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INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**TECO GUATEMALA HOLDINGS, LLC**

*Claimant*

v.

**THE REPUBLIC OF GUATEMALA**

*Respondent*

ICSID CASE NO. ARB/\_\_\_\_\_

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**NOTICE OF ARBITRATION**

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**WHITE & CASE<sup>LLP</sup>**

October 20, 2010

*Counsel for TECO Guatemala Holdings, LLC*

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# CLAIMANT’S NOTICE OF ARBITRATION

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>GENERAL NATURE OF THE CLAIM .....</b>	<b>2</b>
<b>III.</b>	<b>PARTIES TO THE ARBITRATION .....</b>	<b>4</b>
<b>IV.</b>	<b>PROCEDURAL REQUIREMENTS .....</b>	<b>6</b>
	<b>A. Consent and Waiver .....</b>	<b>6</b>
	<b>B. TGH Is Qualified to Submit a Claim to Arbitration Pursuant to Article 10.16.1(a) of the DR-CAFTA.....</b>	<b>7</b>
	<b>C. TGH Exercises Its Right to Commence an Arbitration Under the ICSID Convention and the ICSID Arbitration Rules .....</b>	<b>9</b>
	<b>D. Notice and Time Requirements .....</b>	<b>9</b>
	<b>E. Constitution of the Arbitral Tribunal.....</b>	<b>10</b>
<b>V.</b>	<b>FACTUAL BASIS FOR THE CLAIM.....</b>	<b>11</b>
	<b>A. Guatemala’s Reformation of Its Electricity Sector.....</b>	<b>11</b>
	<b>B. Guatemala’s Disregard of the Legal Framework in Connection with EEGSA’s 2008-2013 VAD Process.....</b>	<b>13</b>
	<b>1. Guatemala Seeks to Grant Itself the Ability to Prepare Its Own VAD Study.....</b>	<b>13</b>
	<b>2. Guatemala’s Manipulation of the Terms of Reference .....</b>	<b>14</b>
	<b>3. Guatemala’s Attempt to Deprive the Technical Committee of Its Neutrality .....</b>	<b>14</b>
	<b>4. Guatemala’s Interference with the Technical Committee .....</b>	<b>16</b>
	<b>5. Guatemala’s Refusal to Comply with the Technical Committee’s Final Report.....</b>	<b>17</b>
<b>VI.</b>	<b>BREACH OF OBLIGATIONS UNDER THE DR-CAFTA.....</b>	<b>19</b>
	<b>A. Violation of Article 10.5 (Minimum Standard of Treatment) of the DR-CAFTA.....</b>	<b>19</b>
<b>VII.</b>	<b>RELIEF REQUESTED.....</b>	<b>21</b>
<b>VIII.</b>	<b>REQUIRED COPIES AND LODGING FEE .....</b>	<b>22</b>

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**NOTICE OF ARBITRATION**

**I. INTRODUCTION**

1. TECO Guatemala Holdings, LLC (“TGH,” the “Investor,” or the “Claimant”) hereby submits this Notice of Arbitration of the following legal dispute with the Republic of Guatemala (“Guatemala,” the “Republic,” the “Government,” or the “Respondent”) in accordance with Chapter Ten of the Dominican Republic-Central America-United States Free Trade Agreement (the “DR-CAFTA”), which entered into force in Guatemala on July 1, 2006, and in the United States on March 1, 2006.

2. TGH hereby elects to proceed with this arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) and the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), as provided for under Article 10.16.3(a) of the DR-CAFTA.

## II. GENERAL NATURE OF THE CLAIM

3. In the mid-1990s, Guatemala faced the need for significant investments in its electricity sector as its electricity supply was insufficient to meet the needs of its people. As a result, Guatemala's leaders liberalized the electricity sector by enacting the 1996 General Electricity Law (the "Law") and its related regulations (the "Regulations"), much as other Latin American nations were doing at the time. Among other things, the Law and its Regulations contained specific incentives and guarantees to privatize Guatemala's electricity sector and to attract foreign investment.

4. As part of its reformation of the electricity sector, Guatemala privatized Empresa Eléctrica de Guatemala, S.A. ("EEGSA"), the country's largest electricity distribution company, and granted EEGSA 50-year authorizations to distribute electricity over certain territory in Guatemala. TGH relied upon Guatemala's new regulatory framework when, in 1998, it decided to invest in Guatemala by purchasing a stake in EEGSA through a joint venture with Iberdrola Energía, S.A. ("Iberdrola"), and Electricidade de Portugal, S.A. ("EDP").

5. In addition to privatizing and liberalizing the electricity sector by unbundling its generation, transmission, distribution, and commercialization components, the Law and Regulations established a fair and objective framework for establishing the Value Added for Distribution ("VAD"), which is the component of electricity tariffs that serves as the principal source of income for Guatemalan electricity distribution companies.

