied to the Kaczmarek Report, the effect is a reduction of TGH's alleged future damages for the 2010-2013 period from US$ 26.8 million to US$ 18.2 million, as shown in the graph below:[502]



3. Mr Kaczmarek's "reasonableness checks" are invalid

242. In order to support his conclusions regarding the value of EEGSA in the actual and but-for scenarios, Mr Kaczmarek presents two alleged "tests" on said results. As we explain below these tests contain conceptual and implementation errors and should therefore be disregarded.

a. EEGSA's value estimated by Mr Kaczmarek in the but-for scenario cannot be compared with the VNR obtained from the Bates White Study of 28 July

243. In the opinion of Mr Kaczmarek the first alleged proof of the reasonableness of the valuations presented by TGH, in both the but-for scenario and the actual scenario, can be shown by comparing these valuations with the VNRs obtained in the Sigla Study and in the Bates White Study of 28 July respectively. According to Mr Kaczmarek this exercise demonstrates that these values should coincide once certain surcharges, which would be

502 *Ibid*, paras. 152, 153 (Figure 12). The table's "Other" category represents the combined effect of adjustments c) and d) above, which derive from the corrections made to the elasticity of energy demand and the application of the correct inflation rates to the VAD analysis, respectively.

justified in the context of the sale of the shares in EEGSA to EPM, are added to his valuations.

244. While Messrs Abdala and Delamer generally agree with Mr Kaczmarek that in a regulated sector there could be equivalence between the value of the capital base and the market value of the company in question, they also explain that such equivalence would not be absolute, nor would it always occur.[503]

245. In addition Messrs Abdala and Delamer explain that, even if it were accepted that this equivalence exists, the comparison made by Mr Kaczmarek is not correct since he wrongly equates the VNR calculated in the Bates White Study of 28 July with the value of the capital base.[504] As we have explained above the gross VNR does not represent the capital base on which tariffs are calculated. Rather the VNR represents the theoretical value of a new network, which on its own does not reflect the state of depreciation on which the return of the investment is estimated. It is only once the gross value of the VNR is incorporated into the FRC formula that one obtains the value of depreciated VNR which is representative of the tariff basis. Therefore, as explained by Messrs Abdala and Delamer, the gross VNR without any depreciation cannot be used as a reference to compare with EEGSA's alleged value in the actual scenario.[505]

246. In any event, as indicated by Messrs Abdala and Delamer, not even the properly depreciated value of the VNR calculated in the Bates White Study of 28 July could be considered as an equivalent to the market value of EEGSA in the but-for scenario. As already explained, the values resulting from the Bates White Study of 28 July are distorted values that bear no relationship to the historical evolution of EEGSA's VNR nor to the expectations for the 2013 tariff review.[506] Hence it would be unreasonable to

503 *Ibid*, paras. 159-163.

504 *Ibid*, para. 160.

505 *Ibid*, paras. 161-163.

506 *See* paras. 227-230 above.

assume that a potential buyer of EEGSA in 2008 would have paid a purchase price with the expectation that those tariffs would remain unchanged over time.[507]

247. To confirm Mr Kaczmarek's overestimation it is worth noting that if an average depreciation rate of 44 percent -equivalent to that agreed between the CNEE and EEGSA in the EEGSA tariff review of 2013- is applied to the gross VNR from the Bates White Study of 28 July, which Mr Kaczmarek took as a basis, this would yield a value of US$ 680 million. That demonstrates that the but-for value of US$1,479 million proposed by Mr Kaczmarek as fair market value for EEGSA is significantly overestimated and cannot be considered to represent value that can be realised in a market transaction.[508]

b. The alleged check by Mr Kaczmarek based on the IRR is incorrect

248. Mr Kaczmarek also tries to validate his conclusions regarding damages on the basis of a calculation of the internal rate of return (***IRR***) to the shareholder based on the privatisation price of EEGSA in 1998.[509] According to Mr Kaczmarek the historical IRR of TGH's investment in EEGSA to the shareholder since 1998 has been lower than TGH's cost of its own equity for this investment. As explained by Mr Kaczmarek this would show that unless the damages claimed were awarded to TGH its investment in EEGSA would result in an economic loss. Further, Mr Kaczmarek claims that even if TGH were awarded the damages claimed in this arbitration, TGH's IRR would still be lower than its cost of equity, which would demonstrate the reasonableness of the damages claimed.[510] However, as explained by Messrs Abdala and Delamer,[511] this supposed verification exercise by Mr Kaczmarek suffers from important errors that invalidate his conclusions.

