

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN  
THE KINGDOM OF SPAIN AND THE REPUBLIC OF GUATEMALA FOR THE  
MUTUAL PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON  
9 DECEMBER 2002 AND ENTERED INTO FORCE ON 21 MAY 2004**

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW 1976**

**-between-**

**IBERDROLA ENERGÍA, S.A. (SPAIN)**

**(“Iberdrola” or the “Claimant”)**

**-and-**

**THE REPUBLIC OF GUATEMALA**

**(“Guatemala” or the “Respondent”, and together with the Claimant, the “Parties”)**

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**FINAL AWARD**

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*Tribunal*

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)  
Prof. Pierre-Marie Dupuy  
J. Christopher Thomas QC

*Secretary of the Tribunal*  
Sabina Sacco

*Registry*  
Permanent Court of Arbitration

24 August 2020

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**LIST OF ABBREVIATIONS AND DEFINITIONS**

Claimant	Iberdrola Energía, S.A (also referred to as “Iberdrola”)
CM	Claimant’s Counter-Memorial on Jurisdiction, Admissibility and Counterclaim, dated 31 October 2018
CNEE	<i>Comisión Nacional de Energía Eléctrica</i>
Consortium	Iberdrola, TPS de Ultramar and EDP Electricidade de Portugal
Contracting Parties	The Kingdom of Spain and the Republic of Guatemala
Counterclaim	Counterclaim included in the Respondent’s Memorial on Objections to Jurisdiction and Admissibility of Claims, dated 19 July 2018
C-PHB1	Claimant’s Submission on Article 26 of the ICSID Convention dated 27 September 2019
C-PHB2	Claimant’s Submission on the Tribunal’s Questions of 10 December 2019, dated 10 January 2020
DECA	Distribución Eléctrica Centroamericana S.A. (later “DECA II”)
Decision on Bifurcation	Decision on Bifurcation, dated 14 March 2019
EDP	EDP Electricidade de Portugal
EEGSA	Empresa Eléctrica de Guatemala, S.A.
Expert Commission	Commission formed by three experts appointed by the distributor and the CNEE in case of disagreement on the review of the tariff studies
FET	Fair and equitable treatment

Hearing on Preliminary Objections	Hearing on Preliminary Objections held on 4 June 2019 at the Peace Palace, The Hague, the Netherlands
<i>Iberdrola I</i>	<i>Iberdrola Energía, S.A. v. Guatemala</i> , ICSID Case No. ARB/09/5
<i>Iberdrola I Award</i>	<i>Iberdrola Energía, S.A. v. Republic of Guatemala</i> , ICSID Case No. ARB/09/5, Award of 17 August 2012
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on 18 March 1965
ILA	International Law Association
LGE	General Electricity Law, Decree 93-96, dated 16 October 1996
Mem.	Respondent's Memorial on Objections to Jurisdiction and Admissibility of Claims, dated 19 July 2018
NAFTA	North American Free Trade Agreement
Notice of Arbitration	Claimant's Notice of Arbitration, dated 15 November 2017
Parties	The Claimant and the Respondent
PCA	Permanent Court of Arbitration
PILA	Swiss Private International Law Act

Reinisch Report	Legal Opinion of August Reinisch on the Scope and Limits of the <i>Res Judicata</i> Effect of the Award in <i>Iberdrola Energía S.A. v. Republic of Guatemala</i> , ICSID Case No. ARB/09/5, Award, 17 August 2012, dated 26 October 2018
Reisman Report	Opinion of Prof. W. Michael Reisman on the Effects of a “Partial <i>res judicata</i> ” in International Law and Its Implications, dated 17 October 2018
Rejoinder	Claimant’s Rejoinder on Jurisdiction, Admissibility and Counterclaim, dated 22 February 2019
Rejoinder on the Counterclaim	Respondent’s Rejoinder on Jurisdiction of the Counterclaim, dated 8 March 2019
Reply	Respondent’s Reply on Objections to Jurisdiction and Admissibility of Claims, dated 21 December 2018
Respondent	The Republic of Guatemala (also referred to as “Guatemala”)
RLGE	Regulation of the General Electricity Law, dated 21 March 1997
R-PHB1	Respondent’s Post-Hearing Brief, dated 13 September 2019
R-PHB2	Respondent’s Second Post-Hearing Brief, dated 10 January 2020
SFSC	Swiss Federal Supreme Court
Tariff-Setting Process	Measures taken by the Guatemalan authorities in the context of fixing tariffs for the distribution of electricity for the 2008-2013 period
TECO	TPS de Ultramar



<i>Teco I</i>	<i>Teco Guatemala Holdings, LLC v. the Republic of Guatemala</i> (ICSID Case No. ARB/10/17)
<i>Teco II</i>	<i>Teco Guatemala Holdings, LLC v. the Republic of Guatemala</i> (ICSID Case No. ARB/10/23)
Terms of Appointment	Terms of Appointment, dated 1 June 2018
ToR	Terms of Reference
Transcript	Transcript of the Hearing on Preliminary Objections (final version circulated on 24 June 2019)
Treaty	Agreement between the Kingdom of Spain and the Republic of Guatemala for the Mutual Promotion and Protection of Investments, signed on 9 December 2002 and entered into force on 21 May 2004 (also referred to as “BIT”)
Tribunal	Arbitral Tribunal in the present case
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law 1976
UNCLOS	United Nations Convention on the Law of the Sea of 10 December 1982
VAD	<i>Valor Agregado de Distribución</i>
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969

## I. INTRODUCTION AND PARTIES

### A. The Claimant

1. The Claimant is Iberdrola Energía, S.A. (“Iberdrola” or the “Claimant”), a corporation (*sociedad anónima unipersonal*) incorporated in Spain, with its domicile at:

Tomás Redondo, 1  
28033 Madrid  
Spain

2. It is represented in this arbitration by:

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María Grande de Capua  
**Iberdrola Energía, S.A.**  
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Gabriel Bottini  
Gillian Cahill  
Heidi López Castro  
**Uría Menéndez Abogados, S.L.P.**  
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Spain

E-mail: miguel.virgos@virgosarbitration.com

**B. The Respondent**

3. The Respondent is the Republic of Guatemala (“Guatemala” or the “Respondent”).
4. It is represented in this arbitration by:

Jorge Luis Donado Vivar  
*Procurador General de la Nación*  
Ana Luisa Gatica Palacios  
Mario René Mérida Pichardo  
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Ciudad de Guatemala  
Guatemala

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### **C. The Arbitral Tribunal**

5. The Arbitral Tribunal (the “Tribunal”) is composed of:

**Prof. Gabrielle Kaufmann-Kohler (President)**

Lévy Kaufmann-Kohler  
3-5, rue du Conseil-Général  
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**Prof. Pierre-Marie Dupuy (Co-Arbitrator)**

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Germany  
Tel.: +33 6 77 95 24 38  
E-mail: pierre-marie.dupuy@graduateinstitute.ch

**J. Christopher Thomas, QC (Co-Arbitrator)**

1200 Waterfront Centre  
200 Burrard Street, Mail Box #48600  
Vancouver, BC V7X 1T2  
Canada  
Tel: +1-604 640-4058  
E-mail: jcthomas@thomas.ca

6. With the consent of the Parties, the Tribunal appointed Ms. Sabina Sacco as its Secretary:

**Ms. Sabina Sacco**

Lévy Kaufmann-Kohler  
3-5, rue du Conseil-Général  
CH-1211 Geneva 4  
Switzerland  
Tel.: +41 22 809 62 00  
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### **D. Seat of the Arbitration**

7. In its Notice of Arbitration, dated 15 November 2017 (the “Notice of Arbitration”), the Claimant initially suggested The Hague as the place of arbitration. In its letter to the Claimant dated 22 December 2017, the Respondent proposed Paris as the legal seat of the arbitration. After considering the Parties’ positions and all relevant factors, the Tribunal fixed Geneva, Switzerland, as the seat of the arbitration.

## II. PROCEDURAL HISTORY

8. On 15 November 2017, the Claimant submitted a Notice of Arbitration, invoking Article 11 of the Agreement between the Kingdom of Spain and the Republic of Guatemala for the Mutual Promotion and Protection of Investments, which was signed on 9 December 2002 and entered into force on 21 May 2004 (the “Treaty” or the “BIT”) and the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the “UNCITRAL Rules”). The Notice of Arbitration was received by the Respondent on 23 November 2017.
9. In its Notice of Arbitration, the Claimant proposed that (i) three arbitrators be appointed; (ii) the arbitration be conducted in English and Spanish; (iii) the seat of the arbitration be The Hague, the Netherlands; and (iv) the Permanent Court of Arbitration (the “PCA”) administer the proceedings. In its Notice of Arbitration, the Claimant also appointed Prof. Pierre-Marie Dupuy, a national of France, as the first arbitrator.
10. By letter dated 22 December 2017, the Respondent (i) agreed that three arbitrators be appointed, that the proceedings be conducted in Spanish and English and that the PCA administer the proceedings; (ii) proposed that the seat of the arbitration be Paris, France; and (iii) proposed that the Parties attempt to agree on the presiding arbitrator within 45 days, following which either Party would be allowed to request that the Secretary-General of the PCA, acting as appointing authority, appoint the presiding arbitrator in accordance with Article 7(2) of the UNCITRAL Rules. In this letter, the Respondent also appointed Mr. J. Christopher Thomas QC, a national of Canada, as the second arbitrator.
11. By their respective communications of 9 and 15 January 2018, the Parties informed the PCA that they had agreed for it to act as administering institution, and as appointing authority in the event that the Parties failed to agree on a choice of presiding arbitrator within 45 days.
12. The Tribunal was constituted on 8 February 2018, when the Parties confirmed the appointment of Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, as the Presiding Arbitrator.
13. By letter dated 28 February 2018, the Tribunal (i) invited the Parties to comment on draft terms of appointment and a draft procedural order; (ii) proposed dates for a first procedural conference; and (iii) proposed that Ms. Sabina Sacco be appointed as Secretary of the Tribunal.
14. On 3 April 2018, the Parties submitted joint comments on the draft terms of appointment and procedural order. *Inter alia*, the Parties agreed that they would exchange two rounds of written briefs on the Respondent’s preliminary objections. The Claimant proposed that the written briefs be followed by a procedural order on bifurcation, following which the Tribunal would either hold a hearing on preliminary objections or convene a procedural hearing to fix the calendar for the subsequent phase of the proceedings. The Respondent

proposed that a hearing on preliminary objections be held after the filing of the last written brief on preliminary objections.

15. By letter dated 12 April 2018, the Tribunal proposed alternative dates for the first procedural conference in light of the Parties' unavailability on the dates proposed by the Tribunal. The Tribunal also noted the Parties' agreement on the sequence and timing of the first round of written briefs, and, subject to any objection from either Party, fixed the deadlines for the Respondent to submit its Preliminary Objections and for the Claimant to submit its Response thereto. On 12 and 13 April 2018, the Respondent and the Claimant respectively confirmed their agreement that the starting date of the procedural calendar be fixed on 20 April 2018, as proposed by the Tribunal.
16. On 11 May 2018, the Parties and the Tribunal held the first procedural conference. The Claimant was represented at the conference by Mr. Félix Sobrino Martínez of Iberdrola Energía, S.A.; and Mr. Miguel Virgós, Mr. Gabriel Bottini, Ms. Gillian Cahill, Ms. Heidi López, Ms. Eugenia Simó and Ms. Jana Lamas de Mesa of Uría Menéndez Abogados, S.L.P. The Respondent was represented at the conference by Ms. Ana Luisa Gatica and Ms. Lilian Nájera of the *Procuraduría General de la Nación* of Guatemala; Ms. Gabriela Hernández, Mr. Francisco Vásquez and Mr. Jorge Mario Andrade of the Ministry of Economy of Guatemala; Mr. Eduardo Silva Romero and Ms. Andrea Zumbado of Dechert (Paris) LLP; and Mr. Juan Felipe Merizalde of Dechert LLP.
17. Subsequent to the procedural conference held on 11 May 2018, on 1 June 2019, the Tribunal circulated a finalized version of the Terms of Appointment for signature and issued Procedural Order No. 1, in which it (i) fixed Geneva (Switzerland) as the seat of the arbitration; (ii) established the regime for confidentiality and transparency of the proceedings; (iii) set forth rules governing the languages of the arbitration; and (iv) established a procedural timetable. The said procedural timetable fixed a calendar for written submissions leading to a decision on bifurcation, in which the Tribunal would determine whether:
  - a. It can resolve the Respondent's preliminary objections without reviewing the merits of the case, in which case the proceedings will continue to be bifurcated, and the next step will be a hearing on preliminary objections, or
  - b. It cannot resolve the Respondent's preliminary objections without going into the merits of the case, in which case it will join the preliminary objections to the merits and convene a procedural hearing to establish a calendar for the joined jurisdiction and merits phase.
18. On 12 June 2018, following consultations with the Parties, the Tribunal fixed the date for a hearing on preliminary objections (should the proceedings be bifurcated) on 4 June 2019 (and, if necessary, 5 June 2019) (the "Hearing on Preliminary Objections").
19. On 16 July 2018, the Tribunal circulated the consolidated executed Terms of Appointment (the "Terms of Appointment").

20. On 19 July 2018, the Respondent filed its Memorial on Objections to Jurisdiction and Admissibility of Claims (“Mem.”), which included a counterclaim (the “Counterclaim”).
21. On 25 July 2018, the Tribunal fixed a calendar for written submissions on the Counterclaim.
22. On 28 September 2018, the Parties agreed that the Hearing on Preliminary Objections be held at the Peace Palace, The Hague, the Netherlands. The Tribunal confirmed the Parties’ agreed venue for the hearing on 1 October 2018.
23. The Claimant filed its Counter-Memorial on Jurisdiction, Admissibility and Counterclaim on 31 October 2018 (“CM”).
24. The Respondent filed its Reply on Objections to Jurisdiction and Admissibility of Claims on 21 December 2018 (the “Reply”).
25. On 22 February 2019, the Claimant filed its Rejoinder on Jurisdiction, Admissibility and Counterclaim (the “Rejoinder”).
26. On 8 March 2019, the Respondent filed its Rejoinder on Jurisdiction on the Counterclaim (the “Rejoinder on the Counterclaim”).
27. On 14 March 2019, the Tribunal issued its Decision on Bifurcation (in English and Spanish) (the “Decision on Bifurcation”), in which it decided as follows:<sup>1</sup>
  - a. Subject to paragraph (b) below, the Respondent’s primary and alternative objections to jurisdiction and/or admissibility shall be bifurcated;
  - b. The Tribunal reserves the possibility to join the Respondent’s alternative objection that the claims fall outside of its *ratione materiae* jurisdiction to the merits after the hearing;
  - c. The hearing scheduled for 4 June 2019 (with 5 June 2019 as reserve day) is confirmed;
  - d. The Respondent shall indicate if it wishes to call any of the Claimant’s experts for cross-examination by 15 April 2019;
  - e. A pre-hearing conference call will be held on one of the following days and times: 23, 24, 25, or 26 April at 15:00, 16:00 or 17:00 CET. The Parties are invited to state whether they are available on such dates and times by 21 March 2019. Unless either Party objects within that time limit, this conference shall be conducted by the Presiding Arbitrator on behalf of the Tribunal;

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<sup>1</sup> Decision on Bifurcation, ¶ 42 (emphasis omitted).

- f. The Tribunal will issue a decision on the Respondent's counterclaim together with its decision on the Respondent's objections;
  - g. The Tribunal defers its decision on costs to a later stage.
28. On 3 April 2019, the Tribunal confirmed that the pre-hearing conference would take place on 25 April 2019.
  29. On 23 April 2019, the Tribunal circulated a draft procedural order for comments and finalization during the pre-hearing conference.
  30. On 25 April 2019, the Tribunal and the Parties held the pre-hearing conference. The Claimant was represented at the conference by Ms. María Grande and Mr. Félix Sobrino of Iberdrola Energía, S.A.; and Mr. Miguel Virgós, Mr. Gabriel Bottini and Mr. Sebastián Green of Uría Menéndez Abogados, S.L.P. The Respondent was represented at the conference by Ms. Ana Luisa Gatica and Ms. Lilian Nájera of the *Procuraduría General de la Nación* of Guatemala; Mr. Eduardo Silva Romero of Dechert (Paris) LLP and Mr. Juan Felipe Merizalde of Dechert LLP.
  31. On 26 April 2019, the Tribunal issued Procedural Order No. 2, deciding the outstanding issues pertaining to the organization of the Hearing on Preliminary Objections.
  32. On 6 May 2019, the Tribunal circulated a Spanish translation of Procedural Order No. 2.
  33. The Hearing on Preliminary Objections was held on 4 June 2019 at the Peace Palace, The Hague, the Netherlands. The following individuals were in attendance:

**Tribunal:**

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)  
Prof. Pierre-Marie Dupuy  
Mr. J. Christopher Thomas QC

**Secretary of the Tribunal**

Ms. Sabina Sacco

**PCA**

Mr. José Luis Aragón Cardiel, Legal Counsel  
Ms. Juana Martínez Quintero, Assistant Legal Counsel

**Claimant**

Mr. Félix Sobrino Martínez, Iberdrola Energía, S.A.  
Ms. María Grande de Capua, Iberdrola Energía, S.A.