6. As detailed further below, the new regulatory framework provided that the VAD rate would be recalculated every five years based on an objective technical VAD study prepared by an independent consultant, pre-qualified by the regulator, the National Electric Energy Commission ("CNEE"<sup>1</sup> or the "Commission"). If the distributor and CNEE were unable to agree on the VAD rates based on the VAD study submitted, the Law and Regulations provided that the parties would submit the dispute to a technical committee formed in accordance with the Regulations, which would consider the matter and resolve the dispute within 60 days of its formation.

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<sup>1</sup> Where appropriate, Spanish acronyms are used.

7. The VAD in force during the 1998-2003 term had been set prior to 1998 while EEGSA was still state-owned and was based on recommendations made by Government consultants. When EEGSA was privatized, its infrastructure was substandard and obsolete. During the first five years after EEGSA's privatization (1998-2003), therefore, financial returns were marginal and, in the case of 2001, negative. During this period, all cash generated from operations was reinvested. Additionally, TGH and the other investors extended loans to EEGSA in order to enable it to bring its infrastructure up to modern standards, and improve the quality of services to EEGSA's customers.

8. In setting the VAD rates for the following five-year period, 2003-2008, EEGSA and CNEE adhered to the procedures established under the Law and its Regulations and were able to work through the VAD-rate process. The parties were able to discuss and resolve issues to their mutual satisfaction without having to submit the resolution of the VAD rate to a technical committee.

9. Overall, from Claimant's initial investment in EEGSA in 1998, until the VAD-rate revision of August 2008, EEGSA: (i) significantly expanded and modernized Guatemala's electricity distribution infrastructure; (ii) introduced significant efficiencies into the distribution system; and (iii) appreciably improved the quality of services to customers, far exceeding the minimum required by the Regulations.

10. Beginning in 2006, however, Guatemala (through the Guatemalan Ministry of Energy and Mines ("MEM" or the "Ministry") and CNEE) began to show signs that it would exercise its sovereign authority unilaterally and arbitrarily to change the agreed-upon commercial terms of TGH's investment.

11. Guatemala's flagrant disregard of the Law and its Regulations and its manipulation of the legal framework it adopted to attract foreign investment came to a head during the 2008-2013 VAD-rate revision period. Desiring to impose on EEGSA a blatantly inadequate VAD rate, and in violation of the Law and its Regulations, Guatemala enacted a Government Accord which purported to authorize CNEE to engage its own consultant to prepare a VAD study. Guatemala also amended the Law and its Regulations to allow the Ministry to appoint two of the three members of the technical committee, should such a committee be

constituted to resolve a dispute between the distributor and CNEE. A technical committee was formed on June 6, 2008 (the “Technical Committee”) after EEGSA and CNEE failed to agree on the VAD rate. Subsequently, however, Guatemala illegally sought to dissolve the Technical Committee when it became apparent that the Technical Committee’s ruling would favor EEGSA. Guatemala then ignored the Technical Committee’s final report, which called for VAD rates that would increase EEGSA’s revenue by approximately 20% over the 2003-2008 level, and unilaterally established VAD rates that, on average, reduced EEGSA’s revenue by approximately 50% for the 2008-2013 period.

12. As detailed below, in taking these actions and enacting these measures, Guatemala caused Claimant to incur severe damages and, in so doing, violated DR-CAFTA Article 10.5 (Minimum Standard of Treatment).

### **III. PARTIES TO THE ARBITRATION**

13. TGH is an investor of a Party to the DR-CAFTA. TGH is a limited liability company incorporated under the laws of the State of Delaware, United States of America, and an indirect, wholly-owned subsidiary of TECO Energy, Inc., an energy-related holding company organized under the laws of the State of Florida, United States of America.

14. Through a joint venture with Iberdrola, and EDP, TGH indirectly holds an approximate 24% ownership interest in EEGSA, one of the largest electricity distribution companies in Central America. Since 1998, TGH, together with Iberdrola and EDP, have held an approximately 81% controlling interest in EEGSA—first through the DECA (Distribución Eléctrica Centroamérica, S.A.) consortium, and later through a successor entity referred to as “DECA II” (Distribución Eléctrica Centroamérica Dos (II), S.A.). Although EEGSA was privatized in 1998, Guatemala retained a stake in EEGSA and currently holds an approximately 14% interest in EEGSA with the remaining interests held by other entities.

15. EEGSA is a Guatemalan utility company that currently delivers electricity to more than 900,000 customers in Guatemala. Pursuant to Ministerial Agreement No. OM-158-98, dated April 2, 1998, and an Authorization Contract dated May 15, 1998, MEM granted EEGSA a 50-year authorization for the distribution of electricity within the Departments of

Guatemala, Sacatepéquez, and Escuintla. After EEGSA's privatization, pursuant to Ministerial Agreement No. OM-32-99, dated January 11, 1999, and an Authorization Contract dated February 2, 1999, MEM also granted EEGSA a 50-year authorization for the distribution of electricity within the Departments of Chimaltenango, Santa Rosa, and Jalapa.