249. Firstly Mr Kaczmarek's verification exercise includes an analysis of the returns for the ten-year period prior to the dispute (1998-2008), without considering whether EEGSA's

---

507 Expert Report of M Abdala and J Delamer, para. 160.

508 *Ibid*, para. 161.

509 Kaczmarek III, para. 298.

510 Claimant's Memorial, 1 September 2017, paras. 220-225.

511 Expert Report of M Abdala and J Delamer, para. 165.

performance during such period - which logically was not affected by the 2008-2013 tariff review discussed in the present dispute - was higher or lower than the return that was actually regulated for the 2008-2013 tariff review. As Messrs Abdala and Delamer explain the regulatory framework does not claim to set down expectations regarding returns which can be guaranteed retroactively. Rather, expectations on returns are established independently and prospectively for each five-year period.[512] Consequently, historical profitability during previous tariff periods cannot be relied upon for the purposes of analysing the reasonableness of the alleged future damages.

250. Mr Kaczmarek's second error, as explained by Messrs Abdala and Delamer, consists of comparing the IRR and the cost of equity on the basis of the returns of TGH, i.e., of the shareholder, even though the regulatory framework regulates the activities and returns of EEGSA. These returns may well differ from each other as a result of financing decisions and levels of indebtedness.[513]

251. Finally, Messrs Abdala and Delamer notice that Mr Kaczmarek's alleged reasonableness test is based on a calculation which includes the tariff period that would commence in August 2013. It has already been explained, however, that no damages whatsoever can exist with regard to that period, and as a consequence it is not correct for that period to be included for the purpose of calculating the IRR, which should be limited to the five-year period of 2008-2013.[514]

252. To support their disagreement with Mr Kaczmarek's assessment, Messrs Abdala and Delamer determined that an analysis of EEGSA's annual return, measured by the return on invested capital (***ROIC***), shows that its return in each distinct tariff period has been reasonable. Moreover as of 2008 this return has been within the range established by the regulation.[515] On the other hand, the ROIC analysis shows that Mr Kaczmarek's projections for the but-for scenario would result in returns of 30.5 percent and 53.1

512 *Ibid*, para. 167.

513 *Ibid*, para. 168.

514 *Ibid*, para. 169.

515 *Ibid*, paras. 171-174.

percent for the third (2008-2013) and fourth (2013-2018) tariff periods, respectively. These returns are unreasonably high by any measure of returns with which they may be compared, and especially when compared to the rates of return provided by the regulatory framework in force in Guatemala.[516]

253. All the above confirms that the alleged reasonableness check offered by Mr Kaczmarek on the basis of the IRR on TGH's investment in EEGSA does not support his quantification of the alleged damages suffered by TGH. The ROIC analysis, on the other hand, confirms the evident overestimation of the damages made by Mr Kaczmarek in his analysis.

V. SUBMISSIONS ON THE CALCULATION OF INTEREST

A. INTEREST ON ALLEGED HISTORICAL DAMAGES FOR THE 2008-2010 PERIOD

254. As we have explained the so-called historical damages[517] are the damages that the Original Tribunal awarded to TGH for the cash flows that EEGSA did not generate between 1 August 2008 and 20 October 2010. The award of the Original Tribunal provided that interest on damages would start to accrue from the sale of the EEGSA shares in October 2010, at a rate equivalent to the United States preferential interest rate plus an extra 2 percent.[518]

255. Hence the Original Tribunal refused to award interest on historical damages from the date on which new tariffs entered into force in August 2008 until the sale of EEGSA's shares in October 2010. The view of the Original Tribunal was that awarding interest on these cash flows for that period would have led to unjust enrichment for TGH since the cash

516 *Ibid*, para. 173.e.

517 As indicated above (*see* para. 112), the position taken by Guatemala in this arbitration is without prejudice to its arguments in the confirmation proceedings before the United States District Court for the District of Columbia.