Mr. Miguel Virgós, Uría Menéndez Abogados, S.L.P  
Mr. Gabriel Bottini, Uría Menéndez Abogados, S.L.P  
Mr. Sebastián Green Martínez, Uría Menéndez Abogados, S.L.P  
Ms. Jana Lamas de Mesa, Uría Menéndez Abogados, S.L.P  
Mr. Daniel García Clavijo, Uría Menéndez Abogados, S.L.P



**Respondent**

Mr. Jorge Luis Donado Vivar, *Procurador General de la Nación*

Mr. Mario de Jesús Morales, *Asesor de Despacho Superior de la Procuraduría General de la Nación*

Ms. Ana Luisa Gatica Palacios, *Jefe de la Unidad de Asuntos Internacionales de la Procuraduría General de la Nación*

Ms. Karla Estefanía Liquez Aldana, *Asesora Legal Vicedespacho de Integración y Comercio Exterior, Ministerio de Economía*

Ms. Agnese Borsoi Jaureguí *Asesora de Defensa Comercial, Dirección de Administración de Comercio Exterior, Ministerio de Economía*

Mr. Eduardo Silva Romero, Dechert (Paris) LLP

Ms. Audrey Caminades, Dechert (Paris) LLP

Mr. Juan Felipe Merizalde, Dechert LLP

Ms. Ana María Durán López, Dechert LLP

**Court Reporters**

Ms. Michelle Kirkpatrick

**Interpreters**

Mr. Tomás José González

Mr. José Antonio Carvallo-Quintana

**IFS Audiovisual**

Mr. Erwin van den Bergh

**Solve IT**

Mr. Sybren Emmelkamp

34. On 5 June 2019, the Tribunal requested that the Parties file their costs statements within two weeks after the final version of the transcript of the Hearing on Preliminary Objections had been circulated, following which each Party would be allowed to comment on the other Party's costs statement within one week of receipt.
35. The final version of the transcript of the Hearing on Preliminary Objections was circulated on 24 June 2019 (the "Transcript").
36. The Parties filed their Statements of Costs on 8 July 2019. On 9 July 2019, the Claimant provided a corrected version of its Statement of Costs. On 16 July 2019, the Parties submitted comments on the other Party's Statement of Costs.
37. On 29 July 2019, the Tribunal invited the Parties to file additional post-hearing briefs on an argument raised by the Respondent for the first time during the Hearing on Preliminary Objections related to Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").
38. The Respondent filed its Post-hearing Brief on 13 September 2019 ("R-PHB1").

39. The Claimant filed its Submission on Article 26 of the ICSID Convention on 27 September 2019 (“C-PHB1”).
40. On 10 December 2019, the Tribunal invited the Parties to file, by 10 January 2020, additional post-hearing briefs (i) addressing whether, when assessing the Respondent’s *res judicata* objection, the Tribunal should consider Swiss international arbitration law in addition to international law, and (ii) in the affirmative, establishing the content of Swiss international arbitration law on *res judicata* with respect to negative jurisdictional awards.
41. On 10 January 2020, the Parties filed their submissions on the notion of *res judicata* under Swiss international arbitration law (“C-PHB2” and “R-PHB2”, respectively).
42. On 10 June 2020, the Claimant noted the issuance of the award in *Teco Guatemala Holdings, LLC v. the Republic of Guatemala* (ICSID Case No. ARB/10/23) Resubmission Proceeding (“*Teco II*”), and noted that it was “in the Tribunal’s hands” should it deem it useful to hear the Parties’ views on the said award.
43. On 19 June 2020, the Respondent noted that the Claimant made no specific request to the Tribunal in connection with the *Teco II* award and declined to make further comments.
44. On 23 June 2020, the Tribunal noted that neither Party had requested leave to make submissions on the *Teco II* award and that, having taken cognizance of the said award, it did not consider further submissions necessary.

### III. OVERVIEW OF THE DISPUTE AND RELIEF SOUGHT

#### A. Undisputed facts

45. The following facts appear to be undisputed by the Parties.
46. *Iberdrola* is a Spanish investor who made an investment in Guatemala's electricity sector. Specifically, in 1998 Iberdrola, together with TPS de Ultramar ("TECO") and EDP Electricidade de Portugal ("EDP", and jointly with Iberdrola and TECO, the "Consortium"), acquired 80.8% of Empresa Eléctrica de Guatemala, S.A. ("EEGSA").<sup>2</sup>
47. Within the framework of the General Electricity Law of 1996 (the "LGE"), Guatemalan authorities took certain measures in the context of fixing tariffs for the distribution of electricity for the 2008-2013 period (the "Tariff-Setting Process"), with which EEGSA disagreed.<sup>3</sup> That process has given rise to different proceedings:
- i. First, in August 2008, EEGSA initiated proceedings before the Guatemalan administrative and judicial courts against the National Electric Energy Commission (*Comisión Nacional de Energía Eléctrica* or the "CNEE"),<sup>4</sup> arguing that the CNEE's resolutions determining the tariffs were not in accordance with Guatemalan law.<sup>5</sup> These proceedings included three constitutional *amparo* actions,<sup>6</sup> which were finally decided against EEGSA by the Guatemalan Constitutional Court.<sup>7</sup>
  - ii. Second, in March 2009, Iberdrola initiated an arbitration against Guatemala before the International Centre for Settlement of Investment Disputes ("ICSID"), invoking provisions of the Treaty ("*Iberdrola I*"). The *Iberdrola I* tribunal declined jurisdiction with respect to all of Iberdrola's claims with the exception of its claim

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<sup>2</sup> Mem., ¶ 35. [Note on the English version of the Award: the Tribunal has reviewed the Respondent's pleadings both in their Spanish original and in their unofficial English translations. When quoting from these pleadings, the Tribunal has used the English translations, unless it has felt that the original Spanish version expresses a different nuance, in which case it has provided its own translation in square brackets.]

<sup>3</sup> *Id.*, ¶ 4; CM, ¶ 92.

<sup>4</sup> The CNEE is a "a technical organ of the Ministry of Energy and Mines (MEM), in charge of, among other things, (i) defining the transmission and distribution tariffs and the methodology for calculating them; (ii) monitoring to ensure the tariff studies presented reflected only efficient, non-excessive costs related to the activity of electricity distribution; and (iii) issuing the technical norms for the electric subsector."; Mem., ¶ 25.

<sup>5</sup> CM, ¶ 92; *see also* Mem., ¶ 4.

<sup>6</sup> *Amparo* appeal by EEGSA against CNEE dated 29 July 2008 (Exh. R-026); *Amparo* appeal by EEGSA (37-2008) against CNEE Resolution GJ Ruling 3121 and CNEE Resolutions 144, 145 and 146 dated 12 August 2008 (Exh. R-27); *Amparo* appeal by EEGSA against CNEE Resolution No. 144-2008 (C2-2008-7964) dated 26 August 2008 (Exh. R-28).

<sup>7</sup> Mem., ¶ 4.

for denial of justice, which the tribunal dismissed on the merits.<sup>8</sup> Specifically, the *Iberdrola I* tribunal found that the facts alleged by Iberdrola, even if proven, could not amount to a breach of the Treaty.<sup>9</sup> Instead, the tribunal concluded that Iberdrola's claims involved issues of domestic law which were not covered by the Treaty dispute resolution clause. It thus denied jurisdiction.

- iii. Third, Iberdrola initiated annulment proceedings pursuant to Article 52 of the ICSID Convention with respect to the *Iberdrola I* award. By a majority, the *ad hoc* Committee denied Iberdrola's annulment request.<sup>10</sup>

## **B. Overview of the Respondent's case and request for relief**

48. Essentially, the Respondent's case is that the dispute before this Tribunal has already been litigated before the Guatemalan courts and arbitrated before an ICSID tribunal and must thus end now.<sup>11</sup> By initiating this arbitration, the Claimant is said to have committed three abuses of process, any one of which suffices for the Tribunal to decline jurisdiction and impose upon the Claimant an exemplary and deterrent award on costs.<sup>12</sup>
49. Citing decisions of the International Court of Justice (the "ICJ"), the Respondent submits that, to ensure the preservation of social peace, the stability of legal relations requires that litigation must come to an end.<sup>13</sup> It thus contends that, even if the dispute on the Tariff-Setting Process did not end with the decisions of the Guatemalan Constitutional Court, fairness demands that the Claimant should cease its actions against Guatemala after the *Iberdrola I* award and decision on annulment. In violation of this principle, the Claimant has brought these UNCITRAL proceedings. In doing so, it has engaged in the following three abuses of process:
  - i. The Claimant has brought this claim in open disregard for the negative effect of *res judicata*. The Claimant has brought a claim based on the same facts and between the same parties, and its attempts to distinguish the legal basis of the claim are unavailing. In *Iberdrola I*, the Claimant brought claims under the Treaty (although the tribunal held that, even if proven, the facts alleged were not susceptible of constituting Treaty breaches). The triple identity test has been met and the Tribunal must decline jurisdiction. Were the Tribunal to hold otherwise, it should conclude that Iberdrola's international law claims are precluded in application of the principle

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<sup>8</sup> *Iberdrola Energía, S.A. v. Guatemala*, ICSID Case No. ARB/09/5, Award of 17 August 2012 ¶¶ 350-373 (Exh. C-004).

<sup>9</sup> *Iberdrola I* Award, ¶¶ 350-373 (Exh. C-004).

<sup>10</sup> Mem., ¶ 7, citing *Iberdrola I*, Annulment Decision (Exh. C-005).

<sup>11</sup> *Id.*, ¶ 14.

<sup>12</sup> *Id.*, ¶ 3.

<sup>13</sup> *Id.*, ¶ 8, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, ¶ 116 (26 February) (Exh. RLA-001)

of concentration of arguments and claims, according to which it is the claimant's duty to invoke all of its legal arguments when submitting its first claim.<sup>14</sup>

- ii. Alternatively, the Claimant has violated the fork in the road clause of the Treaty (Article 11(2)). Although this clause requires a claimant to bring suit in one forum only, the Claimant has acted in three *fora*: the first instance court and then the Constitutional Court of Guatemala, ICSID and this Tribunal. This breach of the fork-in-the-road provision is the ground for the counterclaim.<sup>15</sup> Even if Article 11(2) of the Treaty were not a fork-in-the-road provision, the Respondent argues that Article 26 of the ICSID Convention precludes the Claimant from bringing this arbitration.
  - iii. Alternatively, the claim amounts to harassment and abuse of right. As explained by the *Orascom* tribunal, “the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.”<sup>16</sup>
50. The Respondent also argues in the alternative that Iberdrola's actions violate Article 53(2) of the ICSID Convention and, as a result, Iberdrola's claims are excluded from this Tribunal's jurisdiction. The fact that this Tribunal has been constituted under the 1976 UNCITRAL Arbitration Rules is no impediment to reaching that conclusion.<sup>17</sup>
51. In the final alternative, if the Tribunal were to consider that Iberdrola can reformulate its claims under the Treaty, these claims would still be beyond the Tribunal's jurisdiction because they relate exclusively to Guatemalan law. In addition, this dispute was already resolved by the Guatemalan courts and the Tribunal cannot act as an appellate court in relation to determinations of national law rendered by the Respondent's courts.<sup>18</sup>
52. The Respondent also raises a counterclaim, arguing that the Tribunal must sanction the Claimant for its systematic and abusive resubmission of the same claim. Under basic notions of justice, it would be insufficient for the Tribunal to decline jurisdiction and impose costs; the Tribunal must also uphold the counterclaim and award damages to the Respondent. More specifically, the Respondent argues that the Claimants' violation of the Treaty's fork in the road clause at Article 11(2) has caused it damage, for which the Respondent seeks compensation.<sup>19</sup>

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<sup>14</sup> *Id.*, ¶¶ 9-10.

<sup>15</sup> *Id.*, ¶¶ 11-12.

<sup>16</sup> *Id.*, ¶ 13, citing *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award of 31 May 2017, ¶ 543 (Exh. RLA-004).

<sup>17</sup> *Id.*, ¶ 166.

<sup>18</sup> *Id.*, ¶ 303.

<sup>19</sup> *Id.*, ¶ 14.

53. On this basis, the Respondent requests the following relief:<sup>20</sup>

In view of the foregoing, reserving the right to subsequently supplement, develop or modify its position and in the appropriate phases of these proceedings, Guatemala respectfully requests the Tribunal to:

- a. Declare that it lacks jurisdiction over the claims of the Claimant;
- b. Otherwise, declare that the claims of the Claimant are inadmissible;
- c. Declare that it has jurisdiction over Guatemala's Counterclaim in accordance with Article 11(1) of the Treaty and Article 19 of the UNCITRAL Rules of 1976;
- d. Declare that the Claimant violated Article 11(2) of the Treaty;
- e. Order the Claimant to pay the amount of at least US\$2 million plus all amounts incurred for costs and legal expenses in this arbitration, as reparation for the damages caused, plus interest;
- f. In the alternative, and in accordance with Article 40 of the UNCITRAL Rules of 1976, order the Claimant to reimburse Guatemala all costs and legal expenses it incurred in this arbitration, plus interest; and
- g. Order any other measures that the Arbitral Tribunal deems appropriate.

54. In its Reply, the Respondent updated its request for relief as follows:<sup>21</sup>

In view of the foregoing, reserving the right to subsequently supplement, develop or modify its position and in the appropriate phases of these proceedings, Guatemala respectfully requests the Tribunal to:

- a. Declare that it lacks jurisdiction over the claims of the Claimant;
- b. Otherwise, declare that the claims of the Claimant are inadmissible;
- c. Declare that it has jurisdiction over Guatemala's Counterclaim in accordance with Article 11(1) of the Treaty and Article 19 of the UNCITRAL Rules of 1976;
- d. Declare that the Claimant violated Article 11(2) of the Treaty;
- e. Order the Claimant to pay the amount of at least USD 2 million plus all amounts incurred for costs and legal expenses in this arbitration, as reparation for the damages caused, plus interest;
- f. In the alternative, and in accordance with Article 40 of the UNCITRAL Rules of 1976, order the Claimant to reimburse Guatemala all costs and legal expenses it incurred in this arbitration, plus interest; and

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<sup>20</sup> *Id.*, ¶ 368.

<sup>21</sup> Reply, ¶ 279.

- g. Order a hearing to be held on the preliminary objections pursuant to Article 15(2) of the UNCITRAL Rules of 1976; and
- h. Order any other measures that the Arbitral Tribunal deems appropriate.

### C. Overview of the Claimant's case and request for relief

- 55. The Claimant submits that its claims are treaty claims, which it is entitled to have decided, and that neither *res judicata* nor the other principles invoked by the Respondent bar the Tribunal's jurisdiction.
- 56. First, the Claimant argues that certain measures taken by Guatemala during EEGSA's 2008-2013 tariff review amount to "free-standing violations of the Guatemala-Spain BIT, through arbitrary, unfair, and inequitable acts of Guatemalan authorities, in breach of fundamental due process principles."<sup>22</sup>
- 57. Second, the Claimant argues that, as a protected investor under the BIT (a characterization that is undisputed), it has "an international law right to have its treaty claims against those measures decided on their merits."<sup>23</sup> It concedes that it is only entitled to one resolution on their merits, "no more but no less."<sup>24</sup>
- 58. Third, the Claimant denies that the *Iberdrola I* award precludes it from bringing the present claims for the following reasons:
  - i. With respect to the Respondent's *res judicata* objection, the Claimant denies that the triple identity test has been met. It does not deny that there is an identity of parties and concedes that there is some overlap in the subject matter of the dispute (in particular, it acknowledges that "the different claims arise from the same factual matrix").<sup>25</sup> It argues, however, that the claims in this dispute are claims under the Treaty, while the claims in *Iberdrola I* were found to be claims under domestic law, and consequently not based on the same legal ground (*causa petendi*).<sup>26</sup> In any event, as explained in two recent decisions of the ICJ, aside from applying the triple identity test, it is also necessary to ascertain the content of the prior decision. The *Iberdrola I* tribunal found that the claims submitted to it, as formulated, were national law claims. As the Claimant is now bringing treaty claims that are not

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<sup>22</sup> CM, ¶ 5.