16. TGH's address is as follows:

TECO Guatemala Holdings, LLC  
702 North Franklin Street  
Tampa, FL 33602  
U.S.A.

17. TGH is represented in this Arbitration by:

White & Case, LLP  
701 Thirteenth Street, N.W.  
Washington, DC 20005  
U.S.A.  
TEL: (1-202) 626-3600  
FAX: (1-202) 639-9355  
E-mail: amenaker@whitecase.com, clamm@whitecase.com, asmutny@whitecase.com

All communications to the Claimant in this Arbitration should be made to White & Case LLP at the above-referenced address, attention: Andrea J. Menaker, Carolyn B. Lamm, and Abby Cohen Smutny.<sup>2</sup>

18. The Respondent in this arbitration is Guatemala, a sovereign State. For purposes of disputes arising under the DR-CAFTA, Guatemala's address is:

Mr. Erick Haroldo Coyoy Echeverría  
Ministry of the Economy  
8a Avenida 10-43, Zona 1  
Ciudad de Guatemala,  
Guatemala

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<sup>2</sup> See Power of Attorney issued by TGH to White & Case, LLP, dated October 7, 2010 (attached as Exhibit 2).

#### IV. PROCEDURAL REQUIREMENTS

##### A. Consent and Waiver

19. Guatemala has consented to arbitration pursuant to Article 10.17.1 of the DR-CAFTA, which provides that “Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.”

20. Articles 10.18.2 and 10.18.3 of the DR-CAFTA provide:

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver,

...

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.

21. By virtue of submitting this Notice of Arbitration, TGH hereby consents to arbitration in accordance with the procedures set forth in Chapter Ten of the DR-CAFTA. TGH has taken all necessary internal actions to authorize the commencement of this arbitration.<sup>3</sup> TGH also has executed a power of attorney authorizing White & Case LLP to act on its behalf in this

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<sup>3</sup> See TECO Guatemala Holdings, LLC’s Internal Authorization to Commence Arbitration (attached as Exhibit 3).



arbitration.<sup>4</sup>

22. TGH waives its right to initiate or continue before any administrative tribunal or court, under the law of any Party, proceedings that seek redress with respect to any measure alleged to constitute a breach referred to in Article 10.16 of the DR-CAFTA and reserves its rights to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Guatemala, provided that the action is brought for the sole purpose of preserving TGH's rights and interests during the pendency of this arbitration. A copy of its waiver is attached hereto.<sup>5</sup>

**B. TGH Is Qualified to Submit a Claim to Arbitration Pursuant to Article 10.16.1(a) of the DR-CAFTA**

23. TGH is qualified to commence arbitration against Guatemala pursuant to Article 10.16.1(a) of the DR-CAFTA. Article 10.16.1(a) provides:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach[.]

24. Article 10.28 of the DR-CAFTA defines "claimant" as "an investor of a Party that is a party to an investment dispute with another Party" and defines an "investor of a Party" to

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<sup>4</sup> See Power of Attorney issued by TGH to White & Case, LLP, dated October 7, 2010 (attached as Exhibit 2).

<sup>5</sup> TECO Guatemala Holdings, LLC's Waiver Pursuant to DR-CAFTA Article 10.18 (attached as Exhibit 4).

include “an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party[.]”

25. Article 2.1 of the DR-CAFTA (titled “Definitions of General Application”), demonstrates that an “enterprise of a Party” includes “any entity constituted or organized under [the law of a Party], whether or not for profit . . . including any corporation . . . or other association.” Furthermore, Article 10.28 defines investment to include:

[E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- ...
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- ...
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

26. TGH is incorporated in the State of Delaware, United States of America, and has made a significant investment in Guatemala through its indirect subsidiary’s investment in EEGSA. It therefore is an “investor of a Party” as defined in the DR-CAFTA. TGH’s investment in EEGSA qualifies as an “investment” under the DR-CAFTA, as it is in the form of shares and contains all of the characteristics of an investment, including the commitment of capital, the expectation of gain or profit, and the assumption of risk.

27. The actions of Guatemala, as detailed below, breached Article 10.5 (Minimum

Standard of Treatment) of the DR-CAFTA and TGH has incurred significant loss or damage by reason of, or arising out of, this breach. TGH therefore satisfies the requirements to submit a claim to arbitration under Article 10.16.1(a).

**C. TGH Exercises Its Right to Commence an Arbitration Under the ICSID Convention and the ICSID Arbitration Rules**

28. Article 10.16.3 of the DR-CAFTA provides:

Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention; or

(c) under the UNCITRAL Arbitration Rules.

29. Both the United States and Guatemala are parties to the ICSID Convention.<sup>6</sup> The legal dispute at issue arises directly out of TGH's investment in Guatemala. TGH therefore exercises its right to submit its claim under the ICSID Convention and the ICSID Arbitration Rules in accordance with Article 10.16.3(a) of the DR-CAFTA.