518 Award, 19 December 2013, paras. 762-768.

flows used in the calculation of historical losses had not been discounted.[519] This decision was subsequently annulled by the Committee.[520]

256. Based on the analysis by Guatemala's experts, Dr Manuel Abdala and Mr Julian Delamer, it would be correct, in principle,[521] for interest on the historical damages awarded by the Original Tribunal to accrue for the period of August 2008 to 21 October 2010. As explained by Messrs Abdala and Delamer, an adjustment factor based on EEGSA's cost of own capital, namely the WACC, shall be applied for this exercise. In this regard Mr Kaczmarek's quantification of 8.8 percent is appropriate.[522] Interest on historical damages for the relevant period, calculated using this methodology, amounts to US$ 0.8 million as of 21 October 2010.[523]

B. INTEREST ON ALLEGED FUTURE DAMAGES

257. Should the Tribunal find that the value of TGH's stake in EEGSA suffered a loss between 2010 and 2013 as a result of Guatemala's measures which the Original Tribunal ruled to be in breach of the Treaty (which is categorically denied), Messrs Abdala and Delamer explain that any such interest would begin to accrue from 21 October 2010. Moreover this interest should be calculated by applying a risk-free rate because, once TGH sold its stake in EEGSA, TGH was no longer exposed to the risk of investing in it.[524]

258. In light of the above, and as explained by Messrs Abdala and Delamer, it is incorrect to apply the United States preferential interest rate plus 2 percent, as proposed by Mr

---

519 *Ibid*, paras. 757-759.

520 Decision on Annulment, 5 April 2016, para. 198.

521 Guatemala reiterates that the legality of TGH's claim for historical damages is subject to ongoing proceedings for the confirmation of the Award, and therefore Guatemala expressly reserves its arguments and defences in this regard; *See* para. 112 above.

522 Expert Report of M Abdala and J Delamer, para. 183. This factor reflects the financial cost of opportunity of EEGSA's cash flows and corresponds to the level of commercial risk to which TGH was exposed by virtue of its investment in Guatemala during the period preceding the sale of its stake in EEGSA.

523 *Ibid*, para. 184.

524 *Ibid*, para. 185. The same must apply to any future damages that may be awarded for losses that may be incurred after 2013.

Kaczmarek.[525] That interest rate allows for a commercial risk - specifically the risk of default - which represents the cost of financing for companies which are subject to such risk. Moreover the additional 2 percent proposed by Mr Kaczmarek itself entails the addition of a higher return than that provided by a risk-free rate under normal conditions. Thus, it should be rejected.[526]

VI. TGH'S CLAIM FOR THE COSTS OF THE ORIGINAL ARBITRATION IS GROUNDLESS AND SHOULD BE REJECTED

259. As we have explained the Original Tribunal ordered Guatemala to pay 75 percent of TGH's costs in the Original Arbitration, which amounted to US$ 7,520,695.39.[527] The Original Tribunal explained that it based its decision on the application of the principle that costs follow the event.[528] In the words of the Original Tribunal: "the Claimant has been successful in its arguments regarding jurisdiction, as well as in establishing the Respondent's responsibility. However, the Respondent has been partially successful on quantum."[529]

260. During the annulment proceedings Guatemala requested the annulment of the Original Tribunal's decision on costs for failure to state reasons, on the grounds that the Tribunal had not explained how it had arrived at its decision, especially when considering that most of TGH's claims on the merits had been rejected, as well as more than 90 percent of its claim for damages.[530] The Committee eventually proceeded to annul the costs order although it based its decision directly on the fact that, given the annulment of other sections of the Award, the original costs order could not stand.[531]

---

525 Claimant's Memorial, 1 September 2017, para. 269; Expert Report of M Abdala and J Delamer, para. 188.

526 Expert Report of M Abdala and J Delamer, paras. 185-189.

527 Award, 19 December 2013, para. 779.

528 *Ibid*, para. 777.

529 *Ibid*, para. 778.

530 Claimant's Memorial on Partial Annulment, 17 October 2014, paras. 95-109; Claimant's Rejoinder on Partial Annulment, 8 May 2015, paras. 69-87; Decision on Annulment, 5 April 2016, paras. 352-354.

531 Decision on Annulment, 5 April 2016, paras. 358-362.

261. In its Memorial, TGH argues that Guatemala must be ordered to pay the full costs of the Original Arbitration or, alternatively, at least 75 percent thereof.[532] As we explain below, there is no basis on which to justify this claim. Moreover, given that the Original Tribunal's costs order has been annulled in its entirety this Tribunal is logically empowered to perform a *de novo* analysis of this issue, free from any limitation. In fact, TGH assumed the risk that the costs order could be annulled when it applied for the partial annulment of the Award, and now it cannot argue that this Tribunal is obliged to maintain the position of the Original Tribunal on the point.

262. As we explain below it is especially necessary for this Tribunal to review the issue of costs in the Original Arbitration, since the original Tribunal's costs order against Guatemala (now annulled) was particularly disproportionate and lacked the slightest justification.