<sup>23</sup> *Id.*, ¶ 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, ¶ 88; see also Legal Opinion of August Reinisch on the Scope and Limits of the *Res Judicata* Effect of the Award in *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, dated 26 October 2018 ("Reinisch Report"), ¶ 19 ("It is obvious and undeniable that the two proceedings which involve the same parties are closely linked. In fact, the same claimant is bringing the current proceedings against the same Respondent State, referring essentially to the same facts.")

<sup>26</sup> *Id.*, ¶ 70.

premised on breaches of national law, the present claims are not precluded by *res judicata*.<sup>27</sup>

- ii. The Claimant denies that a “concentration of claims” argument is applicable. The Respondent’s argument is based on national court decisions and is “contrary to the basic principles that regulate *res judicata* in international law”, where “*res judicata* applies only to what has been decided.”<sup>28</sup>
- iii. The Respondent’s fork-in-the-road objection is similarly meritless. According to the Claimant, Article 11(2) of the BIT does not contain a true fork in the road. Even if it did, it would only apply to claims under Article 11 of the BIT. As none of the claims submitted so far were considered to be claims under Article 11, the fork-in-the-road argument cannot apply.<sup>29</sup> Nor does Article 26 of the ICSID Convention bar the present proceedings.
- iv. The Claimant strongly denies having committed an abuse of process, noting that this is a serious accusation that should be made only in extreme circumstances, which are “clearly not present here”.<sup>30</sup> The Claimant insists that it is “simply exercising a right it has to resolve its investment disputes under the Guatemala-Spain BIT through international arbitration, a way of resolving disputes to which Guatemala expressly consented in Article 11 of that Treaty.”<sup>31</sup> The Claimant emphasizes that it has been open and transparent with the Respondent as to why the *Iberdrola I* decision did not prevent Iberdrola’s treaty claims from being finally determined on their merits.<sup>32</sup>
- v. The Claimant further rejects the Respondent’s alternative objection, i.e., that the Tribunal lacks jurisdiction *ratione materiae*. The Claimant insists that its claims before this Tribunal are “treaty claims not premised on any breach of national law.”<sup>33</sup>

59. The Claimant thus submits that this Tribunal has full jurisdiction to hear Iberdrola’s claims, all of which are admissible, and it must hear them and resolve them on their merits.<sup>34</sup>

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<sup>27</sup> *Id.*, ¶ 5.

<sup>28</sup> *Id.*, ¶ 7.

<sup>29</sup> *Id.*, ¶ 8.

<sup>30</sup> *Id.*, ¶ 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, ¶ 9.

<sup>34</sup> *Id.*, ¶ 10.



60. As to the Respondent's counterclaim, the Claimant contends that the Tribunal lacks jurisdiction to entertain it, and that, by submitting the counterclaim, the Respondent has accepted the Tribunal's jurisdiction over the claims. Were the Tribunal to uphold jurisdiction on this matter, the Respondent has failed to submit a proper counterclaim. Even if the Tribunal were to consider that a proper counterclaim has been filed, it lacks merit.
61. For the foregoing reasons, the Claimant requests the following relief in response to the Respondent's preliminary objections:<sup>35</sup>

In light of the above, Iberdrola respectfully requests the Tribunal to:

- (i) Declare that it is competent to hear Iberdrola's claims;
- (ii) Declare that Iberdrola's claims are admissible.
- (iii) Consequently, dismiss all Objections on Jurisdiction and Admissibility raised by Guatemala;
- (iv) Order Guatemala to bear all costs incurred by Iberdrola in relation to Guatemala's Objections on Jurisdiction and Admissibility, plus interest; and
- (v) Order any other relief that the Tribunal may deem fit and proper.

62. In its Rejoinder, the Claimant updated its request for relief as follows:<sup>36</sup>

In light of the above, Iberdrola respectfully requests the Tribunal to:

- (i) Declare that it has jurisdiction to hear and decide on Iberdrola's claims;
- (ii) Declare that Iberdrola's claims are admissible;

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<sup>35</sup> *Id.*, ¶ 315. In its Notice of Arbitration (¶ 174), the Claimant requests the following relief:

*"Por las razones expuestas, la Demandante solicita al Tribunal que se constituya que:*

*(i) Declare que tiene competencia para resolver la presente controversia sujeta al Tratado y que la presente controversia es admisible;*

*(ii) Declare que Guatemala ha violado el artículo 3 del Tratado, en particular las obligaciones de otorgar un tratamiento no menos favorable que el requerido por el Derecho internacional, de otorgar un trato justo y equitativo, y de no adoptar medidas arbitrarias o discriminatorias;*

*(iii) Condene a Guatemala a indemnizar íntegramente a Iberdrola por todos los daños y perjuicios que su actuación en violación del Tratado le causó, tal y como se demostrará en el curso del procedimiento arbitral, más intereses desde que cada violación se produjo y hasta el cobro efectivo por parte de Iberdrola de la indemnización;*

*(iv) Condene a Guatemala a pagar todos los costos y costas que demande este procedimiento arbitral, más intereses, y*

*(v) Otorgue a Iberdrola todo otro remedio que el Tribunal considere justo."*

<sup>36</sup> Rejoinder, ¶ 271.

- (iii) Consequently, dismiss all Objections on Jurisdiction and Admissibility raised by Guatemala;
- (iv) Dismiss Guatemala's counterclaim;
- (v) In due course, find that Guatemala has breached the standards of fair and equitable treatment, full protection and security, the international minimum standard, and the prohibition of arbitrary measures contained in Article 3 of the BIT.
- (vi) Order Guatemala to bear all Iberdrola's costs in relation to Guatemala's Objections on Jurisdiction and Admissibility, plus interest; and
- (vii) Order any other relief that the Tribunal may deem just.

#### IV. FACTUAL BACKGROUND

63. The facts summarized below are provided to give context to the Parties' jurisdictional arguments. The Tribunal has assessed these facts to the extent necessary to determine the issues of jurisdiction and admissibility raised by the Parties.

##### A. The Claimant's investment

64. Between 1993 and 1997, Guatemala amended the legal framework applicable to the electricity sector, allowing for the participation of private actors. Under the LGE<sup>37</sup> and its Regulation of 1998 ("RLGE"),<sup>38</sup> distributors of electricity were compensated as follows:

The distributors of electricity in Guatemala, such as EEGSA, were paid for their services (and for the investments necessary to carry out those services) through a component of the tariff, the *Valor Agregado de Distribución* or VAD. The VAD of each distributor, including EEGSA, was to be determined through a procedure established under the General Electricity Law of Guatemala (LGE) and its regulation (RLGE). The procedure contemplated the participation of the distributor (in this case EEGSA) in the determination of the VAD and the intervention of an Expert Commission of three members (appointed by the distributor and the regulator) should discrepancies arise between the distributor and the regulator.<sup>39</sup>

65. According to the Claimant, the system enshrined two important principles aimed at attracting foreign investment in the electricity sector: the principles of participation and neutrality in the determination of tariffs.<sup>40</sup>

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<sup>37</sup> General Electricity Law, Decree 93-96 of 16 October 1996 (Exh. C-002).

<sup>38</sup> Regulations of the General Electricity Law of 21 March 1997 (Exh. C-003).

<sup>39</sup> CM, ¶ 99.

<sup>40</sup> *Id.*

66. The Respondent further explains that tariffs were to be calculated every five years on the basis of the sum of the weighted price of all of the distributor's purchases related to the entry to the distribution network and the *Valor Agregado de Distribución* ("VAD").<sup>41</sup> Each distributor was to calculate the components of the VAD through a tariff study entrusted to an engineering firm prequalified by the CNEE under the Terms of Reference by the CNEE (the "ToR").<sup>42</sup> The CNEE was then to review such tariff studies and, if necessary, formulate observations. In case of disagreement, the distributor and the CNEE were required to appoint a three-member expert commission (the "Expert Commission"), which would rule on those disagreements, according to the Respondent in a non-binding manner.<sup>43</sup>
67. This was the legal framework in which the Claimant decided to invest in Guatemala. Specifically, when Guatemala decided to privatize EEGSA in 1997, Iberdrola joined forces with TECO, a US company, and EDP, with which they formed the Consortium defined in paragraph 46, and ultimately acquired the majority of EEGSA in September 1998.<sup>44</sup> The value of EEGSA (i.e., the price paid to the government for it in the privatization) was calculated in accordance with the regulatory framework offered by Guatemala.<sup>45</sup> The Consortium held and managed the company through an intermediary company called *Distribución Eléctrica Centroamericana S.A.* ("DECA", and later "DECA II"). In total, the partners held 80.8% of EEGSA, and Iberdrola's indirect shareholding was 39.64%. The rest was held by other shareholders, including the State of Guatemala (14%).<sup>46</sup>

### **B. The facts leading to the dispute**

68. For purposes of the jurisdictional phase, the Parties summarize the main facts as follows.
69. The Claimant alleges that the VAD for the initial period after the privatization (1999-2003) was established on the basis of a transitional rule, using the values of other countries following comparable methodologies. The procedure for the determination of the VAD under the LGE and RLGE was applied for the first time in the tariff review for the period 2003-2008.<sup>47</sup> The Claimant does not appear to have complaints in this respect.

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<sup>41</sup> Mem., ¶ 26, citing LGE, Articles 71-72.

<sup>42</sup> Mem., ¶ 26, citing LGE, Article 74.

<sup>43</sup> Mem., ¶ 28, citing LGE, Article 75 ("*La Comisión revisará los estudios efectuados y podrá formular observaciones a los mismos. En caso de discrepancias formuladas por escrito, la Comisión y las distribuidoras deberán acordar el nombramiento de una Comisión Pericial de tres integrantes, uno nombrado por cada parte y el tercero de común acuerdo. La Comisión Pericial se pronunciará sobre las discrepancias, en un plazo de 60 días contados desde su conformación*").

<sup>44</sup> Mem., ¶ 35; CM, ¶¶ 100-101.

<sup>45</sup> CM, ¶ 100.

<sup>46</sup> *Id.*, ¶¶ 100-101.

<sup>47</sup> *Id.*, ¶ 103.

70. However, the Claimant submits that “[t]hings changed in the tariff setting process for the 2008-2013 period. Indeed, from the very beginning Guatemala made it clear that its intention was to decrease the electricity tariff. The sequence of events that followed was directed to fulfil at all costs this political goal.”<sup>48</sup> The Claimant further asserts that the Ministry of Energy and Mines modified the RLGE to allow the CNEE to set the tariff in certain exceptional cases without the distributor’s participation.<sup>49</sup> During this phase on preliminary objections, the Respondent has not disputed this allegation.
71. It is the Claimant’s further submission that the CNEE used the ToR for the independent consultant Mercados Energéticos who had to calculate the VAD<sup>50</sup> to predetermine the result of the consultant’s study on the VAD. According to the Claimant, the CNEE finally abandoned this strategy in the light of the challenges initiated by EEGSA before the local courts.<sup>51</sup> The Respondent opposes that Mercados Energéticos were appointed to move forward with the Tariff-Setting Process and meet the applicable deadlines.<sup>52</sup> It confirms that EEGSA withdrew its court challenges upon accepting the modified version of the ToR, which tasked Bates White with preparing new preliminary-stage reports.<sup>53</sup>
72. The Claimant also contends that the CNEE sought to determine the outcome of Bates White’s study<sup>54</sup> by trying to force the consultant to incorporate comments in its study with which Bates White did not agree. In the Claimant’s view, the CNEE rejected the study prepared by Bates White because it had not incorporated all such comments.<sup>55</sup>
73. The Respondent admits filing several observations concerning Bates White’s tariff study. To the CNEE’s surprise, Bates White disregarded most of the observations,<sup>56</sup> which prompted the CNEE to reject the study.<sup>57</sup>
74. During the constitution of the Expert Commission,<sup>58</sup> so the Claimant says, Guatemala tried to influence its composition by modifying the LGE. In the original drafting of the rule, EEGSA and the CNEE were to have each appointed a member and the third one

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<sup>48</sup> *Id.*, ¶ 105.

<sup>49</sup> *Id.*, ¶ 106 (i).

<sup>50</sup> Mem., ¶ 50.

<sup>51</sup> CM, ¶ 106 (ii).

<sup>52</sup> Mem., ¶¶ 43, 50.

<sup>53</sup> Terms of Reference for Conducting the Added Value of Distribution Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution No. 124-2007 dated 9 October 2007 (Exh. R-015).

<sup>54</sup> First Version of the Study by Bates White, Extract on the VAD Calculation dated 31 March 2008 (Exh. R-016).

<sup>55</sup> CM, ¶ 106 (iii).

<sup>56</sup> Second Version of the Study by Bates White, Extract on the VAD Calculation dated 5 May 2008 (Exh. R-017).

<sup>57</sup> Mem., ¶¶ 53-54, citing CNEE Resolution No. 63-2008 dated 11 April 2008 (Exh. C-025).

<sup>58</sup> CNEE Resolution No. 96-2008, ordering the creation of the Expert Commission dated 15 May 2008 (Exh. R-018).

would be appointed by common agreement. However, with the modification of the LGE, in the event of disagreement, the third member would be appointed by Guatemala.<sup>59</sup> While the Respondent does not challenge this allegation, it notes that, as a matter of fact, the third member of the Expert Commission was appointed by mutual agreement.<sup>60</sup>

75. The Claimant also contends that the CNEE subsequently held *ex parte* communications with one member of the CNEE and dissolved the Commission when its work had not been completed.<sup>61</sup> The Respondent replies that the Expert Commission was dissolved “by virtue of having met the objective of its appointment”.<sup>62</sup>
76. Thereafter, so the Claimant alleges, through Resolutions 144, 145, and 146-2008<sup>63</sup> the CNEE completely ignored the report of the Expert Commission and discarded the VAD study of Bates White (although this study had been corrected to reflect the conclusions of the Expert Commission). Instead of relying on Bates White’s study, the CNEE approved a different VAD on the basis of a study prepared by a company called Sigla, which was engaged by the CNEE and did not consider the Expert Commission’s report.<sup>64</sup>
77. For the Respondent, the CNEE relied on the Sigla<sup>65</sup> study because the new one by Bates White failed to acknowledge some of the Expert Commission’s main observations.<sup>66</sup>

### **C. Proceedings arising from this factual matrix**

78. According to the Claimant, these facts gave rise to proceedings before the local courts in which EEGSA challenged the CNEE’s measures and to ICSID proceedings in which Iberdrola claimed that Guatemala had breached the BIT.

#### **1. Domestic proceedings initiated by EEGSA**

79. In the month following the passing of Resolutions 144, 145, and 146/2008, EEGSA (not Iberdrola) initiated several local court proceedings against the CNEE (not the State of Guatemala). The bases of those claims were exclusively alleged to be breaches of Guatemalan law by the CNEE.<sup>67</sup> The first instance courts ruled in favor of EEGSA on

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<sup>59</sup> CM, ¶ 106 (iv).

<sup>60</sup> Mem., ¶ 56.

<sup>61</sup> CM, ¶ 106 (v).

<sup>62</sup> CNEE GJ-Order-3121 dated 25 July 2008 (Exh. R-020).

<sup>63</sup> CNEE Resolution No. 144-2008 dated 29 July 2008 (Exh. C-036); CNEE Resolutions Nos. 145-2008 and 146-2008 dated 30 July 2008 (Exh. C-037).

<sup>64</sup> CM, ¶ 106 (vi).

<sup>65</sup> Mem., ¶ 61, citing National Electric Energy Commission Agreement No. CNEE 150-2007 dated 26 October 2007 (Exh. R-012).

<sup>66</sup> Third Version of the Study by Bates White, Extract on the VAD Calculation dated 31 July 2008 (Exh. R-021).

<sup>67</sup> CM, ¶ 109 (ii).