**D. Notice and Time Requirements**

30. In order for a claimant to submit a claim to arbitration under the DR-CAFTA: (1) at least "six months must have elapsed since the events giving rise to the claim";<sup>7</sup> (2) no "more than three years [may] have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that

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<sup>6</sup> See ICSID, List of Contracting States and Other Signatories of the Convention (indicating that Guatemala signed the ICSID Convention on Nov. 9, 1995 with the Convention entering into force on Feb. 20, 2003; and that the United States signed the ICSID Convention on Aug. 27, 1965 with the Convention entering into force on Oct. 14, 1966), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

<sup>7</sup> DR-CAFTA, Art. 10.16.3 (attached as Exhibit 1).

the claimant ... has incurred loss or damage”;<sup>8</sup> and (3) “[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (‘notice of intent’).”<sup>9</sup> TGH has satisfied all of these requirements.

31. As detailed below, the events giving rise to the claim occurred more than six months, but less than three years, prior to the submission of this Notice of Arbitration.

32. TGH submitted a Notice of Intent (“NOI”), which was stamped as received by Guatemala’s Ministry of the Economy on January 13, 2009.<sup>10</sup> This NOI was accompanied by a cover letter expressing TGH’s desire to “amicably resolv[e] the present dispute through consultation or negotiation,” but noting that TGH “reserves the right to submit this investment dispute to arbitration within the timeframes set forth in the DR-CAFTA if such a resolution is not reached in a timely and satisfying fashion.”

33. Shortly before expiration of the 90-day period following delivery of TGH’s NOI, by letter dated April 2, 2009, Mr. Ruben Morales Monroy, Minister of the Economy at the time, responded to TGH’s NOI by inviting TGH to participate in a meeting at the Ministry on June 22, 2009, in order for Guatemala to “explain the disagreement and the position of the Republic of Guatemala” and to make “evident in [the] meeting” that “Guatemala in no manner has violated [the DR-CAFTA] . . . .” Thereafter, the parties met in an effort to resolve TGH’s dispute. The discussions have proven unfruitful as TGH has not received any indication that Guatemala is willing to remedy the situation fairly and to compensate TGH for its losses. As more than 90 days have elapsed since TGH delivered its NOI to Guatemala, TGH is now submitting its Notice of Arbitration.

#### **E. Constitution of the Arbitral Tribunal**

34. Under Article 10.19.1 of the DR-CAFTA:

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<sup>8</sup> DR-CAFTA, Art. 10.18.1 (attached as Exhibit 1).

<sup>9</sup> DR-CAFTA, Art. 10.16.2 (attached as Exhibit 1).

<sup>10</sup> See Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the Dominican Republic-Central America-United States Free Trade Agreement dated January 9, 2009 (attached as Exhibit 5).

Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

35. As TGH and Guatemala have not otherwise agreed to the number and appointment of arbitrators, the default provisions of Article 10.19.1 remain applicable.

36. Under Article 10.16.6 of the DR-CAFTA:

The claimant shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the claimant appoints; or
- (b) the claimant's written consent for the Secretary General to appoint such arbitrator.

37. Accordingly, TGH appoints William W. Park to the Tribunal. All communications to Prof. Park should be sent to the following address:

Professor William W. Park  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
TEL: (617) 353-3149  
FAX: (617) 353-3077  
Email: [wwpark@bu.edu](mailto:wwpark@bu.edu)

## **V. FACTUAL BASIS FOR THE CLAIM**

### **A. Guatemala's Reformation of Its Electricity Sector**

38. On October 16, 1996, the Guatemalan Congress enacted the *Ley General de Electricidad*, Decree No. 93-96—the Law—recognizing that the Republic's existing “supply of electric energy [did] not satisfy the needs of the majority of the Guatemalan population, and . . . [that] the deficiency in this sector [was] an obstacle to the country's integral development. . . .” The Congress, therefore, resolved to “increase the production, transmission,

and distribution of . . . energy by liberalizing the sector.”<sup>11</sup> To this end, the Law mandated the unbundling of generation, transmission, distribution, and commercialization activities within the Guatemalan electricity sector and established a new regulatory framework for determining electricity transmission and distribution prices, among other things. To implement these sector-wide reforms, Article 4 of the Law provided for the establishment of CNEE, a regulatory agency that is part of the MEM.

39. Electricity tariffs in Guatemala for regulated end users consist of several components, including the costs associated with electricity generation and transmission, as well as the VAD (the Value Added for Distribution). The VAD serves as the principal source of income for the Guatemalan electricity distribution companies and permits these companies to make investments in their electricity networks and ensures that their respective investors receive a fair return on their investments.