A. THE PRINCIPLE OF "COSTS FOLLOW THE EVENT" DOES NOT JUSTIFY A COSTS AWARD AGAINST GUATEMALA

263. TGH asserts that there is no dispute between the parties regarding the application of the principle that costs follow the event.[533] According to TGH, this principle implies that the prevailing party should receive all or a significant portion of its costs.[534]

264. Guatemala questions TGH's interpretation of this principle in the context of the Original Arbitration. Indeed, it should be noted that it is widely accepted in international arbitration that, in those cases where the result of an arbitration is not clear, costs must be awarded in consideration of the relative success of the claims of each of the parties.[535] In line with this principle Article 60(2) of the ICSID Convention leaves it to the Tribunal's

---

532 Claimant's Memorial, 1 September 2017, paras. 260, 264 and 268.

533 *Ibid*, para. 261.

534 *Ibid*, paras. 262-263.

535 CH Schreuer, *The ICSID Convention: A commentary* (2nd ed. 2009), **RL-1017**, paras. 19-21. *See also* G Petrochilos, *Procedural Law in International Arbitration* (1st ed. 2004), **RL-1007**, para. 5,125(8).

discretion to determine whether costs are to be paid by one of the parties, and to what extent.[536]

265. The Tribunal must exercise such discretion in this case. As explained below, there are several reasons why the Tribunal's discretion should be exercised. In particular, this is because most of TGH's arguments on the merits were rejected, save one, and 90 percent of its claim for damages was also rejected. In addition Guatemala's conduct in the Original Arbitration was beyond reproach. TGH already attempted to convince the Original Tribunal to the contrary but was unsuccessful. Finally, there were no exceptional circumstances in the Original Arbitration that would justify a costs award against Guatemala.

1. The conduct of the Parties

266. In its Memorial TGH provides an opportunistic and selective presentation of certain procedural events that took place during the Original Arbitration, which, according to TGH, are representative of Guatemala's overall inappropriate "procedural conduct". TGH alleges that it was harmed by this conduct and that an award on costs would therefore be justified.[537] TGH already made these arguments during the costs allocation phase of the Original Arbitration,[538] during which each argument was duly answered by

---

536 *Churchill Mining PLC and Planet Mining Pty Ltd v The Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40) (***Churchill Mining v Indonesia*** or ***Churchill Mining***), Award, 6 December 2016, **Exhibit RL-1033**, para. 547 ("[…] Article 61(2) of the Convention grants the Tribunal discretion in allocating the ICSID arbitration costs and the Parties' costs, including legal fees."); *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/12/31), Award, 22 September 2015, **Exhibit RL-1027**, para. 149 ("The divergent practice reflects the considerable degree of discretion that ICSID tribunals enjoy under Article 61(2) of the Convention, which does not prescribe any particular approach, in making costs awards."); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 March 2015, **Exhibit RL-1026**, para. 210 ("In accordance with Article 61 of the ICSID Convention it is obliged to determine how and by whom the costs of and associated with these proceedings are to be borne, as to which it retains a wide discretion."); *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) (***El Paso v Argentina*** or ***El Paso***), Award, 31 October 2011, **Exhibit CL-1010**, para. 750 ("The Convention and the Arbitration Rules give ICSID tribunals broad discretion in awarding costs.").

537 Claimant's Memorial, 1 September 2017, para. 267.

538 Claimant's Submission on Costs (Original Arbitration), 24 July 2013, paras. 5-21.

Guatemala.[539] The Original Tribunal made no reference to TGH's arguments in its decision on costs.[540] In its Memorial, TGH once again submits the same arguments, ignoring the counter-arguments already made by Guatemala in the past.

267. Contrary to the allegations made by TGH, there was no misconduct on the part of Guatemala. In fact Guatemala's conduct in the Original Arbitration was a strong example of collaboration and efficiency, which is rather unusual for States in investment arbitrations. In fact TGH's accusations are nothing short of extraordinary since Guatemala did not create any obstacles in the Original Arbitration and even consented not to bifurcate the issue of the Original Tribunal's jurisdiction. Guatemala cooperated to such an extent that the proceedings lasted only two and a half years, from inception to the post-hearing briefs, which is wholly exceptional given the typical current lifespan of arbitrations arising out of investment treaties.