31 July 2008, 31 August 2009, and 15 May 2009. However, on 18 November 2009 and 24 February 2010, the Constitutional Court of Guatemala ruled in favor of the CNEE.<sup>68</sup>

## 2. *Iberdrola I*

80. In parallel with the local court proceedings, on 16 March 2009, following the expiration of the six-month cooling-off period under the BIT, Iberdrola initiated ICSID proceedings against Guatemala. The Claimant's request for relief is quoted in Section V.C.2 below. Essentially, the Claimant sought declarations that Guatemala had breached its obligation under the expropriation and fair and equitable ("FET") standards enshrined in the BIT and claimed compensation for the harm caused by those breaches.<sup>69</sup>
81. The *Iberdrola I* tribunal declined jurisdiction over all of Iberdrola's claims save one (denial of justice), which it dismissed on the merits.
82. The *Iberdrola I* tribunal's reasoning will be discussed in the analysis section below. It suffices to mention here that, on the basis of Article 11 of the BIT, the tribunal observed that Guatemala's consent to arbitrate was limited to disputes over "matters regulated" by the Treaty.<sup>70</sup> After reviewing each of the claims, it concluded that, as a result of the manner in which the Claimant had pleaded its claims, it had actually only raised claims under local law as opposed to claims under the BIT and dismissed the claim.<sup>71</sup>

## 3. The annulment proceedings against the *Iberdrola I* Award

83. On 11 December 2012, Iberdrola initiated annulment proceedings against the *Iberdrola I* Award under Article 52 of the ICSID Convention. In support of its request for annulment, the Claimant argued that the tribunal had manifestly exceeded its power (Article 52(b)), had seriously departed from a fundamental rule of procedure (Article 52(d)), and had failed to state its reasons (Article 52(e)).<sup>72</sup>
84. The *ad hoc* committee, by a majority, denied the request for annulment. It held that none of the grounds invoked were well-founded.<sup>73</sup> Specifically, it gave the following reasons for dismissing Iberdrola's request:
  - i. The *ad hoc* committee found that the *Iberdrola I* tribunal did not manifestly exceed its power. It noted that arbitral tribunals have the authority to characterize the claims

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<sup>68</sup> CM, ¶ 109 (iv).

<sup>69</sup> *Iberdrola I* Award, ¶¶ 280, 282 (Exh. C-004).

<sup>70</sup> *Id.*, ¶ 309.

<sup>71</sup> *Id.*, ¶ 349.

<sup>72</sup> *Iberdrola I*, Annulment Decision, ¶¶ 46-60 (Exh. C-005).

<sup>73</sup> *Id.*, ¶ 148.

submitted by the parties from a legal perspective, and that the *Iberdrola I* tribunal's approach in this regard, while strict, had been reasonable.<sup>74</sup>

ii. The *Iberdrola I* tribunal did not depart from any fundamental rule of procedure. First, because the *Iberdrola I* tribunal had the authority to make a procedural decision, such as ruling that the claimant could not modify the relief sought after the hearing.<sup>75</sup> Second, the *Iberdrola I* tribunal addressed in its award each of Iberdrola's claims.<sup>76</sup>

iii. The *ad hoc* committee found, after reviewing the structure of the reasoning of the *Iberdrola I* tribunal in its Award, that the tribunal had properly stated its reasons.<sup>77</sup>

85. As discussed below,<sup>78</sup> the Parties disagree on the interpretation of the *ad hoc* committee's decision, and on whether it confirms that the negative decision of the *Iberdrola I* tribunal on jurisdiction carries *res judicata* effects.

#### 4. Institution of the present arbitration

86. On 15 November 2017, the Claimant initiated the present UNCITRAL arbitration under the BIT.<sup>79</sup> The Claimant's prayers for relief are quoted in Section III.C above and further discussed in the analysis (Section V.C.2). Essentially, Iberdrola seeks declarations that the Tribunal has jurisdiction over this dispute<sup>80</sup> and that the Respondent has violated its Treaty obligations in respect of expropriation and FET,<sup>81</sup> as well as compensation for the damage resulting from these violations.<sup>82</sup>

#### 5. The *Teco* arbitrations

87. In October 2010, TECO (one of Iberdrola's partners in the investment in EEGSA) initiated an investment arbitration against Guatemala under the provisions of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) based on the same factual matrix ("*Teco I*"). The *Teco I* tribunal held that these facts constituted a breach of the protection standards of the CAFTA-DR.<sup>83</sup>

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<sup>74</sup> *Id.*, ¶ 93.

<sup>75</sup> *Id.*, ¶ 109.

<sup>76</sup> *Id.*, ¶ 115.

<sup>77</sup> *Id.*, ¶ 133.

<sup>78</sup> See Section V below.

<sup>79</sup> Notice of Arbitration.

<sup>80</sup> CM, ¶ 315.

<sup>81</sup> Notice of Arbitration, ¶¶ 155-163, 167.

<sup>82</sup> *Id.*, ¶¶ 164-166.

<sup>83</sup> CM, ¶¶ 129, 131, referring to *Teco Guatemala Holdings, LLC v. the Republic of Guatemala* (ICSID Case No. ARB/10/17), Award of 19 December 2013 (Exh. C-006).

88. It is noteworthy in the present context that the *Teco I* tribunal stressed that “[t]he fact that, in order to assess the Respondent’s alleged responsibility in international law, the Arbitral Tribunal will have to decide certain points of interpretation of the regulatory framework by applying Guatemalan law, does not and cannot deprive the Arbitral Tribunal of its jurisdiction.”<sup>84</sup> The tribunal also mentioned that its “task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law”; it is “rather to apply international law to the facts in dispute, including the content of Guatemalan law as interpreted by the Constitutional Court.”<sup>85</sup>
89. The *Teco I* tribunal ordered Guatemala to pay approximately USD 21 million in damages. Both TECO and Guatemala initiated annulment proceedings against the award. On 5 April 2016, the *ad hoc* committee annulled part of the award relating to damages and otherwise denied the annulment.
90. While the Claimant relies on the *Teco I* tribunal’s findings to support its case, the Respondent alleges that said arbitration proceeding is not relevant for the case at hand, notably because the applicable treaties are different.<sup>86</sup> The Tribunal addresses the Parties’ respective positions on this issue below.<sup>87</sup>
91. On 3 October 2016, TECO initiated a new ICSID arbitration concerning damages that were not granted by the *Teco I* tribunal (“*Teco II*”). The *Teco II* tribunal rendered its award on 13 May 2020.<sup>88</sup> While the Claimant brought this fact to the Tribunal’s attention, neither party requested the opportunity to make comments on this award. The Tribunal has reviewed this award but has not found it helpful for its analysis.

## V. JURISDICTION AND ADMISSIBILITY

### A. The Respondent’s position

92. The Respondent objects to the Tribunal’s jurisdiction, and to the admissibility of the claims, on the following grounds: the claims are barred by the principle of *res judicata*; in the alternative, they are precluded by the doctrine of concentration of arguments; in the further alternative, the Tribunal has no jurisdiction because the Claimant has violated the Treaty’s fork-in-the-road clause and the claims are precluded by Article 26 of the ICSID Convention; in the further alternative, the claims amount to a harassment of the Respondent and an abuse of right; in the further alternative, the Claimant’s actions violate Article 53(2) of the ICSID Convention and, as a result, Iberdrola’s claims are excluded from this Tribunal’s jurisdiction; finally and also in the alternative, were the Tribunal to

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<sup>84</sup> *Teco I*, Award, ¶¶ 466, 468 (Exh. C-006).

<sup>85</sup> *Id.*, ¶ 477.

<sup>86</sup> Mem., ¶¶ 227-239.

<sup>87</sup> See ¶¶ 228-229 below.

<sup>88</sup> *Teco Guatemala Holdings, LLC v. the Republic of Guatemala* (ICSID Case No. ARB/10/23), Resubmission Proceeding, Award of 13 May 2020.



consider that Iberdrola can reformulate its claims under the Treaty, these claims would likewise be beyond the Tribunal's jurisdiction as they relate exclusively to Guatemalan law.

93. The Tribunal will start its analysis with the main objections, i.e. *res judicata*. It will review the other objections if necessary or appropriate depending on the outcome of its examination of *res judicata*.

#### 1. *Res judicata*

94. The Respondent contends that the principle of *res judicata*, which is a “well-established and generally recognized principle of law”,<sup>89</sup> bars the Claimant from restating claims that have already been decided. The *Iberdrola I* tribunal already decided the claims submitted to this Tribunal, and the Claimant is precluded from bringing them for a second time. The Respondent raises *res judicata* as its primary objection and appears to argue that it precludes the Tribunal's jurisdiction.
95. The Respondent argues that (a) if there is triple identity, decisions on jurisdiction have *res judicata* effect, (b) the *Iberdrola I* tribunal dismissed the claims that have been submitted here, and (c) the *res judicata* principle prevents the Claimant from resubmitting these claims.

##### a. The principle of *res judicata* applies to decisions on jurisdiction

96. Relying on jurisprudence from the ICJ and other international tribunals, the Respondent submits that “[t]he principle of *res judicata* seeks to prevent a decision by a court or tribunal – which must be final with regard to the parties – from being reopened in new judicial or arbitral proceedings.”<sup>90</sup> This principle applies both to arbitral awards on the merits of the dispute and to decisions and awards on jurisdictional objections.<sup>91</sup> For instance, the ICJ stated in the *Genocide Case* that “once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context

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<sup>89</sup> *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, 1954 ICJ Rep., p. 53 (July 13) (Exh. RLA-12).

<sup>90</sup> Mem., ¶ 171.

<sup>91</sup> *Id.*, ¶ 174, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, ¶ 130 (Exh. RLA-18) (“[T]he issue of jurisdiction is *res judicata*. No aspect has been left unresolved. Hence, having restated the content of the Decision on Jurisdiction, the Tribunal will abstain from entertaining further arguments put forward by the Parties after that decision was rendered”) and *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad Hoc Case, Award of 23 April 2012, ¶ 135 (Exh. RLA-19) (“This determination on jurisdiction was a final one which has a *res judicata* effect. It was not issued prima facie. The only prima facie finding related to the existence of treaty breaches, which, by its very nature, can only be preliminary at the jurisdictional stage”).

of that case.”<sup>92</sup> ICSID tribunals have even found that decisions prior to an award also have *res judicata* effect when part of the same arbitral proceedings.<sup>93</sup>

97. To establish whether *res judicata* is met, international courts and tribunals have consistently applied the triple identity test, which requires (i) identity of parties (*persona*), (ii) identity of object (*petitum*) and (iii) identity of cause of action or legal grounds (*causa petendi*).<sup>94</sup> The Respondent denies that the *res judicata* effect of an award is limited to what the tribunal decided “expressly or by necessary implication.”<sup>95</sup> The formalistic and legalistic interpretation of *res judicata* advanced by the Claimant has been widely reassessed by international jurisprudence and doctrine in favor of a flexible and pragmatic approach.<sup>96</sup>

**b. The *Iberdrola I* tribunal dismissed the claims with *res judicata* effect**

98. The Respondent emphasizes that the *Iberdrola I* Award dismissed the same claims submitted in this arbitration with *res judicata* effect.
99. First, the Respondent contends that the triple identity test is met here:
- i. It is undisputed that the parties in this case and in *Iberdrola I* are the same.<sup>97</sup>
  - ii. In both cases, the Claimant has requested the tribunal to hold that Guatemala had violated Article 3 of the Treaty and order the State to pay compensation.<sup>98</sup> There is thus identity of *petitum*.
  - iii. Finally, there is identity of factual and legal bases, and thus identity of cause of action.<sup>99</sup> Both cases rely on the same set of facts related to the Tariff-Setting Process and, in particular, to CNEE Resolutions 144-2008, 145-2008 and 146-2008. Indeed, the Claimant has accepted that both cases are based on the same facts. Crucially, in *Iberdrola I* the Claimant invoked the same Treaty breaches that it is invoking now

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<sup>92</sup> Mem., ¶ 173, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, ¶ 138 (26 February) (Exh. RLA-001).

<sup>93</sup> Mem., ¶ 175, citing *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador’s Request for Reconsideration of 10 April 2015, ¶ 43 (Exh. RLA-17).

<sup>94</sup> Mem., ¶ 177, citing *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Judgment, 1927 PCIJ (Ser. A) No. 13, Dissenting Opinion of Judge Anzilotti, p. 23 (December 16) (Exh. CLA-011).

<sup>95</sup> CM, ¶ 35, citing *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Decision on Jurisdiction, ICJ Reports 2018, ¶ 68 (2 February) (Exh. CLA-12).

<sup>96</sup> Reply, ¶¶ 34-35.

<sup>97</sup> Mem., ¶ 182.

<sup>98</sup> *Id.*, ¶¶ 187-189.

<sup>99</sup> *Id.*, ¶¶ 179-183, 213; Reply, ¶¶ 37-52.

and pleaded first before the tribunal and then before the *ad hoc* committee that its claims were made under international law.<sup>100</sup>

100. For the Respondent, the fact that the *Iberdrola I* tribunal found that the claims were not claims that could be advanced under the Treaty is irrelevant to determining whether there is an identity of cause of action. The decisive factor is whether the claims that the Claimant submitted in the first proceedings and in the present one are identical. The Claimant has expressly acknowledged that it initiated *Iberdrola I* “to have its international law claims heard and determined,”<sup>101</sup> and there is no doubt that it invoked the Treaty to support its prayer for relief there, as it is doing now. The requirement of identity of cause of action bars the Claimant from raising the same claim a second time “in a new light.”<sup>102</sup> The Claimant’s reliance on the contract/treaty claim distinction is irrelevant, as *Iberdrola* never attempted to bring a contract (or national law) claim in *Iberdrola I*.
101. In the alternative, what matters is whether the claims in *Iberdrola I* were based on the facts alleged in this second arbitration, which is undisputed.<sup>103</sup>
102. Second, contrary to the Claimant’s arguments, the *Iberdrola I* Award was not limited to finding that the claims submitted by *Iberdrola* were national law claims because of the “form” in which they were formulated, nor did the tribunal fail to analyze “whether the facts were an eligible basis for the dispute under the Treaty or under international law.”<sup>104</sup> The *Iberdrola I* tribunal did analyze the facts alleged by the Claimant and dismissed the claims.<sup>105</sup> It correctly found that the facts alleged, if proven, could not amount to a violation of the Treaty, but at best, to a breach of domestic law that was outside the jurisdiction granted by the Treaty. To reach this conclusion, the Tribunal took into account all of the Parties’ arguments and evidence, including all factual and legal issues relevant to this matter.<sup>106</sup> More specifically, the *Iberdrola I* tribunal found that the CNEE and the Guatemalan courts, acting within their authority under local law, had interpreted that law in a particular way, and that it thus had no jurisdiction to judge this interpretation under international law, as this would require it to act as a court of appeal. As a result, the tribunal found that the facts invoked by *Iberdrola* could only give rise to a denial of justice claim.<sup>107</sup>

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<sup>100</sup> Mem., ¶¶ 179, 213; Reply, ¶¶ 37-52.

<sup>101</sup> Reply, ¶ 40, citing CM, ¶ 212.

<sup>102</sup> Reply, ¶ 44, citing B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge: Grotius Publications 1987) p. 346 (Exh. RLA-116).

<sup>103</sup> Reply, ¶¶ 48-51.

<sup>104</sup> Mem., ¶ 193.

<sup>105</sup> Reply, ¶¶ 53-86.

<sup>106</sup> *Id.*, ¶¶ 59-61, citing *Iberdrola I* Award, ¶ 287 (Exh. C-004).

<sup>107</sup> *Id.*, ¶¶ 70-71, citing *Iberdrola I* Award, ¶¶ 367-371 (Exh. C-004).

103. The Respondent denies that the *res judicata* effect of the *Iberdrola I* Award is limited to what the tribunal decided “expressly or by necessary implication.” However, even if the Tribunal were to adopt this restrictive and formalistic position, Iberdrola’s claims in this arbitration would still be *res judicata*. To determine the scope of *res judicata*, it is necessary to take into account the reasoning behind the operative part of the award and the parties’ pleadings throughout the course of the proceeding.<sup>108</sup> In this respect, Guatemala stresses that:
- i. The parties to *Iberdrola I* thoroughly debated whether or not the facts invoked by the Claimant constituted a dispute under the Treaty. The discussion was not about the “form” in which the claims had been submitted. Indeed, the tribunal requested the parties to indicate in their post-hearing briefs whether the facts that they considered proved had produced consequences under the BIT or under international law. The Claimant made colossal efforts to show this.<sup>109</sup>
  - ii. The *Iberdrola I* tribunal analyzed whether the facts alleged by the Claimant, if proven, could amount to a violation of the Treaty.<sup>110</sup> After assessing these facts, as set out in the parties’ pleadings and evidence, the tribunal found that “the foundation for Iberdrola’s claim” was a dispute under Guatemalan law, and that Iberdrola had failed to show which “acts of authority” by Guatemala could constitute violations of the Treaty.<sup>111</sup>
  - iii. The *Iberdrola I* tribunal also analyzed Iberdrola’s legal arguments and found that there was no connection between the facts alleged and the standards invoked. Nor were there any acts of *imperium* which under international law may constitute violations of treaty rights.<sup>112</sup>
104. In any event, the parties’ positions summarized in the *Iberdrola I* Award show that the tribunal did take into consideration the same facts and arguments that the Claimant now seeks to submit before this Tribunal.<sup>113</sup>
105. The Respondent further argues that the annulment decision (as well as the Claimant’s arguments during the annulment proceedings) corroborates the *res judicata* effect of the *Iberdrola I* Award. During the annulment proceedings, the Claimant focused its efforts on demonstrating that the facts set forth in *Iberdrola I* involved a dispute under

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<sup>108</sup> Mem., ¶¶ 196-198, citing the decisions of various international law tribunals, in particular *Apotex v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014, ¶¶ 7.28, 7.30 (Exh. RLA-10).