40. Under the Law and its Regulations, Guatemalan electricity distributors must recalculate the components of the VAD at the conclusion of each five-year period. To this end, each distributor is required to engage an engineering consulting firm (prequalified by CNEE) to prepare a study on the calculation of the relevant VAD components. Article 98 of the Regulations provides that the distributor’s prequalified engineering consultant is to submit its completed VAD study to CNEE four months prior to the effective date of the new VAD rates. Upon receipt of the VAD study, CNEE has two months to review the study, to “determine the propriety or impropriety” of the study, and to make observations on the study. The engineering consultant has 15 days to analyze CNEE’s observations, make any necessary corrections to its study, and submit the revised document to CNEE for further review.

41. Central to the reforms made pursuant to the Law and Regulations is the provision that provide that, if a disagreement over the VAD study persists, the distributor and CNEE are to submit their dispute to a technical committee composed of three members with one member being named by each party and the third by mutual agreement. Article 75 of the Law provides that the technical committee is to issue its pronouncement regarding the parties’ dispute within

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<sup>11</sup> The Law, Preamble, Decreto No. 93-96 del Congreso de la República de Guatemala (1996) (Guat.).

60 days of its formation. The resulting VAD rates derived from the technical committee process are to be used by CNEE to set the electricity tariffs for the distributor's customers.

**B. Guatemala's Disregard of the Legal Framework in Connection with EEGSA's 2008-2013 VAD Process**

42. During the 2008-2013 VAD-rate revision period, Guatemala repeatedly and flagrantly disregarded the Law and manipulated the regulatory framework adopted to attract foreign investment to disadvantage EEGSA and its foreign investors by imposing woefully inadequate VAD rates.

**1. Guatemala Seeks to Grant Itself the Ability to Prepare Its Own VAD Study**

43. The Law and its Regulations in place at the time TGH made its investment decision clearly provided that the distributor was responsible for retaining a consultant to prepare the VAD study. If a distributor failed to submit a VAD study, the existing tariffs would remain in effect. Generally, distributors had an incentive to file a new VAD study because the distributor would want its rates to reflect the growth of assets. To the extent disagreements regarding the VAD study persisted between CNEE and the distributor, the Law and its Regulations provided that the parties should submit the dispute to a technical committee. Such provisions were critical to TGH, as they provided assurance that the Government could not unilaterally set the VAD rate after it had received the benefits of the investors' investments.

44. The Government, however, fundamentally altered this regime when, on March 5, 2007 — just before expiration of EEGSA's existing VAD rates and the beginning of EEGSA's VAD review process — MEM issued Government Accord No. 68-2007. Among other things, the resolution attempted to modify Article 98 of the Regulations by providing:

In the event of an omission by the Distributor in delivering the studies *or corrections thereto*, the Commission shall be authorized to issue and publish the corresponding tariff schedule, based on the tariff study the Commission performs independently, or performing the corrections to the studies begun by the distributor. (Emphasis added.)

45. Thus, for the first time, the Government claimed to have the right to commission its own VAD study and to publish the tariff schedule based upon such VAD study under certain

circumstances, including if the CNEE determined that the distributor failed to deliver a VAD study or make corrections to its VAD study.

## **2. Guatemala's Manipulation of the Terms of Reference**

46. Further underscoring Guatemala's disregard of the legal protections put in place to attract foreign investors to invest in its electricity sector, on April 30, 2007 — as the existing VAD rates for EEGSA's regulated customers were set to expire (on July 31, 2008) — CNEE issued the Terms of Reference for the development of EEGSA's 2008-2013 VAD Study. Article 19 of the Terms of Reference particularly concerned TGH and its joint venture partners: that Article authorized CNEE to consider as “not received” a VAD Study that, in CNEE's judgment, did not comply with the Terms of Reference, or if EEGSA was untimely in submitting periodic reports.

47. Shortly thereafter, EEGSA sought a declaratory judgment (“*amparo*”) to invalidate the 2008-2013 VAD Terms of Reference. CNEE ultimately issued Resolutions No. CNEE-124-2007 and -05-2008, which amended the contested Terms of Reference, whereupon EEGSA withdrew its legal action.

## **3. Guatemala's Attempt to Deprive the Technical Committee of Its Neutrality**

48. Pursuant to the Law, on January 23, 2008, EEGSA had retained a CNEE-prequalified engineering consultant, Bates White LLC (“Bates White”) to prepare the VAD study for the following five-year VAD period. EEGSA submitted the Bates White Study (the “Original VAD Study”) to CNEE on March 31, 2008.

49. CNEE responded on April 11, 2008, by issuing Resolution No. CNEE-63-2008, wherein it concluded that the Original VAD Study was “improper” and would require correction within a 15-day period.