268. TGH accuses Guatemala, for example, of improperly including arguments on jurisdiction in its Rejoinder.[541] As indicated above, Guatemala agreed to having no separate jurisdiction phase, which allowed the arbitration to be resolved in record time, and it also agreed in principle that only the first round of pleadings on the merits would address issues of jurisdiction. TGH's complaint regarding Guatemala's Rejoinder fails to mention, however, that this Rejoinder was preceded a few weeks earlier by the issuance of the award in the *Iberdrola* case which rejected the parallel (and factually identical) ICSID claim brought by EEGSA's main shareholder against Guatemala.[542] Given the undeniable relevance of that decision to the dispute before the Original Tribunal, it was entirely reasonable and expected for Guatemala to make reference to the jurisdictional issues dealt with in that award in its Rejoinder. As acknowledged by TGH itself, it subsequently had the opportunity to answer these submissions.[543]

---

539 Respondent's Reply on Costs (Original Arbitration), 7 August 2013, paras. 18-29.

540 Award, 19 December 2013, paras. 769-779.

541 Claimant's Memorial, 1 September 2017, paras. 86, 87.

542 The award in the *Iberdrola* case was issued on 17 August 2012, and Guatemala's Rejoinder was filed on 24 September 2012.

543 *See* Claimant's Rejoinder on Jurisdiction and Admissibility (Original Arbitration), 9 November 2012.

269. TGH also accuses Guatemala of making improper reference to documentary and testimonial evidence from the *Iberdrola* case.[544] Here too TGH distorts the facts. There was no procedural rule in the Original Arbitration that limited the presentation of material from the *Iberdrola* case. Guatemala exhibited with its Counter-Memorial certain documents from that arbitration. TGH objected but the Original Tribunal rejected TGH's opposition almost in its entirety, ordering the exclusion of nothing more than some extracts of two witness examinations from the *Iberdrola* hearing.[545]

270. TGH also complains of Guatemala's alleged refusal to deliver relevant documents during the document production phase, accusing it of withholding documents including minutes of the CNEE's Board meetings as well as promotional material used for the privatisation of EEGSA.[546] This is a baseless accusation. Guatemala already explained to TGH that the absence of documents regarding the CNEE's Board meetings was due to the nature of its decision-making procedure, which is documented via public resolutions and therefore does not require the preparation of minutes.[547] Likewise Guatemala explained that it had submitted all the promotional materials relating to the privatisation of EEGSA that were in its possession, and that in any event the Claimant's request was surprising because it was EEGSA itself that was responsible for the sale of its own shares during the privatisation process.[548]

271. Another of TGH's complaints is that Guatemala allegedly made misleading arguments in the Original Arbitration.[549] Guatemala already explained that this accusation is unfounded.[550] In any event, this accusation is rather extraordinary coming from a party that notified Guatemala of its dispute in January 2009, claiming Guatemala had

544 Claimant's Memorial, 1 September 2017, paras. 88-93.

545 Letter from the Original Tribunal to the Parties, 10 February 2012, **Exhibit C-1275**.

546 Claimant's Memorial, 1 September 2017, paras. 94, 95.

547 Respondent's Reply Post-Hearing Brief (Original Arbitration), 8 July 2013, para. 9.

548 *Ibid*, para. 10.

549 Claimant's Memorial, 1 September 2017, paras. 96, 97.

550 Respondent's Reply on Costs (Original Arbitration), 7 August 2013, paras. 9-17.

"expropriated" its stake in EEGSA in violation of Article 10.7 of the CAFTA-DR,[551] and then it negotiated the sale of the that same stake to EPM (just one year later) for an amount of close to US$ 150 million.[552] Actually the facts show that it was TGH that submitted misleading arguments in the Original Arbitration. As explained above, all but one of the arguments it submitted in the Original Arbitration were rejected.[553] As shown above that mis-characterisation continues in this arbitration where TGH submits a description of the dispute without mentioning that its position was in most cases rejected by the Original Tribunal.[554]

272. Finally TGH seeks to justify a costs award on the basis of the alleged reprehensible conduct of Guatemala in relation to translations of extracts from legal authorities in the Original Arbitration.[555] It should be noted in this regard that initially the Guatemalan Government internal legal team - who did not speak English - requested translations of extracts from legal authorities. Later this proved to be unnecessary due to certain changes in the Government's legal team, once the arbitration had started. In any event, translations of extracts from legal authorities represent a small part (less than 1 percent) of TGH's exorbitant claim for costs in the Original Arbitration.[556] Similarly TGH's accusation that Guatemala did not fully translate the Mercados Energéticos report is unfounded. Guatemala had no obligation to translate any document in its entirety since the parties expressly agreed that only relevant extracts would be translated,[557] and that is what Guatemala did with the Mercados Energéticos report.[558] In addition (and despite not

---

551 Notice of Intent, 9 January 2009, **Exhibit R-1044**.

552 *See* Section III.A.4 above.