<sup>109</sup> Reply, ¶¶ 73-75.

<sup>110</sup> *Iberdrola I* Award, ¶ 350 (Exh. C-004).

<sup>111</sup> *Id.*, ¶¶ 321, 323, 349, 358-359, 370.

<sup>112</sup> Reply, ¶ 68, citing *Iberdrola I* Award, ¶ 358 (Exh. C-004).

<sup>113</sup> CM, ¶ 65.

international law. Specifically, the Claimant devoted an entire section of its annulment memorial to the reasons why the facts it had invoked gave rise to a dispute under the Treaty;<sup>114</sup> it identified 16 facts that were said to have led to a breach of the obligation to afford FET;<sup>115</sup> it submitted two appendices to support its arguments, one explaining the connection between the alleged facts and the violation of the Treaty standards, and another with its responses to Guatemala’s jurisdictional objections; it also filed an expert opinion by Prof. Rudolph Dolzer on the international nature of its claims.

106. The *ad hoc* committee concluded that the tribunal had acted within its authority by legally characterizing the claims of the Claimant as a dispute arising under domestic law, and that it was thus inappropriate to annul the *Iberdrola I* Award. The *ad hoc* Committee’s decision thus further “affirmed the [final and unappealable nature] of this award pursuant to the provisions of the ICSID Convention.”<sup>116</sup>
107. The very fact that the Claimant applied for annulment of the *Iberdrola I* award demonstrates that the Claimant is well aware of the *res judicata* effect of that award, or else “it would not have felt the need to apply for the annulment.”<sup>117</sup>

**c. The *res judicata* principle prevents the Claimant from resubmitting its claims**

108. For the Respondent, the *res judicata* principle prevents the Claimant from resubmitting its claims. The *Iberdrola I* tribunal has already ruled on “whether, *prima facie*, the fundamental basis for Iberdrola’s claim in this case is the Treaty”, which Iberdrola argues is this Tribunal’s task.<sup>118</sup> According to the Respondent, the Claimant seeks to “have this Tribunal review and overturn the decision in the *Iberdrola I* Award – this time accepting the position that the Claimant advanced throughout the entire course of the prior arbitral proceeding. Consequently, for all practical purposes, this Tribunal would be acting as an appellate tribunal, in clear violation of the cardinal principle of *res judicata* and the provisions of the ICSID Convention.”<sup>119</sup>
109. Contrary to the Claimant’s suggestion, the *res judicata* principle precludes the Claimant from refiling its claims after those claims were rejected on jurisdictional grounds. The *Iberdrola I* decision is final and cannot be remedied in a subsequent proceeding. Whether the Claimant (or, for the sake of argument, this Tribunal) disagrees with the *Iberdrola I* tribunal’s reasoning is irrelevant: the fact is that a duly constituted tribunal with the authority to reach a finding on the Claimant’s claims has rendered its decision.

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<sup>114</sup> *Iberdrola I*, Iberdrola’s Memorial on Annulment, 30 April 2013, section 8.2.2, ¶¶ 379-395 (Exh. R-001).

<sup>115</sup> *Id.*, section 8.2.2, ¶¶ 376-378 (Exh. R-001).

<sup>116</sup> Mem., ¶ 220.

<sup>117</sup> *Id.*, ¶ 211.

<sup>118</sup> *Id.*, ¶ 199, citing Notice of Arbitration, ¶ 37.

<sup>119</sup> Mem., ¶ 221.

110. If the Tribunal were to accept Iberdrola’s position, it would set a dangerous precedent, as it would allow investors to question decisions on lack of jurisdiction. For instance, if a tribunal decided that a particular investment was not protected under the relevant treaty, the claimant could (erroneously) call for a new tribunal under the treaty in the hopes that that tribunal would reach a different outcome on its jurisdiction. This would jeopardize the finality of arbitral awards and the competence of international courts to rule on their jurisdiction.<sup>120</sup>
111. In any event, even if the Tribunal accepted the Claimant’s views, the defects in the Claimant’s legal strategy cannot be corrected in this arbitration.<sup>121</sup> For policy reasons, the Claimant may not cure its claims by reformulating them in another forum. This would be contrary to principles of finality, efficiency, justice, legality, loyalty, procedural diligence, equality of arms, procedural economy and good public management, which have been recognized by national courts as well as international tribunals.<sup>122</sup> Citing *Apotex III*, the Respondent argues that “were it so easy to side-step the application of *res judicata*, the doctrine would be largely meaningless under international law [...]. The costs and time required for investor-state arbitrations, already not inconsiderable, would be multiplied several times over if unsuccessful claimants could persuade later tribunals to restrict the effect of earlier awards by simply reformulating their claims and arguments. As already described, there is a strong interest, both public and private, in bringing an end to a dispute by one final and binding arbitration award.”<sup>123</sup>
112. Regardless of policy, the Respondent submits that the way in which the Claimant formulated its claims in *Iberdrola I* is not a jurisdictional defect that can be cured by bringing newly formulated claims. The Respondent accepts that certain jurisdictional defects can be cured, but they refer only to procedural requirements to submit a dispute to arbitration that would otherwise render the claim premature (such as the cooling-off period or waiver requirements). Neither *Waste Management II*, nor *Mobil v. Canada II*, nor *Nicaragua v. Colombia II* support the proposition that a claimant might correct a defect related to the way in which its claims have been formulated. To the contrary, these cases confirm that only a premature claim can be resubmitted. That is not the case here: claims that have been badly formulated are not premature; nothing prevents the claimant from submitting them correctly from the outset.<sup>124</sup>

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<sup>120</sup> Mem., ¶ 225.

<sup>121</sup> Reply, ¶ 87.

<sup>122</sup> *Id.*, ¶¶ 12-30.

<sup>123</sup> *Id.*, ¶ 16, citing *Apotex v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014, ¶ 7.59 (Exh. RLA-10).

<sup>124</sup> Reply, ¶¶ 89-102.

**d. Relevance and content of Swiss international arbitration law**

**(i) Should the Tribunal consider Swiss international arbitration law on *res judicata* in addition to international law?**

113. The Respondent submits that Swiss law should be taken into consideration by the Tribunal, in addition to the applicable international law. The Respondent acknowledges that “investment treaty tribunals seated in Switzerland are not automatically bound to apply the law of their seat to *res judicata* objections”; rather, the applicable law (including to the issue of *res judicata*) is defined at Article 11(3) of the Treaty, which points to the terms of the Treaty, the law of the host State and international law.<sup>125</sup> That said, the Respondent contends that “the law of the seat should be taken into consideration to determine whether or not a future award could be set aside in the jurisdiction serving as the seat of the arbitration proceedings as part of the tribunal’s duty to make every effort to render an award enforceable at law”.<sup>126</sup>
114. The seat of the arbitration being Geneva (Switzerland), the Tribunal should take into consideration Swiss international arbitration law when assessing the Respondent’s *res judicata* objection.<sup>127</sup> In particular, pursuant to Article 176 of the Swiss Private International Law Act (the “PILA”), Chapter 12 of the PILA would govern any annulment proceedings in Switzerland.

**(ii) What is the content of Swiss international arbitration law about *res judicata* of negative jurisdictional awards?**

115. The Respondent makes seven main points with respect to the content of Swiss international arbitration law on the notion of *res judicata* and its application to negative jurisdictional awards.
116. First, the Respondent submits that, under Swiss law, negative awards on jurisdiction are final awards, and as such carry *res judicata* effects.<sup>128</sup> Likewise, awards (including ICSID

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<sup>125</sup> R-PHB2, ¶ 3, citing S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 31 (Exh. RLA-126): (“[A] Swiss court or arbitral tribunal seated in Switzerland must apply Swiss *res judicata* principles to determine the *res judicata* effect of a foreign judgment or arbitral award, unless an international treaty provides otherwise”); H. Wehland, “The Application of Lis Pendens and Res Judicata in Investment Treaty Arbitration”, in: *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford Legal Research Library 2013) ¶¶ 6.03-6.36 (Exh. RLA-184).

<sup>126</sup> R-PHB2, ¶ 5.

<sup>127</sup> *Id.*, ¶¶ 2, 6.

<sup>128</sup> *Id.*, ¶ 8, citing S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 35 (Exh. RLA-126); S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press 2016) ¶¶ 4.80, 6.185 (Exh. RLA-185); JF. Poudret, S. Besson, *Comparative Law of International Arbitration* (2nd ed., Sweet & Maxwell 2007) ¶¶ 479, 731 (Exh. RLA-186); F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Interim Report on *Res judicata* and

awards) and foreign judgments have *res judicata* effects, to the extent that they may be recognized and enforced in Switzerland.<sup>129</sup> As “[i]t is beyond any doubt that ICSID awards can be recognized and enforced in Switzerland, a Contracting State to the ICSID Convention”, the Respondent argues that the “the *Iberdrola I* ICSID award which declined jurisdiction over Claimant’s claim for a breach of Article III of the Treaty produces *res judicata* effects in Switzerland.”<sup>130</sup>

117. Second, according to the Respondent, under Swiss law the doctrine of *res judicata* applies where the parties to the dispute are the same and the subject matter of the dispute is the same, which in turn depends on whether the dispute is based on the same set of facts.<sup>131</sup> These requirements are met here: the parties, the facts and the relief sought – a declaration that Guatemala breached Article 3 of the Treaty – are identical in both arbitration proceedings.<sup>132</sup>
118. Third, the Respondent submits that, under Swiss law, a negative award on jurisdiction carries both negative and positive *res judicata* effects. The negative effect of *res judicata* “entails that the same claim cannot be brought again in other proceedings”, while the positive effect of *res judicata* “entails that, if an adjudicator has to decide a preliminary issue that has already been finally decided in the dispositive part of an earlier award, that adjudicator is bound by the earlier award, and must implement it in its own decision.”<sup>133</sup> The consequences of these principles for this case are two-fold: the Claimant cannot bring its claim for a breach of Article 3 of the Treaty again, and this Tribunal is bound by the *Iberdrola I* award’s decision to decline jurisdiction over the Claimant’s claims for a breach of Article 3 of the Treaty.<sup>134</sup>
119. Fourth, the Respondent contends that, “under Swiss law, the *res judicata* effect of an arbitral award attaches to the dispositive part of said award”,<sup>135</sup> but does “does not extend

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Arbitration”, *International Law Association Conference on International Commercial Arbitration* (2004) p. 53 (Exh. RLA-187).

<sup>129</sup> R-PHB2, ¶ 9, citing S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 31 (Exh. RLA-126).

<sup>130</sup> R-PHB2, ¶¶ 9-10.

<sup>131</sup> *Id.*, ¶ 11.

<sup>132</sup> *Id.*, ¶ 13.

<sup>133</sup> *Id.*, ¶ 14, citing Swiss Federal Supreme Court (“SFSC”) decision 4A\_496/2012 of 25 February 2013, ¶ 3.1 (Exh. RLA-188); citing S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 20 (Exh. RLA-126).

<sup>134</sup> R-PHB2, ¶ 15.

<sup>135</sup> *Id.*, ¶ 21, citing G. Kaufmann-Kohler and A. Rigozzi, “The Law Applicable to the Merits and the Award”, in: *International Arbitration: Law and Practice in Switzerland* (3<sup>rd</sup> ed., Oxford Legal Research Library 2015) ¶ 7.188 (Exh. RLA-192); see also F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Interim Report on *Res judicata* and Arbitration”, *International Law Association Conference on International Commercial Arbitration* (2004) pp. 51-52 (Exh. RLA-187).



to the entire award, and does not extend to the reasons of a tribunal's decision".<sup>136</sup> The *Iberdrola I* tribunal found that it had no *ratione materiae* jurisdiction over the Claimant's claims.<sup>137</sup> This decision carries *res judicata* effects, irrespective of the reasons underlying the Tribunal's decision.<sup>138</sup> Accordingly, "[e]ven if the *Iberdrola I* tribunal's reasoning that Claimant's claims are domestic claims were to be considered incorrect by this Tribunal (*quod non*), the *Iberdrola I* tribunal's decision that Claimant's claims were *ratione materiae* outside of the scope of Article 11 of the Treaty retains its *res judicata* effects."<sup>139</sup>

120. Fifth, the Respondent contends that, "under Swiss law, a party may not bring a new action with respect to the same dispute by relying on facts that it did not invoke, but could and should have invoked, during the first proceedings"; "[a] party can only bring a new action with respect to new facts, i.e., facts that have arisen after the moment up until which that party could have validly invoked new facts in the first proceedings".<sup>140</sup> In other words, if the new claim arises out of new facts then there is no identity of subject matter under Swiss law.<sup>141</sup> The Respondent notes in this regard that the Claimant's claims in this arbitration do not result from new facts.<sup>142</sup>
121. Sixth, the Respondent contends that, "under Swiss law, a subsequent award will be annulled if rendered in violation of the *res judicata* effect of a prior award,"<sup>143</sup> because violations of *res judicata* are considered to be contrary to procedural public policy, which is a ground for annulment under Article 190(e) PILA. As a result, if the Tribunal were to allow the Claimant's case to proceed, the award would be annulled under Article 190 PILA for being contrary to procedural public policy.<sup>144</sup>

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<sup>136</sup> R-PHB2, ¶ 23, citing G. Kaufmann-Kohler and A. Rigozzi, "The Law Applicable to the Merits and the Award", in: *International Arbitration: Law and Practice in Switzerland* (3<sup>rd</sup> ed., Oxford Legal Research Library 2015) ¶ 7.188 (Exh. RLA-192); SFSC decision 4A\_720/2011, BGE 138 III 261, of 15 March 2012 (Exh. RLA-193).

<sup>137</sup> R-PHB2, ¶ 24.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*, §§ 25-26, S. Schaffstein, "Chapter 18, Part VIII: Res Judicata in International Arbitration", in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 26 (Exh. RLA-126); SFSC decision 4A\_508/2013, BGE 140 III 278, of 27 May 2014 (Exh. RLA-182).

<sup>141</sup> *Id.*, ¶ 26.

<sup>142</sup> *Id.*, ¶ 27.

<sup>143</sup> *Id.*, ¶ 16.

<sup>144</sup> *Id.*, §§ 19-20, citing G. Kaufmann-Kohler and A. Rigozzi, "The Law Applicable to the Merits and the Award", in: *International Arbitration: Law and Practice in Switzerland* (3<sup>rd</sup> ed., Oxford Legal Research Library 2015) ¶ 7.188 (Exh. RLA-192); the Respondent submits that "the annulment grounds of Article 190(2)(c) to (e) PILA can be invoked in challenges against preliminary awards brought on the basis of Article 190(2)(a) or (b) PILA, provided they are limited to matters that are directly related to the constitution, composition or jurisdiction of the arbitral tribunal."; R-PHB2, ¶ 18.

122. Seventh, the Respondent argues that, as under international law, under Swiss law the Claimant's resubmission of its claim constitutes an abuse of process which would be contrary to Article 2.2 of the Swiss Civil Code.<sup>145</sup>

## 2. Concentration of claims

123. Even if the Tribunal were to find that the Claimant can reformulate its treaty claims to evade the *res judicata* principle, the Respondent submits that these claims are still precluded and outside of the Tribunal's jurisdiction by application of the concentration of claims principle. Pursuant to this principle, a claimant is required to submit all available claims related to a particular dispute when initiating judicial or arbitral proceedings. If it fails to do so, it is barred from raising its claim in subsequent proceedings.<sup>146</sup> This principle seeks to protect the general public interest as well as the interest of the parties, in particular, the respondent's interest of not being harassed by successive claims when only one would suffice.<sup>147</sup>

124. According to the Respondent, the concentration of claims principle has been recognized by both domestic courts and international tribunals. The Respondent relies on norms and case law of the French courts (RLA-34 and RLA-35), the English courts in *Henderson v. Henderson* (RLA-36), Guatemalan procedural norms and jurisprudence (RLA-38), international courts and commissions such as in the *Delgado* (RLA-39) and the *Machado* cases (RLA-40), and investment tribunals, for instance, in *RSM v. Granada* (RLA-41) and *Petrobart v. Kyrgyz Republic* (DL-3/CLA-3).