50. Accordingly, Bates White analyzed CNEE's comments, evaluated the Original VAD Study, and submitted an amended Study (the “Amended VAD Study”) to CNEE on May 5, 2008. In response, CNEE issued Resolution No. CNEE-96-2008 on May 15, 2008, in which it asserted that EEGSA had “ignore[d] all of the observations provided by the Commission” and



that the Amended VAD Study contained “unsolicited changes and additional modifications” CNEE further announced that, in accordance with the Law, it would form a technical committee “to settle the [parties’] disagreements over the Value Added for Distribution Study . . . .”

51. Perhaps recognizing the legal infirmities associated with its objections to EEGSA’s Original VAD Study and the Amended VAD Study, Guatemala and its agencies and instrumentalities immediately began to engage in further systematic efforts to undermine the legal framework on which TGH had relied in making its investment in EEGSA, principally by attempting to change the Law and the Regulations to its advantage.

52. In particular, on May 19, 2008, MEM and Guatemalan President Álvaro Colom Caballeros signed Governmental Agreement No. 145-2008, which amended the Regulations by inserting Article 98 *bis*. Pursuant to this amendment, MEM was granted the authority to select the third member of the Technical Committee if CNEE and EEGSA proved unable to do so within three days. Notably, the Governmental Agreement was issued only four days after CNEE called for the formation of the Technical Committee. Only after EEGSA argued that the new regulation should not apply to a process that had already commenced, and made clear that it was prepared to initiate a court action to prevent MEM from appointing the third member, did MEM agree to abstain from applying the new regulation.

53. Thus, on June 6, 2008, CNEE and EEGSA agreed to appoint Carlos Manuel Bastos as the third member of the Technical Committee. Consequently, on June 6, 2008, the Technical Committee was constituted.

54. Before commencing the dispute-resolution process, CNEE and EEGSA established twelve rules (the “Rules of Order”) on how the proceeding before the Technical Committee was to be conducted. In particular, the parties’ Rules of Order specified that, after the Technical Committee issued its ruling,

The Distributor [would] inform its consultant of the pronouncement of the Technical Committee, who then [would] implement all of the proposed changes contained in the pronouncement of the Technical Committee and submit the new version [of its VAD Study] to the Technical Committee for its review and approval.

#### 4. Guatemala's Interference with the Technical Committee

55. Guatemala's unlawful efforts to impose its will, however, continued even after the Technical Committee was formed. Among other things, Respondent engaged in a public effort to undermine the authority of the Technical Committee. In an article published in the *Prensa Libre* newspaper on July 23, 2008, for example, CNEE President Colom Bickford was quoted as saying that, while the Technical Committee's recommendations would be taken into account, CNEE could choose whether or not to abide by them. The following day, a *Siglo 21* article reported that President Colom Bickford had publicly declared that the Technical Committee's report would not be binding on CNEE.

56. The Technical Committee issued its final report (the "Final Report") on July 25, 2008, in which it confirmed that its role was to "put an end to the disputes (in terms of art. 75 of the [General Electricity Law])—between CNEE and EEGSA." In its analysis of the nine disputes that it was called upon to decide, the Technical Committee denied CNEE's objections to the Amended VAD Study in a significant number of instances. The implementation of the Technical Committee's ruling would have resulted in an approximately 20% increase in EEGSA's VAD revenue.

57. After issuing its Final Report and in accordance with the Rules of Order, the Technical Committee requested that the parties "take the necessary steps to ensure that the Bates White firm [was] made aware of the Report, so that it [could then] make the necessary changes, modifications, extensions, and adjustments to the . . . [Amended VAD] Study presented to the CNEE on May 5, 2008 . . . ."

58. Immediately thereafter, CNEE began taking unlawful steps to block the Technical Committee from approving the revised VAD Study (the "Final VAD Study"). On July 25, 2008, CNEE took the extraordinary step of issuing a resolution identified as "Expediente GTTE-28-2008, GJ-Providencia-3121," ordering the dissolution of the Technical Committee.

59. EEGSA, in the meantime, continued to act in accordance with the Technical Committee's direction and the Rules of Order by requesting that Bates White modify the Amended VAD Study to bring it into conformity with the terms of the Final Report. Accordingly, on July 28, 2008, Bates White submitted the Final VAD Study to EEGSA, CNEE,

and the Technical Committee.

60. Shortly thereafter, the third member (and chair) of the Technical Committee, Mr. Carlos Manuel Bastos, requested that the Technical Committee gather in Washington, D.C., on July 31, 2008, to review and approve the Final VAD Study. Under Rule 1 of the parties' Rules of Order, meetings of the Technical Committee required the participation of all three members. When CNEE's party-appointed member, Mr. Jean Riubrugent, subsequently failed to appear in Washington for the meeting, Mr. Bastos and EEGSA's appointee, Dr. Leonardo Giacchino tried (unsuccessfully) to contact him by telephone and other means. Later that same day, Mr. Riubrugent sent an e-mail message to Mr. Bastos notifying him that he would be unable to participate in the scheduled meeting. In his message, Mr. Riubrugent explained that a CNEE employee (later identified as Melvin Quijivix) had warned him that he would "overstep[] his authority" under Guatemalan law if he continued serving on the Technical Committee.