553 *See* Section III.B.3 above.

554 *See, for example,* paras. 44, 47, 50, 52, 56, 64, 65, 66, 68, 69, 81, 84 above.

555 Claimant's Memorial, 1 September 2017, paras. 98-101.

556 TGH claims more than US$ 10 million in costs of the Original Arbitration. The cost of translations <u>for all items in the arbitration</u> (i.e., translations of its pleadings, statements and exhibits) represent US$ 226,223.78. Claimant's Memorial, 1 September 2017, para. 268; Claimant's Reply on Costs (Original Arbitration), 7 August 2013, para. 9.

557 Minutes of the First Session, 23 May 2011, Section 10, **Exhibit C-1284**.

558 Mercados Energéticos, "Review of EEGSA's Value-Added for Distribution Study in the Relation to the Opinion of the Expert Commission", July 2009, **Exhibit R-1048**.

being obliged to do so) Guatemala presented full translations of several fundamental documents in the case, such as the decisions of the Constitutional Court[559] and the *Iberdrola* award.[560]

2. The outcome of the Original Arbitration

273. As explained, TGH did not prevail on the majority of its claims in the Original Arbitration; therefore no clear winner can be determined. For example, the Original Tribunal upheld Guatemala's argument regarding the advisory and non-binding nature of the Expert Commission's report which constituted a central issue in the dispute between the parties and their experts in the Original Arbitration.[561] In fact, the Original Tribunal rejected all TGH's arguments on the merits, except for one.[562]

274. Guatemala does not dispute that the Original Tribunal ultimately declared its international responsibility, but this Tribunal cannot overlook the fact that the Original Tribunal decided to reject more than 90 percent of the claim for damages submitted by TGH.

275. Considering these circumstances as a whole, the Tribunal should find that neither of the parties clearly prevailed in the Original Arbitration, and therefore the costs of those proceedings should be apportioned according to their relative degrees of success.

276. In this regard particular attention should be given to the practice of many tribunals which, despite having found that the claimant had succeeded to some extent, have chosen not to

559 Decision of the Constitutional Court, Consolidated Case Files 1836-1846-2006, 18 November 2009, **Exhibit R-1049**; Decision of the Constitutional Court, Case File 3831-2009, 24 February 2010, **Exhibit R-1051**.

560 *Iberdrola Energía S.A. v The Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, **Exhibit RL-1019**.

561 Award, 19 December 2013, paras. 565, 670.

562 The Original Tribunal rejected TGH's arguments regarding: (i) the alleged manipulation of the Terms of Reference; (ii) the alleged lack of cooperation in the tariff review process; (iii) the alleged attempts to improperly influence the Expert Commission; (iv) the alleged repudiation of the operating rules that expanded the powers of the Expert Commission; (v) the alleged illegitimate dissolution of the Expert Commission once it had issued its finding, and (vi) the alleged retaliation against EEGSA and its directors. Award, 19 December 2013, paras. 639-657 and 712-714.

order the State to pay costs based on the specific circumstances of the case.[563] Furthermore, some tribunals have apportioned costs according to the relative success of each party.[564] As explained by the tribunal in *Eastern Sugar,* the principle of costs follow the event does not mean that "the winner on balance takes all". Rather, costs "must be borne in proportion to the outcome."[565]

---

563 *See Joseph Houben v The Republic of Burundi* (ICSID Case No. ARB/13/7), Award, 12 January 2016, **Exhibit RL-1028**, para. 259; *Micula v. Rumania*, Award, 11 December 2013, **Exhibit RL-1021**, para. 1328; *Mr. Franck Charles Arif v The Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013, **Exhibit RL-1020**, paras. 631, 632; *EDF v Argentina*, Award, 11 June 2012, **Exhibit CL-1024**, para. 1345; *El Paso v Argentina*, Award, 31 October 2011, **Exhibit CL-1010**, paras. 750-751; *Impregilo v Argentina*, Award, 21 June 2011, **Exhibit CL-1025**, para. 385; *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic* (ICSID Case No. ARB/01/3), Award, 22 May 2007, **Exhibit RL-1010**, para. 453; *Duke Energy International Peru Investments No. 1 Ltd. v The Republic of Peru* (ICSID Case No. ARB/03/28), Award, 18 August 2008, **Exhibit RL-1016**, para. 500; *M.C.I. Power Group, L.C. and New Turbine, Inc. v The Republic of Ecuador* (ICSID Case No. ARB/03/6), Award, 31 July 2007, **Exhibit RL-1011**, para. 372. This practice is also observed in instances where other arbitration rules were applied. *See, for example, Murphy v Ecuador*, Final Award, 10 February 2017, **Exhibit CL-1070**, paras. 78-80 and *Copper Mesa Mining Corporation v The Republic of Ecuador* (UNCITRAL, PCA Case No. 2012-2), Award, 15 March 2016, **Exhibit RL-1030**, para. 9.7.