125. In response to the Claimant's arguments, the Respondent maintains that the principle of concentration of arguments:

- i. Is a general principle of law in the terms of Article 38.1 of the ICJ Statute. The references to national law have been provided by way of example. The Respondent cites more examples to support this assertion.<sup>148</sup>
- ii. Has been applied by many international courts and tribunals<sup>149</sup>, as international law condemns the practice of "claim-splitting".

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<sup>145</sup> R-PHB2, ¶ 28, citing Award in ICC Case 16548 of 2011 (unpublished, quoted in B. Zajdela, "Chapitre 2: Les Autres Formes d'Autorité de la Chose Jugée", in: *L'autorité de la chose jugée devant l'arbitre du commerce international* (Bruylant 2018) p. 263, ¶ 336 (Exh. RLA-159); see also P.Y. Tschanz, *en Commentaire Romand, Loi sur le droit international privé, Convention de Lugano*, (excerpt) ¶ 59 (Exh. RLA-194).

<sup>146</sup> Mem., ¶ 243.

<sup>147</sup> *Id.*, ¶ 254.

<sup>148</sup> Reply, ¶¶ 108-117.

<sup>149</sup> *Id.*, ¶¶ 118-129.

- iii. Is consistent with the doctrine of “exhaustion of treaty process” (in French, “*épuisement des recours prévus dans le traité*”) recognized by the ICJ. Like the *res judicata* and the principle of *ne bis in idem*, this doctrine seeks to put an end to disputes. Citing the *Nicaragua v. Colombia* case, the Respondent argues that, “[u]nder this principle, ‘the renewed presentation of a claim previously examined by the Court may be considered inadmissible if that claim relies on the same treaty process as the basis of jurisdiction of the Court.’”<sup>150</sup>
- iv. Is supported by international legal authorities.<sup>151</sup>

### 3. Fork in the road

126. In the alternative, the Respondent contends that the fork-in-the-road clause of Article 11(2) of the Treaty bars the Claimant from raising anew claims that have already been submitted to the Guatemalan courts and the *Iberdrola I* tribunal.<sup>152</sup>
127. The Respondent disputes the Claimant’s contention that the Respondent’s fork-in-the-road objection fails because of its alternative nature. The Respondent agrees that if *res judicata* and fork in the road were equivalent concepts, as construed by the Claimant, a fork-in-the-road objection could not be alternative. However, these concepts are “neither equivalent nor the ones advanced by Claimant.”<sup>153</sup> Accordingly, if the Tribunal were to find that Iberdrola’s treaty claims were not decided with *res judicata* effect, they would be barred under Article 11(2) of the Treaty.<sup>154</sup>
128. In essence, the Respondent contends that Article 11(2) of the Treaty is a fork-in-the-road clause (a), which has been triggered twice by the Claimant (b), and even if the Tribunal were to consider otherwise, Article 26 of the ICSID Convention precludes the Claimant from bringing this UNCITRAL proceeding arbitration (c).

#### a. Article 11(2) is a fork-in-the-road clause

129. Article 11(2) of the Treaty is a fork-in-the-road clause, so says the Respondent, because it expressly establishes that an investor may have recourse only to one forum for resolving a dispute with the host State.
130. The Respondent emphasizes that Article 11(2) must be interpreted pursuant to its wording, as established in Article 31 of the Vienna Convention on the Law of Treaties

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<sup>150</sup> *Id.*, ¶ 130, citing *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, Joint Dissenting Opinion, ICJ Reports 2016, ¶ 61 ( 17 March) (Exh. RLA-118).

<sup>151</sup> Reply, ¶¶ 131-137.

<sup>152</sup> Mem., ¶¶ 258-302.

<sup>153</sup> Transcript, 56:21-22.

<sup>154</sup> *Id.*, 56:23-57:1.

(“VCLT”) and confirmed in *H&H*.<sup>155</sup> Article 11(2) provides for three alternative and exclusive mechanisms for dispute resolution. The use of the expression “at the choice of the investor” and of the conjunction “or” indicate that the three mechanisms are alternative, so that the choice of one of these *fora* is irrevocable.<sup>156</sup>

131. This is consistent with the purpose of fork-in-the-road provisions. Relying on Prof. Zachary Douglas’s writings, the Respondent contends that “[t]he rationale underpinning the ‘fork in the road’ provision in investment treaties is clearly the avoidance of multiple proceedings in multiple *fora* in relation to the same investment dispute. In more colloquial terms, it is designed to prevent the investor having several bites at the cherry.”<sup>157</sup>
132. According to the Respondent, the essential criterion for the application of the fork-in-the-road clause under the Treaty is the submission of the “same dispute” to more than one forum. The dispute is the same if “the respective claims share the same fundamental basis;”<sup>158</sup> it does not need to meet the triple identity test. Relying on *Pantechniki v. Albania*, the Respondent argues that it suffices for the disputes to share the same “normative source”.<sup>159</sup> The test is whether, if the Claimants’ case had been accepted in domestic proceedings, “it would grant the Claimant exactly what it is seeking” in these proceedings, and on the same “fundamental basis”.<sup>160</sup>
133. This test has been applied by several investment tribunals, such as *H&H v. Egypt*, *Supervisión y Control v. Costa Rica*, *Chevron v. Ecuador* and *Salini Impregilo v. Argentina*.<sup>161</sup> A similar test has been developed by certain commentators, who argue that disputes should be “substantially equivalent” for the fork-in-the-road clause to apply.<sup>162</sup>
134. Nor is it necessary, according to the Respondent, for the parties to be identical for the fork-in-the-road clause to be triggered. The fork-in-the-road clause will be triggered if

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<sup>155</sup> Mem., ¶ 262 citing *H&H Enterprises Investment Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award of 6 May 2014, ¶ 365 (Exh. RLA-43).

<sup>156</sup> Mem., ¶ 260.

<sup>157</sup> *Id.*, ¶ 261

<sup>158</sup> *Id.*, ¶¶ 262-264.

<sup>159</sup> Reply, ¶ 145, citing *Pantechniki S.A. Contractors & Engineer v. Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, ¶¶ 61-62 (Exh. RLA-46).

<sup>160</sup> Reply, ¶ 152, citing *Pantechniki S.A. Contractors & Engineer v. Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, ¶ 67 (Exh. RLA-46).

<sup>161</sup> *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award of 18 January 2017, ¶ 330 (Exh. RLA-84); *H&H Enterprises Investment Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award of 6 May 2014, ¶ 370 (Exh. RLA-43); *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility of 23 February 2018, ¶ 133 (Exh. RLA-148); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador [II]*, PCA Case No. 2009-23, Third Partial Award on Jurisdiction of 27 February 2012, ¶ 4.76 (Exh. RLA-45).

<sup>162</sup> Reply, ¶ 148, citing McLachlan, Campbell, Shore, Laurence, and Weiniger, M., *International Investment Arbitration. Substantive principles* (2nd ed. Oxford: Oxford, 2017) ¶¶ 4.107-108 (Exh. CLA-075).

domestic proceedings have been initiated by the local company, and an investment arbitration is later initiated by the investor or controlling shareholder, or by other companies in the same corporate chain or in “privity of interest” with the claimant.<sup>163</sup> Nor is there any authority to support the contention that the State *per se* needs to be a party to the domestic proceedings.<sup>164</sup>

**b. The fork-in-the-road clause in Article 11(2) has been triggered twice**

135. On this basis, the Respondent submits that the fork-in-the-road clause in Article 11(2) of the BIT has been triggered twice. It was first triggered by EEGSA’s domestic *amparo* proceedings against the CNEE. Those proceedings had the same fundamental basis and factual matrix. Had Iberdrola prevailed in the domestic proceedings, it “would have been granted exactly what it is sought before [this] Tribunal.”<sup>165</sup> As to the parties to those disputes, the Respondent argues that it suffices that Iberdrola exercised *de facto* control over DECA II and thereby EEGSA, and was in any event in privity of interest with EEGSA,<sup>166</sup> and that a State agency (CNEE) was a party.<sup>167</sup>
136. Even if the Tribunal were to find that the local proceedings did not trigger the fork-in-the-road clause, the “exact same dispute”, between the same parties, arising from the same factual matrix, and seeking the same relief, has already been submitted to an ICSID tribunal.<sup>168</sup> The Respondent disputes that the Claimant can avoid the operation of the fork-in-the-road clause by relying on the *Iberdrola I* Award. The application of the fork in the road does not depend on the finding of another court or tribunal; rather, it depends on the claims submitted. It is therefore irrelevant that the *Iberdrola I* tribunal decided that the claims were not treaty claims.<sup>169</sup> The Claimant’s interpretation would run contrary to the concept of fork in the road. In reliance on *Ekosol*, the Respondent argues that “the very notion of a ‘fork’ in a road [...] implies the choice between two different paths,

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<sup>163</sup> Reply, ¶¶ 156-160, citing *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award of 18 January 2017, ¶¶ 327, 329 (Exh. RLA-84); *H&H Enterprises Investment Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award of 6 May 2014, ¶ 367 (Exh. RLA-43); *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility of 23 February 2018, ¶ 133 (Exh. RLA-148); *Ampal-American Israel Corp et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability of 21 February 2017, ¶¶ 261-270 (Exh. RLA-150); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010, ¶¶ 7.1.5-7.1.7 (Exh. RLA-41); *Apotex v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014, ¶¶ 7.38-7.40 (Exh. RLA-10).

<sup>164</sup> Reply, ¶¶ 164-166.

<sup>165</sup> Transcript, 52:9-12.

<sup>166</sup> Reply, ¶¶ 161-163.

<sup>167</sup> *Id.*, ¶¶ 164-166.

<sup>168</sup> Transcript, 52:23-53:6.

<sup>169</sup> Reply, ¶ 169; Transcript, 54:8-15.

rather than repeat travels down the identical path.”<sup>170</sup> That interpretation also runs in conflict with the purpose of fork-in-the-road provisions, which is to avoid the duplication of proceedings.<sup>171</sup>

**c. Article 26 of the ICSID Convention bars the Claimant initiating these UNCITRAL proceedings**

137. Even if Article 11(2) of the Treaty were not a fork-in-the-road provision, the Respondent argues that Article 26 of the ICSID Convention, by virtue of which consent to ICSID arbitration excludes other remedies, precludes Iberdrola from bringing these proceedings.
138. According to the Respondent, this means that by consenting to ICSID arbitration, the parties waive their right to any other remedy, unless they agree otherwise, which they have not done in the present case.<sup>172</sup>
139. As noted by Prof. Schreuer, the exclusivity rule enshrined in Article 26 “operates from the moment of valid consent.”<sup>173</sup> In the ICSID system, this occurs when the investor submits a request for arbitration to the Centre. Here, the Claimant consented to ICSID arbitration when it submitted its request for arbitration to ICSID on 17 April 2009 in the *Iberdrola I* proceedings. From then onwards, the Claimant could not withdraw its consent unilaterally.
140. The Claimant cannot now argue that, because its claims were not decided on the merits, this consent can somehow be undone. By consenting to ICSID arbitration, the Claimant consented to a tribunal determining its competence over the dispute and the merits of the claims. The *Iberdrola I* tribunal ruled on the dispute by dismissing the Claimant’s denial of justice claims on the merits and declining jurisdiction over its remaining claims.
141. Because it consented to submit the dispute to ICSID, the Claimant waived its right to any other remedy available under the Treaty, including UNCITRAL arbitration. Citing Prof. Schreuer and *Pey Casado v. Chile*, the Respondent submits that, once there is a valid consent given to ICSID arbitration, any other forum should decline jurisdiction unless a contrary intention of the parties can be established.<sup>174</sup>

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<sup>170</sup> Reply, ¶ 169, citing *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent’s Application under Rule 41(5) of 20 March 2017, ¶ 134 (Exh. RLA-54); Transcript, 54:16-25.

<sup>171</sup> Transcript, 55:1-13.

<sup>172</sup> R-PHB1, ¶ 8.

<sup>173</sup> C. Schreuer, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 351, ¶ 2 (Exh. RLA-58bis).

<sup>174</sup> R-PHB1, ¶ 15, citing C. Schreuer, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 381, ¶ 114; p. 351, ¶ 2 (Exh. RLA-58bis): (“Once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international”); *Victor Pey Casado and President Allende Foundation v. Republic of Chile [I]*, ICSID Case No. ARB/98/2, Second

142. For the Respondent, the *Iberdrola I* tribunal’s characterization is immaterial to the application of the exclusivity rule. What matters is “whether the arbitration submitted by Claimant to both ICSID and UNCITRAL arbitration is the same.”<sup>175</sup> Relying on *Tokios Tokelés v. Ukraine* and *Quiborax v. Bolivia*, the Respondent submits that Article 26 applies not only to identical claims, but also to claims related to the same subject matter.<sup>176</sup> Here, the claims in both arbitrations relate to the same subject matter, as “[o]n the basis of these same facts, Claimant, in both proceedings, sought a declaration of violation of Article 3 of the Treaty.”<sup>177</sup>
143. Finally, Guatemala clarifies that its objection does not mean that Article 26 governs in these proceedings or binds the Tribunal. What is binding is the Claimant’s waiver that is enforceable by any adjudicator with a dispute already submitted to ICSID arbitration.<sup>178</sup>
144. For these reasons, the Respondent requests the Tribunal to enforce the Claimant’s waiver of UNCITRAL arbitration, and to decline jurisdiction over the claims.<sup>179</sup>

#### 4. Abuse of process

145. Should the Tribunal dismiss the Respondent’s previous objections, the Respondent argues that the doctrine of abuse of process or “*abuso del derecho*” (abuse of right), as the Respondent refers to it in Spanish, would preclude the Claimant from raising its claims again, which would be inadmissible.<sup>180</sup>
146. Citing *Phoenix Action* and *Orascom*, among other cases, the Respondent argues that the principle of good faith prevents investors from abusing the rights granted under international investment treaties and the prohibition of abuse of right bars the exercise of a right, whether substantive or procedural, for purposes other than those for which it was established.<sup>181</sup> It further specifies that the prohibition of abuse of process sanctions the submission of multiple claims, even where the triple identity test is not strictly met, with the inadmissibility of the claims.<sup>182</sup> The Respondent also points out that the abuse of

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Annulment Proceeding Decision on the Request for the Stay of the Enforcement of the Award of 15 March 2018, ¶¶ 80-81 (Exh. CLA-070).

<sup>175</sup> R-PHB1, ¶ 24.

<sup>176</sup> *Id.*, ¶ 25.

<sup>177</sup> *Id.*, ¶ 26.

<sup>178</sup> *Id.*, ¶ 32.

<sup>179</sup> *Id.*, ¶ 33.

<sup>180</sup> Mem., ¶¶ 278-290, citing *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, ¶ 107 (Exh. RLA-49); *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award of 31 May 2017, ¶ 545 (Exh. RLA-4); *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent’s Application under Rule 41(5) of 20 March 2017, ¶ 134 (Exh. RLA-54).

<sup>181</sup> Mem., ¶ 281.