61. Consequently, the remaining two members of the Technical Committee reviewed EEGSA's Final VAD Study and noted in separate communications to CNEE and EEGSA that the changes made by Bates White in the Final VAD Study fully complied with the Technical Committee's Final Report.

##### **5. Guatemala's Refusal to Comply with the Technical Committee's Final Report**

62. In response to CNEE's public statements, as well as its decision to dissolve the Technical Committee, EEGSA on July 29, 2008, filed a petition for a provisional writ of constitutional protection ("*Amparo* No. 6968-2008") with the Court of First Instance for Civil Matters in the Department of Guatemala, in an effort to compel CNEE to abide by the Technical Committee's ruling. In its petition, EEGSA explained that the CNEE's statements to the press, coupled with its unilateral action purporting to dissolve the Technical Committee, strongly indicated that CNEE intended to disregard the Technical Committee's ruling in violation of Articles 74 and 78 of the Law.

63. On July 30, 2008, Judge Silvia Patricia Valdés Quezada of the First Court of First Instance granted EEGSA's *amparo* and ordered CNEE "to fully comply with the pronouncement of the Technical Committee for the duration of the present injunction" and to "permit[] . . . the

Technical Committee to conclude its work, in particular, the final review of [those] changes submitted” by EEGSA on July 28, 2008.

64. On July 31, 2008, CNEE published Resolution No. CNEE-144-2008 (actually dated July 30, 2008), in which CNEE asserted, among other things, that EEGSA had violated the Law by failing to concede to the various comments and purported deficiencies cited in its initial resolution of April 11, 2008—Resolution No. CNEE-63-2008—setting forth CNEE’s objections to the Original VAD Study. CNEE then asserted that it had the right to use a study by its own consultant (the “Electrotek-Sigla VAD Study”) for the purpose of establishing the new VAD rates for the 2008-2013 period. The Electrotek-Sigla VAD Study was commissioned in contravention of the Law and without affording EEGSA any opportunity to comment on it.

65. That same day, July 31, 2008, in further violation of Judge Valdés’ order, CNEE also issued Resolution Nos. CNEE-145-2008 and -146-2008 (both also dated July 30, 2008), which established new VAD rates for (1) the “Social Tariff Rate Customers;” and (2) the “Non-Social Tariff Rate Customers,” respectively. The new VAD rates imposed by CNEE deviated significantly from the rates calculated in accordance with the Technical Committee’s ruling. Indeed, the new rates imposed by CNEE resulted in approximately 50% lower revenue for EEGSA compared to the VAD rates in force during the 2003-2008 tariff period.

66. Also on July 31, 2008, Judge Valdés issued a letter to the parties, attaching an order (oddly, dated July 30, 2008, the same date that the *amparo* was issued) that suspended *Amparo* No. 6968-2008 and lifted the provisional injunction against CNEE, on a merely pretextual basis.

67. As a result of the above ruling, the VAD rates set forth in Resolution Nos. CNEE-145-2008 and -146-2008 came into force on August 1, 2008.

68. Since these new VAD rates came into force, EEGSA has initiated multiple actions before the administrative agencies and courts of Guatemala, all to no avail. Furthermore, on August 13, 2008, the Guatemalan Congress took part in the ongoing VAD dispute by issuing Resolution No. 21-2008. In its Resolution, the Legislature urged CNEE to stand by its decision to reduce EEGSA’s VAD and insisted that EEGSA comply with CNEE’s decision on the new

VAD rates.

69. As a direct result of Respondent's unlawful actions, TGH has suffered severe financial damage. EEGSA has been forced to implement extreme measures to reduce its costs, including foregoing planned capital expenditures and reducing operational costs (including the elimination of personnel) to a degree that jeopardizes long-term sustainability. As a result of Guatemala's actions, EEGSA's credit rating has been adversely affected, resulting in a downgrade by the international credit-rating agencies Standard & Poor's Ratings Services and Moody's Investors Service, on August 26, 2008, and December 11, 2008, respectively. Such downgrades have the effect of significantly restricting EEGSA's access to credit from both local and international lenders and increasing associated borrowing costs for any future credit needs. This situation has severely undermined EEGSA's operational viability and has had a significant financial impact on TGH's investment in EEGSA.

70. As a result of the severe financial damage inflicted upon EEGSA and its foreign investor shareholders and the diminished future prospects for EEGSA, TGH has decided to mitigate its losses by selling its interest in EEGSA. TGH anticipates that the sale of its investment will close imminently. TGH has suffered lost revenue in the approximately two years since the 2008-2013 VAD rates have been in effect, and will receive but a fraction of the value it would have received for its investment had Respondent not taken the unlawful actions outlined above.