564 *Orascom TMT Investments S.à r.l. v The People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Award, 31 May 2017, **Exhibit RL-1035**, para. 583 ("Two approaches have been adopted by ICSID tribunals in awarding costs. The first consists in apportioning ICSID costs in equal shares and ruling that each party shall bear its own costs. The second applies the principle 'costs follow the event', such that the losing party bears the costs of the proceedings, including those of the other party, or that the parties share in the costs proportionately to their success or failure."); *Churchill Mining v Indonesia*, Award, 6 December 2016 **Exhibit RL-1033**, para. 548 ("Two approaches have been adopted by ICSID tribunals in awarding costs. The first consists in apportioning ICSID costs in equal shares and ruling that each party shall bear its own costs. The second applies the principle 'costs follow the event', such that the losing party bears the costs of the proceedings, including those of the other party, or that the parties share in the costs proportionately to their success or failure."); *Oxus Gold plc v The Republic of Uzbekistan, the State Committee of Uzbekistan and others* (UNCITRAL), Final Award, 17 December 2015, **Exhibit CL-1047**, para. 1040 ("[…] the Arbitral Tribunal therefore considers that costs should in principle be awarded 'following the event', i.e. taking into account the parties' relative success regarding their claims and defenses. In limited circumstances, a party's conduct during the proceedings such as deficiencies in its presentation of the case or obstructive behavior may justify a deviation from that principle."). (emphasis added).

565 *Eastern Sugar B.V. (Netherlands) v The Czech Republic* (SCC Case No. 088/2004), Final Award, 12 April 2007, **Exhibit RL-1009**, para. 6. This decision is even more relevant if one takes into account the fact that a successful party is more likely to recover its costs in UNCITRAL arbitrations, such as *Eastern Sugar*, where the principle of "costs follow the event" is specifically provided for in the rules. In ICSID arbitrations, however, such determination is left to the discretion of the tribunal. Furthermore, in *Eastern Sugar*, the tribunal ultimately ordered the investor to pay part of the respondent State's costs. According to the tribunal, while the investor had succeeded in the arbitration, it had only done so in respect of 25 percent of its claims. M Hodgson, "Counting the costs of investment treaty arbitration", *Global Arbitration Review*, 24 March 2014, **Exhibit RL-1022**, p. 6. The proportion of damages awarded in comparison with the total damages claimed was also taken into account by the tribunal in *Garanti Koza*, who limited its costs order to ICSID costs (leaving aside the costs of each party's legal representation). The tribunal did so because, although the claimant had succeeded, it had only obtained "about five percent of the compensation it

277. That position is logical since otherwise there would be a perverse incentive for a party, which might succeed on a specific issue, to litigate other potential issues despite their low probability of success. That is precisely what happened in this case, where TGH made a number of unsupported claims regarding both the merits and damages. The tribunal in *SD Myers v Canada* recognised the need to protect the party which has been forced to incur legal expenses in order to defend its legitimate interests.[566] Ordering Guatemala to pay the costs incurred by TGH in presenting claims that failed would therefore be unfair.

278. Finally the Tribunal should dismiss TGH's argument that, since the portion of the Award on which Guatemala had prevailed (the future damages) has been annulled, there would be no reason to limit Guatemala's liability for costs to 75 percent.[567] As previously explained, the annulment of the costs award actually allows this Tribunal to decide the issue from its own perspective.

B. THE COSTS INCURRED BY TGH ARE NOT REASONABLE

279. Furthermore, contrary to TGH's allegations,[568] its costs in the Original Arbitration are not reasonable in light of the circumstances of the case. TGH incurred total costs of US$ 10,027,593.86, almost double the costs incurred by Guatemala. The proceedings did not require a separate jurisdiction or damages phase and the case was resolved in just over three years,[569] which is a very short period for arbitrations of this kind.[570]

---

sought". *Garanti Koza LLP v Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016, **Exhibit RL-1034,** paras. 449-451.