<sup>182</sup> *Id.*, ¶ 282.

process theory applies irrespective of whether the proceedings are used for an illicit purpose.<sup>183</sup>

147. To resolve any disputes with the host State, the Treaty grants investors recourse to (i) a domestic court, (ii) an *ad hoc* tribunal established in accordance with the UNCITRAL Rules 1976, or (iii) an arbitral tribunal constituted under the ICSID Convention. Here, however, the Claimant abused its right of recourse to any of these *fora* by initiating multiple proceedings against Guatemala on the basis of the Tariff-Setting Process.<sup>184</sup>
148. The Respondent contends that “there is no question that the restatement of Iberdrola’s claims under the Treaty ‘entail[s] the exercise of rights for purposes that are alien to those for which these rights were established.’”<sup>185</sup> Accordingly, the Claimant’s Notice of Arbitration is abusive and must be rejected.<sup>186</sup>

### 5. Article 53 of the ICSID Convention

149. Even if all of the previous objections were to fail, the Respondent contends that the claims would still be excluded from the Tribunal’s jurisdiction because they violate Article 53 of the ICSID Convention.<sup>187</sup> This provision stipulates that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” For the Respondent, this means that “the forms of recourse established in the ICSID Convention are exclusive of each other [and] do not include the possibility of appealing the factual or legal findings of an ICSID tribunal.”<sup>188</sup>
150. The Respondent contends that the Claimant has exhausted the available remedies against the *Iberdrola I* Award by seeking the annulment of this award under Article 52 of the ICSID Convention.<sup>189</sup> There is no dispute that the *Iberdrola I* tribunal was competent to determine whether the claims fell under the Treaty. After the *Iberdrola I* Award, the Claimant availed itself of the recourse established in the ICSID Convention and unsuccessfully applied for its annulment. Now it requests this Tribunal to make a finding that is contrary to that of the *Iberdrola I* tribunal. Relying on *RSM v. Grenada*, the Respondent submits that reopening the findings of an ICSID tribunal (as the Claimant attempts to do in this arbitration) would breach Article 53 of the ICSID Convention, with the result that the Tribunal would lack jurisdiction.<sup>190</sup>

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<sup>183</sup> Reply, ¶ 187.

<sup>184</sup> Mem., ¶ 286.

<sup>185</sup> Reply, ¶ 208.

<sup>186</sup> Mem., ¶ 290.

<sup>187</sup> *Id.*, ¶¶ 291-302.

<sup>188</sup> *Id.*, ¶ 293.

<sup>189</sup> *Id.*, ¶ 298.

<sup>190</sup> *Id.*, ¶ 299, citing *RSM Production Corporation and Others v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010, ¶ 7.1.9 (Exh. RLA-41).



151. For the Respondent, the fact that this is an UNCITRAL arbitration is no excuse for the Claimant to violate the ICSID Convention. The contrary solution would affect the integrity of the investment dispute settlement system.<sup>191</sup>

**6. Jurisdiction *ratione materiae***

152. The Respondent submits that, in the unlikely event that Iberdrola were allowed to reformulate its claims, the latter are likewise outside of the Tribunal’s jurisdiction as they relate exclusively to Guatemalan law.<sup>192</sup> Even if the Tribunal were to disagree with this characterization, the claims have in any event already been resolved by the Guatemalan courts, and are thus not within the Tribunal’s jurisdiction.

**a. The claims relate exclusively to questions of Guatemalan law**

153. The Respondent argues that, under Article 11(1) of the Treaty, Guatemala’s consent is limited to disputes concerning matters governed by the Treaty. Disputes about issues of Guatemalan law are thus outside this Tribunal’s jurisdiction.
154. Jurisdiction must be proven applying the *pro tem* test articulated by Judge Higgins in the *Oil Platforms* case. Specifically, so says Guatemala, “the Claimant must demonstrate that the alleged facts, if established, may entail a violation of ‘matters governed’ by the Treaty.”<sup>193</sup> This is not the case here, as the Claimant’s claims are grounded on domestic law, particularly on “(i) the binding or nonbinding nature of the Expert Commission’s statement, (ii) the authority of the [CNEE] to approve the independent study conducted by Sigla, and (iii) the authority of the [CNEE] to adopt the tariffs based upon said report.”<sup>194</sup> Labelling the actions of the CNEE as violations of international law<sup>195</sup> is insufficient to establish jurisdiction. If the Tribunal were to accept jurisdiction, “the Parties would become mired in a purely regulatory debate revolving around the powers of the regulatory entity and the distributor in the Tariff-Setting Process.”<sup>196</sup> For the Respondent, the Claimant has provided no information to the contrary.<sup>197</sup>

**b. The claims have already been resolved by Guatemalan courts**

155. The Respondent further asserts that, even if the Tribunal were to hold that the claims relate to “matters governed” by the Treaty, it could not review the decisions of the Guatemalan Constitutional Court which resolved the dispute over the Tariff Setting

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<sup>191</sup> Mem., ¶¶ 298-301.

<sup>192</sup> *Id.*, ¶¶ 303-318.

<sup>193</sup> *Id.*, ¶ 314.

<sup>194</sup> *Id.*, ¶ 315.

<sup>195</sup> *Id.*, ¶ 315.

<sup>196</sup> Reply, ¶ 239.

<sup>197</sup> Mem., ¶ 318.

Process.<sup>198</sup> Citing the *Serbian Loan* decision, the Respondent submits that “an international tribunal cannot act as an appellate court on matters of domestic law.”<sup>199</sup>

156. In its Notice of Arbitration, the Claimant acknowledged that its claims were finally resolved by the Constitutional Court of Guatemala on 18 November 2009 and 24 February 2010.<sup>200</sup> As the dispute has already been resolved by domestic courts, so argues the Respondent, only a denial of justice claim could raise it to the international level.<sup>201</sup> Yet, the *Iberdrola I* tribunal dismissed the denial of justice claim on its merits. The Claimant has accepted this and has expressly excluded its previous denial of justice claim from this arbitration. As a result, nothing in the Claimant’s Notice of Arbitration allows its exclusively national dispute to be raised to the international level.<sup>202</sup>

## B. The Claimant’s position

157. The Claimant submits that this Tribunal has jurisdiction over its claims, all of which are admissible, for the following reasons: (1) the claims are not barred by the principle of *res judicata*; (2) the doctrine of concentration of arguments is inapplicable; (3) the Treaty does not contain a fork-in-the-road clause, and even if it did, it has not been triggered, nor are the proceedings precluded by Article 26 of the ICSID Convention; (4) there has been no abuse of process; (5) the claims do not violate Article 53 of the ICSID Convention; and (6) they are treaty claims not premised on national law, with the result that the Tribunal has the required jurisdiction *ratione materiae*.

### 1. *Res judicata*

158. According to the Claimant, the Respondent has failed properly to establish the content of the *res judicata* principle in international law. Properly defined, the *res judicata* principle does not prevent the Tribunal’s rendering a decision on the international law claims in this case. More specifically, the Claimant submits that (a) for *res judicata* to apply, it is not sufficient for the triple identity test to be met; it is also necessary to determine what has been “definitively settled”; (b) decisions on jurisdiction do not have preclusive effects over merits issues; and (c) applying these principles, *res judicata* does not bar the present claims. Finally, *res judicata* does not preclude jurisdiction, but goes to the admissibility of the claims.

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<sup>198</sup> Mem., ¶¶ 319-346.

<sup>199</sup> *Id.*, ¶ 320 citing *Serbian Loans (France v. Kingdom of the Slovenes, Croats and Serbs)*, Judgment, 1929 PICJ No. 20, pp. 46-47 (12 July) (Exh. RLA-69).

<sup>200</sup> Mem., ¶¶ 327-328, citing *Amparo* appeal by EEGSA against CNEE dated 29 July 2008 (Exh. R-026); Constitutional Court, Judgment (*Amparo* 7964-2008) denying the *amparo* appeal against CNEE Resolution No. 144-2008, dated 18 November 2009 (Exh. R-036); *see also* Constitutional Court, Judgment (*Amparo* 37-2008) denying the *amparo* appeal against CNEE GJ-Providencia-3121, dated 24 February 2010, p. 34 (Exh. R-037).

<sup>201</sup> Mem., ¶¶ 333-336.

<sup>202</sup> *Id.*, ¶¶ 334-337.

**a. The content of the *res judicata* principle in international law**

159. The Claimant accepts that *res judicata* is a principle of international law as well as a general principle of law in the meaning of Article 38(1)(c) of the ICJ Statute. According to this principle, “the issues that have been determined” are binding on the parties and final.<sup>203</sup> The Claimant further accepts that “for the principle of *res judicata* to apply the international proceedings in question must involve the same parties, the same object, and the same legal ground, i.e. meet the triple identity test.”<sup>204</sup> Yet while the triple identity test is a necessary condition, it is also necessary to determine what issues have actually been “definitively settled” by the previous decision.<sup>205</sup> The Claimant cites two recent decisions of the ICJ on this matter:

It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.<sup>206</sup>

[F]or *res judicata* to apply in a given case, the Court ‘must determine whether and to what extent the first claim has already been definitively settled’ [...] for ‘[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it’.<sup>207</sup>

160. In this respect, the Claimant’s expert, Prof. Michael Reisman, opines that “[t]he construction of *res judicata* in the field of public international law thus is confined to the preclusion of claims that not only have been raised but have been decided with finality in the earlier judgment”.<sup>208</sup> As a result, “the *res judicata* objection requires the tribunal to review the prior award to determine whether or not what is now being claimed is what was definitely decided by the prior tribunal.”<sup>209</sup>

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<sup>203</sup> CM, ¶ 28, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, ¶ 115 (26 February) (Exh. CLA-005).

<sup>204</sup> CM, ¶ 33.

<sup>205</sup> *Id.*, ¶ 38.

<sup>206</sup> *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 59 (17 March) (Exh. CLA-007).

<sup>207</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Decision on Jurisdiction, ICJ Reports 2018, ¶ 68 (2 February) (Exh. CLA-12).

<sup>208</sup> Opinion of Prof. W. Michael Reisman on the Effects of a “Partial *res judicata*” in International Law and Its Implications, 17 October 2018 (“Reisman Report”), ¶ 53.

<sup>209</sup> *Id.*, ¶ 54.

161. The Claimant further asserts in connection with ascertaining the scope of the *res judicata* formed by a prior award or judgment that the ICJ held that, although the decision “is contained in the operative clause of the judgment”, “it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question”.<sup>210</sup> This being so, the goal remains to identify what was decided and “the fact that a point was argued by the Parties does not necessarily mean that it was definitively decided by the Court.”<sup>211</sup>
162. The Claimant opposes the Respondent’s suggestion that there is a contemporary trend in international arbitration towards an autonomous and flexible approach to *res judicata* which does not reflect current public international law.<sup>212</sup> According to the Claimant, the Respondent’s position is flawed because it relies on national laws and disregards the relevant rules of international law<sup>213</sup> and it is an academic proposal or a consideration *de lege ferenda* often discussed in the context of international commercial arbitration and not of investment arbitration.<sup>214</sup> Further, the sources cited by the Respondent suggest that claims brought before an international tribunal, and rejected at the jurisdictional stage do not entail *res judicata* effects, whatever the submissions made before the tribunal declining jurisdiction.<sup>215</sup>
163. This being so, “[a]s a party that is seeking to obtain a decision on the merits of its treaty claims for the first time,”<sup>216</sup> the Claimant does not favor a formalistic approach to *res judicata*, and agrees with the Respondent that “[i]nstead of rigid identity tests, an overall assessment of the parties involved, the legal grounds invoked, the objects pursued and the underlying facts will be necessary in order to avoid a multiplication of proceedings with its inherent danger of conflicting outcomes.”<sup>217</sup> Hence, the Tribunal must apply the three elements of the triple identity test, i.e. *personae*, *petitum*, and *causa petendi*. In other words, *res judicata* is not only dependent on the parties and the facts, it is also limited by the relief sought and the legal basis i.e., the *causa petendi*.<sup>218</sup> In addition, to apply the triple identity test, the Tribunal must determine “what has been decided in the first case.”<sup>219</sup>

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<sup>210</sup> *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 61 (17 March) (Exh. CLA-7).

<sup>211</sup> *Id.*, ¶ 76.

<sup>212</sup> Rejoinder, ¶¶ 36-48.

<sup>213</sup> *Id.*, ¶¶ 37-40; 65-68.

<sup>214</sup> *Id.*, ¶ 46.

<sup>215</sup> *Id.*, ¶ 57.

<sup>216</sup> *Id.*, ¶ 43 (emphasis in original).

<sup>217</sup> *Id.*, ¶¶ 42-43, citing Reply, fn. 44.

<sup>218</sup> Rejoinder, ¶ 68.

<sup>219</sup> *Id.*, ¶ 68.

**b. Decisions on jurisdiction have no preclusive effects over merits issues**

164. The Claimant submits that “[w]hen declining jurisdiction an international tribunal exercises its *compétence de la compétence* powers exclusively over the claims submitted to it.”<sup>220</sup> The power to identify the nature of the dispute lies within such *compétence de la compétence*.<sup>221</sup> In characterizing the claims, the international tribunal will take into account the position of both parties and pay particular attention to the formulation of the dispute by the applicant.<sup>222</sup> In the end, however, it is for the international tribunal itself “to determine on an objective basis the subject matter of the dispute between the parties, that is, to ‘isolate the real issue in the case and to identify the object of the claim.’”<sup>223</sup>
165. Further, Iberdrola submits that decisions on jurisdiction have no preclusive effects over merits issues, as the ICJ held in *South West Africa*:

The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection [...] It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved.<sup>224</sup>

166. That being said, the Claimant acknowledges that, in principle, a decision on jurisdiction has *res judicata* effect as regards the matters that it definitively decides. However, relying on *Waste Management II*, the Claimant submits that no *res judicata* bar applies when “the jurisdictional barrier or flaw can be corrected.”<sup>225</sup> The same rule applies to decisions on admissibility.<sup>226</sup>

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<sup>220</sup> CM, ¶ 46, citing *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment on Preliminary Objections, ICJ Reports 2015, p. 592, ¶ 26 (24 September) (Exh. CLA-020).

<sup>221</sup> Rejoinder, ¶ 73, citing *Nuclear Tests Case (New Zealand v. France)*, Judgment, ICJ Reports 1974, p. 457, ¶¶ 22, 24 (20 December) (Exh. CLA-122); L. Boisson de Chazournes, “The Principle of *Compétence de la Compétence* in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals”, in: J. Cogan *et al.* (eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman* (Martinus Nijhoff 2010) p. 1039 (Exh. CLA-123); *Interhandel (Switzerland v. United States)*, Judgment on Preliminary Objections, Dissenting Opinion of Judge Lauterpacht, ICJ Reports 1959, p. 95, ¶ 104 (21 March) (Exh. CLA-121).

<sup>222</sup> CM, ¶ 46, citing *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment on Preliminary Objections, ICJ Reports 2015, p. 592, ¶ 26 (24 September) (Exh. CLA-20).

<sup>223</sup> CM, ¶ 46, citing *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment on Preliminary Objections, ICJ Reports 2015, p. 592, ¶ 26 (24 September) (Exh. CLA-20).

<sup>224</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment on the Second Phase, ICJ Reports 1966, p. 6, ¶ 59 (18 July) (Exh. CLA-021).

<sup>225</sup> CM, ¶ 51.

<sup>226</sup> *Id.*, ¶ 54, citing *Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings of 26 June 2002, ¶ 43

167. According to the Claimant, the Respondent has failed to address the effects of decisions declining jurisdiction and rather adopts a simplistic approach that relies on virtually no sources of international law, or takes them out of context. In particular,<sup>227</sup> it has quoted Bin Cheng out of context, when that author's position is that no one should be proceeded against twice for the same cause, and that the "negative effect of *res judicata* [...] only attaches, however, to a final judgment of a competent tribunal. Where a tribunal has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the same issue from being presented before another tribunal which may be competent."<sup>228</sup> Similarly, Guatemala quotes Hobér out of context. While Hobér does state that "[j]urisdictional decisions based on curable procedural requirements do not constitute *res judicata*", he also writes that *res judicata* does not apply to awards by which an ICSID tribunal decides that the dispute is not within its competence or the jurisdiction of ICSID. Consequently, if an ICSID tribunal declines jurisdiction, a claimant may start proceedings in another forum.<sup>229</sup> Furthermore, the Respondent's assertion that the ICJ decision on *Nicaragua v. Colombia II* "should be awarded scant persuasive value" in light of the distribution of votes and criticism from the dissenting judges ignores that this was not an isolated decision. In addition, the admissibility issue was decided by 15 votes to 1.<sup>230</sup>

**c. Properly defined, the *res judicata* principle does not prevent a decision on the international law claims**

168. Building on the elements set out in (a) and (b) above, the Claimant submits, essentially for three reasons, that the principle of *res judicata* does not preclude it from having its treaty claims decided.

169. First, Iberdrola's treaty claims have not been decided and, therefore, cannot fall within the scope of *res judicata*. Indeed, the *Iberdrola I* tribunal "considered that the nature of the claims submitted by *Iberdrola I* in that arbitration was one of Guatemalan national law."<sup>231</sup> This is also the manner in which the annulment committee understood it.<sup>232</sup> Accordingly, "the tribunal in *Iberdrola I* could have never decided upon any treaty claim whatsoever because, under its characterization, the claims before it were purely domestic claims".<sup>233</sup>

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(Exh. CLA-022); C. Amerasinghe, *Local Remedies in International Law* (Cambridge: Grotius Publications 1990) p. 416 (Exh. CLA-026).