## **VI. BREACH OF OBLIGATIONS UNDER THE DR-CAFTA**

71. Guatemala has breached its obligations under Chapter Ten of the DR-CAFTA and TGH has incurred significant losses as a consequence of that breach.

### **A. Violation of Article 10.5 (Minimum Standard of Treatment) of the DR-CAFTA**

72. Article 10.5 of the DR-CAFTA provides:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems in the world; and

(b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

73. By agreeing to provide investors with the customary international law minimum standard of treatment, including fair and equitable treatment, Guatemala agreed not to fundamentally alter to its benefit and to the investor’s detriment the legal and regulatory framework that investors reasonably relied upon when making their investments. It is critical for an investor to know beforehand the rules and regulations that will govern its investment so that it can make informed decisions, including, most essentially, whether it will make the investment.

74. In deciding to invest in Guatemala, TGH reasonably relied upon the regulatory regime established by the Law and its Regulations. Of chief importance to TGH when making its investment was that the Law and its Regulations established a fair and objective framework and procedure for establishing the appropriate VAD and electricity rates for each five-year term, designed to ensure that investors would receive a reasonable return on their investments and that Guatemala would not be able to unilaterally change the established VAD rate in the middle of a term, or to unilaterally change the procedure for setting the VAD rate at the beginning of a new term.

75. Guatemala, acting through CNEE, MEM, its President, Legislature, and Judiciary, has refused to abide by the Law and its Regulations and has cast aside and fundamentally altered

the regulatory system it had established precisely for the purpose of attracting foreign investment in the electricity sector. It has done so in an arbitrary, unfair, and targeted manner.

76. Examples of Guatemala's conduct that violate Article 10.5 of the DR-CAFTA include, but are not limited to:

- Enacting Government Accord 68-2007 in March 2007, which modified Article 98 of the Regulations to allow CNEE to commission and utilize its own VAD study if the distributor failed to deliver a VAD study or failed to accept CNEE's corrections, in violation of the Law and its Regulations applicable at the time of TGH's investment;
- Using its sovereign authority to insert Article 98 *bis* into the General Electricity Law Regulations, thereby purporting to grant MEM the right to appoint the third member of the Technical Committee if the parties, within a mere three days, failed to reach agreement on whom to appoint;
- Taking steps to prevent the Technical Committee from meeting to approve the Final VAD Study and, ultimately, issuing a resolution that ordered the dissolution of the Technical Committee; and
- Unilaterally establishing new VAD rates that were detrimental to TGH's investment and based on a study that CNEE commissioned in contravention of the Law and its Regulations.

77. Guatemalan law required CNEE to adopt the Technical Committee's Final Report, which called for the 2008-2013 VAD revenue to increase by approximately 20% from its 2003-2008 level. Rather than comply with that obligation, CNEE illegally assumed unfettered authority to unilaterally set the new VAD, which it determined should result in approximately 50% less revenue for EEGSA than the 2003-2008 rate.

78. These decisions, and the processes through which they were made, were arbitrary and unlawful, and constitute a violation of the Government's obligation to provide fair and equitable treatment to TGH.

## **VII. RELIEF REQUESTED**

79. TGH hereby requests that the Arbitral Tribunal to be constituted in this case issue

a final award declaring that Guatemala has breached its obligations under the DR-CAFTA and ordering Guatemala to compensate TGH in the amount of:

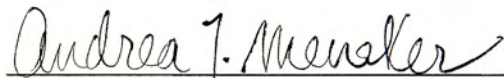
- a. Damages suffered of up to approximately U.S. \$285,600,000.00;
- b. Costs associated with these proceedings, including all professional fees, attorneys' fees, and disbursements;
- c. Pre-award and post-award interest at a rate to be fixed; and
- d. Such further or other relief as the Tribunal may deem appropriate.

80. TGH reserves its rights to amend this Notice of Arbitration and assert additional claims as permitted by the ICSID Convention and the ICSID Arbitration Rules.

#### **VIII. REQUIRED COPIES AND LODGING FEE**

81. In accordance with Rule 4 of the Institution Rules and the January 1, 2008 Schedule of Fees, this Notice of Arbitration is accompanied by five additional signed copies and by a non-refundable fee of twenty-five thousand dollars (U.S. \$25,000.00).

Respectfully submitted,



Andrea J. Menaker

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*Counsel for Claimant*

October 20, 2010



**EXHIBITS TO NOTICE OF ARBITRATION**

<b><u>Exhibit</u></b>	<b><u>Tab</u></b>
DR-CAFTA Chapter 10	1
Power of Attorney issued by TGH to White & Case, LLP, dated October 7, 2010	2
TECO Guatemala Holdings, LLC's Internal Authorization to Commence Arbitration	3
TECO Guatemala Holdings, LLC's Waiver Pursuant to DR-CAFTA Article 10.18	4
TECO Guatemala Holdings, LLC's Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the Dominican Republic-Central America-United States Free Trade Agreement dated January 9, 2009	5