566 *S.D. Myers, Inc. v The Government of Canada*, (UNCITRAL), Final Award, 30 December 2002, **Exhibit RL-1005**. The circumstances of *SD Myers* are analogous to those of this case. The claimant obtained approximately US$ 3.8 million (equivalent to CAN$ 6 million according to the applicable exchange rate in October 2002, *i.e.,* US$ 1 = CAN$ 1,578), representing 7.2 percent of the compensation claimed in the damages phase (US$ 53 million). In the Original Arbitration, TGH obtained 8.6 percent of the approximately US$ 243.6 million it sought, and which Guatemala had to defend. Noting the manifest degree of success of the respondent in its defense, the tribunal of *SD Myers* ordered the respondent to pay only 50 percent of the claimant's procedural costs and 14 percent of its legal costs. This was the case despite the fact that *SD Myers* was an UNCITRAL arbitration, where the rules favour the application of the principle that costs follow the event, as previously explained.

567 Claimant's Memorial, 1 September 2017, para. 264.

568 *Ibid*, para. 265.

569 TGH's Request for Arbitration was filed on 20 October 2010 and the Original Tribunal issued its decision on 19 December 2013.

280. Even without using the costs incurred by Guatemala as a reference, it is possible to arrive at the same conclusion. A study of ICSID arbitrations concluded between 2011 and 2015 reveals that the costs incurred amounted to an average of US$ 5,619,261.74 for claimants, and US$ 4,954,461.27 for respondents.[571] This means that the costs claimed by TGH for proceedings, that did not involve any complex or unforeseen procedural situation (such as bifurcation or challenges to members of the tribunal) are almost double the average costs incurred by claimants in 138 cases during the same period and in similar arbitrations.[572] This shows that the costs claimed by TGH cannot be considered reasonable.

C. CONCLUSION ON COSTS

281. In light of the arguments set out in the preceding sections, it is appropriate for this Tribunal to order the apportionment of the costs which each party incurred in the Original Arbitration according to the relative success of each party in their claims, after having determined whether such costs can be considered reasonable (and if it should find otherwise, to reduce such costs fairly).

282. In this regard, as explained above, Guatemala succeeded in four of the five claims submitted by TGH, and TGH's claims for damages were reduced by more than 90 percent. TGH, in turn, succeeded on the jurisdiction of the Original Tribunal, and ultimately prevailed in respect of one of its claims on the merits. Furthermore the extent of the costs incurred by TGH is not reasonable in light of the procedural circumstances of the Original Arbitration. Thus, Guatemala proposes that the Tribunal applies a 50 percent reduction to the amount of costs claimed by TGH in the Original Arbitration, and that it

570 J Commission, "The duration costs of ICSID and UNCITRAL investment treaty arbitrations", *Funding in Focus*, July 2016, **Exhibit RL-1031**. Mr Commission explains that, according to results published by ICSID in 2015, "the average duration of [ICSID] proceedings – from registration to award – was 3.75 years, or 1,370 days." Between the date of registration of TGH's Request for Arbitration on 23 November 2010, and the issuance date of the Award on 19 December 2013, only 1,122 days or 3.07 years had passed. Consequently, based on the parameters assessed in this study, the Original Arbitration was resolved in a significantly shorter time than the average (eight months faster).

571 J Commission, "How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years", *Kluwer Arbitration Blog*, 29 February 2016, **Exhibit RL-1029**.

572 *Ibid*.

orders Guatemala to pay no more than 10 percent of such costs in consideration of the success of TGH on its claims.

VII. REQUEST FOR RELIEF

283. The Republic of Guatemala respectfully requests the Tribunal to:

(a) REJECT TGH's claim for future damages and the loss of value of its shares in EEGSA;

(b) GRANT any further relief to Guatemala that the Tribunal may deem appropriate;

(c) ORDER the Parties to pay the costs relating to the two arbitrations as follows:

a. Regarding the costs of the Original Arbitration, that the amount of costs claimed by TGH be reduced by 50 percent and, in any event, that Guatemala be ordered to pay no more than 10 percent of such costs; and

b. Regarding costs of this arbitration, that TGH be ordered to pay such costs in their entirety, including the fees and expenses of the Tribunal and of ICSID, and the fees and expenses incurred by Guatemala for purposes of legal representation, with interest.

Respectfully submitted on behalf of the Republic of Guatemala on 2 February 2018.

Nigel Blackaby

Freshfields Bruckhaus Deringer

Acisclo Valladares Urruela
Ministry of Economy of the Republic of Guatemala

Anabella Morfín
Solicitor General of the Nation of the Republic of Guatemala