<sup>227</sup> Rejoinder, ¶¶ 93-108.

<sup>228</sup> B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge: Grotius Publications 1987) pp. 337-338 (Exh. CLA-126).

<sup>229</sup> Rejoinder, ¶ 96, citing K. Hobér, "Res Judicata and Lis Pendens in International Arbitration", in: *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 2014) pp. 382-383 (Exh. CLA-025).

<sup>230</sup> Rejoinder, ¶¶ 98-104.

<sup>231</sup> *Id.*, ¶ 83.

<sup>232</sup> *Id.*, ¶ 83, citing *Iberdrola I*, Annulment Decision, ¶ 93 (Exh. C-005).

<sup>233</sup> *Id.*, ¶ 84.

170. In the Claimant’s submission, the Respondent’s argument that the *Iberdrola I* tribunal did rule on Iberdrola’s international law claims because Iberdrola failed to establish that the facts, as alleged, could amount to international law claims, is untenable.<sup>234</sup> The *Iberdrola I* tribunal accepted a jurisdictional defense and, hence, by definition, did not rule on the merits. It actually underscored that it “did not even have competence to consider the parties’ allegations about the regulatory or contractual nature of the dispute, because that would be, above all, a matter relating to the merits of the dispute”.<sup>235</sup> In line with this finding, it did not mention let alone assess a single piece of evidence.<sup>236</sup>
171. The Claimant makes the following comments on the *Iberdrola I* award:
- i. The tribunal started by analyzing Article 11 of the BIT. It concluded that “the consent of the Republic of Guatemala to submit disputes under the Treaty to arbitration is clearly limited to those disputes concerning ‘matters regulated by’ the Treaty itself.”<sup>237</sup>
  - ii. The tribunal then addressed how “the way in which the Claimant raised its claims regarding the standards of the Treaty that it considers have been violated by Guatemala.” For the Claimant, this means that the tribunal was addressing how Iberdrola’s claims had been formulated.<sup>238</sup>
  - iii. When assessing each of the claims, the tribunal concluded that Iberdrola had only presented local law claims.
  - iv. After this claim by claim analysis, the tribunal found that Iberdrola had only submitted claims of Guatemalan law over which it had no jurisdiction, and that, as formulated, Iberdrola’s claims required a prior decision from the tribunal on claims of local law.<sup>239</sup> However, the tribunal determined that it was not its function to act as an appellate body and review the findings of local courts.
172. According to the Claimant, the *Iberdrola I* tribunal “did not conclude that the factual matrix at the origin of the dispute could not give rise to treaty claims, but that, as formulated by Iberdrola, the claims in *Iberdrola I* were local law claims premised on the violation of local law with respect to which the tribunal lacked jurisdiction to make a ruling.”<sup>240</sup>

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<sup>234</sup> Rejoinder, ¶ 85.

<sup>235</sup> *Id.*, ¶ 86

<sup>236</sup> *Id.*, ¶ 90.

<sup>237</sup> CM, ¶ 114, citing *Iberdrola I Award*, ¶ 309 (Exh. C-004).

<sup>238</sup> *Id.*, ¶ 115.

<sup>239</sup> Mem., ¶¶ 118-119.

<sup>240</sup> *Id.*, ¶ 122.

173. The repeated references to the form in which the claimant had presented its claims were meant to delineate the scope of its jurisdictional decision.”<sup>241</sup> Pursuant to the rule against *ultra petita* decisions, the *Iberdrola I* tribunal could not dismiss claims that it regarded as not having been submitted.<sup>242</sup> According to the Claimant, the tribunal did not say that the facts of the case could not give rise to treaty breaches.<sup>243</sup>
174. Second, the Claimant contends that the triple identity test and in particular the requirement of identical *causa petendi*, is not met, because the claims before this Tribunal are treaty claims and thus have a different legal basis from the claims in *Iberdrola I*.<sup>244</sup> In support, it relies in particular on the International Law Association’s (“ILA”) Final Report on *Res judicata*, which emphasizes that a claim brought in the second proceedings based on a different cause of action than the one raised in the first arbitration is not barred by *res judicata*.<sup>245</sup> This distinction was also noted for instance by the *SGS v. Pakistan* tribunal, according to which “the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders.”<sup>246</sup> This distinction, which is “widely acknowledged as customary international law”, “is also reflected in Article 3 of the Articles on Responsibility of States for Internationally Wrongful Acts.”<sup>247</sup>
175. Third, the tribunal in *Iberdrola I* refused to exercise jurisdiction due to the manner in which the claims were presented. Relying on its expert, Prof. August Reinisch, the Claimant submits that “by accepting a jurisdictional objection based on the national law nature of the claims that had been formulated, the *Iberdrola I* Award does not prevent *Iberdrola* from submitting its international law claims to a newly formed arbitral tribunal.”<sup>248</sup> While accepting the jurisdictional finding in respect of national law claims that cannot be revisited,<sup>249</sup> the Claimant stresses that the jurisdictional flaw related to how the claims were formulated, “may be corrected by bringing newly formulated claims based on treaty breaches that are not premised on national law violations.”<sup>250</sup> As stated in

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<sup>241</sup> Rejoinder, ¶ 87, citing *Iberdrola I* Award ¶¶ 319, 354, 364, fn. 347 (Exh.C-004)

<sup>242</sup> *Id.*, ¶ 89.

<sup>243</sup> *Id.*, ¶ 88, citing *Iberdrola I* Annulment Decision, ¶ 124 (Exh. C-005).

<sup>244</sup> CM, ¶ 57.

<sup>245</sup> F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Final Report on *Res judicata* and Arbitration”, *Seventy-second International Law Association Conference on International Commercial Arbitration* (2006) ¶ 43 (Exh. CLA-038).

<sup>246</sup> Rejoinder, ¶ 59, citing *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction of 6 August 2003, ¶ 147 (Exh. CLA-034).

<sup>247</sup> Rejoinder, ¶ 59.

<sup>248</sup> CM, ¶¶ 58-59, citing Reinisch Report, ¶ 90.

<sup>249</sup> *Id.*

<sup>250</sup> CM, ¶ 80.



*Waste Management II*, “if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State recommencing its action”.<sup>251</sup>

176. This being so, the Claimant concedes that there can be “jurisdictional barriers that cannot be removed”, such as the lack of a protected investment on the critical date or a finding that the claimant was not a protected investor, for instance because it lacked the required nationality at the relevant time. However, the jurisdictional flaw found by the *Iberdrola I* tribunal, relating to how the claimant formulated its claims, is a curable one.<sup>252</sup> The Claimant invokes especially Hobér who explains as follows:

If an ICSID tribunal declines jurisdiction, a party may also commence proceedings in another forum for a decision on the merits, provided of course that the other forum has jurisdiction. Another situation where a decision on jurisdiction does not have *res judicata* effect is when jurisdiction is declined based on a so-called curable jurisdictional defect.<sup>253</sup>

177. According to the Claimant, the *Iberdrola I* tribunal concluded that “the substance of [the disputed] issues and, above all, of the disputes that [Iberdrola] asks the Tribunal to rule on, refer to Guatemalan law.”<sup>254</sup> By contrast, the claims brought in this arbitration are stand-alone international law claims. Iberdrola asks the Tribunal to assess the facts exclusively in the light of international law, the fundamental basis of the claims being “Guatemala’s obligations under Article 3 of the Treaty to grant fair and equitable treatment to Claimant’s investments, to respect the minimum standard of treatment under international law, and not to adopt arbitrary measures. No domestic law violations are alleged in the present claims; only these facts and the treaty rules applicable to that set of facts.”<sup>255</sup>
178. The Claimant admits that there is some overlap between the two cases given that they share the same factual matrix. However, unlike the claim in *Iberdrola I*, the present case “does not pass by or posit a [violation of Guatemalan law] as a fundamental element or premise of its cause of action”.<sup>256</sup>

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<sup>251</sup> CM, ¶ 81, citing *Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings of 26 June 2002, ¶ 36 (Exh. CLA-022).

<sup>252</sup> CM, ¶¶ 82-83.

<sup>253</sup> K. Hobér, “*Res Judicata* and *Lis Pendens* in International Arbitration”, in: *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 2014) pp. 393-394 (Exh. CLA-025).

<sup>254</sup> CM, ¶ 86, citing *Iberdrola I* Award, ¶ 351 (Exh. C-004).

<sup>255</sup> CM, ¶ 87.

<sup>256</sup> *Id.*, ¶ 88, citing *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Concurring Opinion of Georges Abi-Saab of 19 December 2008, ¶ 4 (Exh. CLA-042).

179. For these reasons, the Claimant concludes that *res judicata* is not dispositive of the Tribunal's jurisdiction or of the admissibility of the claim. On the contrary, it maintains that it is entitled under international law to a decision on the merits under the Treaty.<sup>257</sup>

**d. Relevance and content of Swiss international arbitration law**

**(i) Should the Tribunal consider Swiss international arbitration law on *res judicata* in addition to international law?**

180. The Claimant's short answer to the Tribunal's first question is as follows:

The issue of the alleged *res judicata* should be decided solely on the basis of international law. Swiss law is only applicable to the extent that annulment or recognition and enforcement proceedings are initiated in Switzerland. Even in that case, Swiss law would make a *renvoi* to the ICSID Convention and international law.<sup>258</sup>

181. More specifically, the Claimant submits that the Respondent's *res judicata* objection, including determining what the ICSID tribunal definitively decided and to what extent that tribunal's negative jurisdictional award has preclusive effects over the Claimant's treaty claims, must be determined in accordance with international law,<sup>259</sup> for the following reasons:

- i. The Tribunal is an international tribunal, whose constitution and jurisdiction are based on the terms of a treaty;<sup>260</sup>
- ii. The agreement to arbitrate (made up of the State's offer to arbitrate contained in the Treaty and the Claimant's acceptance) is subject to international law;<sup>261</sup>
- iii. Article 11(3) provides that the arbitration shall be governed by the Treaty's provisions, Guatemalan law and international law, and does not refer to the law of the seat;<sup>262</sup> and
- iv. The Respondent's admissibility objection stems from an international law instrument, namely an ICSID award, and thus is premised on alleged inadmissibility grounds pertaining to the international legal order.<sup>263</sup>

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<sup>257</sup> CM, ¶ 90.

<sup>258</sup> C-PHB2, ¶ 1.

<sup>259</sup> *Id.*, ¶ 7.

<sup>260</sup> *Id.*, ¶ 3, citing J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. Oxford University Press 2019) p. 694 (Exh. CLA 175).

<sup>261</sup> C-PHB2, ¶ 4, citing Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) p. 76 (Exh. CLA-176).

<sup>262</sup> C-PHB2, ¶ 5.

<sup>263</sup> *Id.*, ¶ 6.

182. That being said, the Claimant acknowledges that, in principle, international law recognizes that the seat of the arbitration (in the present case Geneva, Switzerland) has jurisdiction to prescribe rules relating to the arbitration agreement, the arbitral procedure, and the annulment/enforcement of the arbitral award, subject to any applicable international law obligations. However, the Claimant emphasizes that “[n]one of these legal rules alter the fact that this Tribunal must be regarded as a tribunal based on an international agreement and not one based on Swiss law. Accordingly, the Claimant submits that “the role of Swiss law is necessarily limited to any annulment or recognition and enforcement proceedings that any of the parties may initiate in the competent Swiss court against an award rendered by this Tribunal.”<sup>264</sup>
183. The Claimant further contends that, were the law of the seat to apply, as shown in its response to Question 2, Swiss law would lead to the same conclusion as it makes a *renvoi* to the applicable international treaty, i.e. the ICSID Convention.<sup>265</sup> In any event, “the application of Swiss law could only result in limiting, but never in extending, the scope of *res judicata* of the *Iberdrola I* award as determined by international law.”<sup>266</sup>

**(ii) What is the content of Swiss international arbitration law about *res judicata* of negative jurisdictional awards?**

184. The Claimant’s short answer to Question 2 is the following:

The answer to question (1) is not affirmative but even were that to be the case, the substantive result would not change as Swiss law contains a *renvoi* to international law. In all events, the content of Swiss international arbitration law as regards the *res judicata* effect of negative jurisdictional awards, set out below, leads to the same outcome.<sup>267</sup>

185. The Claimant submits that, for the Swiss Federal Supreme Court (the “SFSC”), the assessment of the *res judicata* effects of previous decisions “entails considering two competing principles of Swiss public policy: the finality of decisions and access to

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<sup>264</sup> C-PHB2, ¶ 8, citing Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) p. 106 (Exh. CLA-176): Importantly, Swiss law recognizes the principle of primacy of international law over domestic law; see SFSC decision ATF 4A\_34/2015 of 6 October 2015, ¶ 5.3.1 (Exh. CLA-177); D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules* (2nd ed. Oxford University Press 2013) pp. 85-87 (Exh. CLA-179).

<sup>265</sup> C-PHB2, ¶ 9.

<sup>266</sup> *Id.*, ¶ 9.

<sup>267</sup> *Id.*, p. 3 (short answer to Question 2).

justice”.<sup>268</sup> As such, while it must ensure the finality of decisions, the approach to *res judicata* must also protect Iberdrola’s right to be heard.<sup>269</sup>

186. Hence, according to the Claimant, “Swiss law adopts a restrictive approach as opposed to broader common law principles of *res judicata* or a proposed transnational approach”.<sup>270</sup> The Claimant also notes that, as there is no positive rule or law or case law in Switzerland on the extent of the *res judicata* effect of an ICSID negative award on jurisdiction, the principles developed in the case law of the SFSC when assessing the *res judicata* effects of foreign awards in a non-treaty arbitration may be considered by analogy.<sup>271</sup>
187. As to the content of Swiss international arbitration law on *res judicata*, the Claimant makes six main points. The Claimant argues however that “Swiss law **can only limit** the effect of *res judicata* of an ICSID award resulting from the ICSID Convention and international law”, and as a result the extent of *res judicata* under Swiss law can only be considered in this context.<sup>272</sup>
188. First, the Claimant submits that, “[u]nder Swiss law, a foreign decision can only have *res judicata* effects if it is capable of recognition in Switzerland.”<sup>273</sup> According to the Claimant, “[u]nless an international treaty provides otherwise”, for a foreign decision to be capable of recognition, a Swiss court or arbitral tribunal must review the jurisdiction of the foreign court or arbitral tribunal that adopted the foreign decision in question.<sup>274</sup> As a result, “a foreign decision on jurisdiction cannot have *res judicata* effect on the Swiss seated court or arbitral tribunal that will undertake this review.”<sup>275</sup> However, the Claimant points out that, “[f]or ICSID awards, this question must be assessed considering Art. 54(1) of the ICSID Convention which provides that “[e]ach Contracting State shall recognize

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<sup>268</sup> *Id.*, ¶ 10, citing SFSC decision ATF 127 III 279 of 14 May 2001, ¶ 2.b, (Exh. CLA-180); SFSC decision 4A\_374/2014 of 26 February 2015, ¶ 4.2.2 (Exh. CLA-181); *see also* SFSC decision 4A\_633/2014 of 29 May 2015, ¶ 3.2.6 (Exh. CLA-182); B. Berger, *No Force of Res Judicata for an Award’s Underlying Reasoning, Note on 4A\_633/2014 of 29 May 2015* (ASA Bulletin Vol. 33 Issue 3, 2015) pp. 642-657 (Exh. CLA-183).

<sup>269</sup> C-PHB2, ¶ 34.

<sup>270</sup> C-PHB2, ¶ 11, citing SFSC decision 4A\_633/2014 of 29 May 2015, ¶ 3.2.5 (Exh. CLA-182); S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 29 (Exh. RLA-126).

<sup>271</sup> C-PHB2, ¶ 12, citing SFSC decision 4A\_633/2014 of 29 May 2015, ¶ 3.2.3 (Exh. CLA-182); *see also* B. Berger, F. Kellerhals, *International and Domestic Arbitration in Switzerland*, Berne (3rd ed. Beck/Hart 2014) ¶ 1659 (Exh. CLA-184).

<sup>272</sup> C-PHB2, ¶ 22 (emphasis in the original).

<sup>273</sup> *Id.*, ¶ 14, citing SFSC decision 4A\_508/2010 of 14 February 2011, ¶ C.3.2 (Exh. CLA-185); *Loi fédérale sur le droit international privé* [Swiss International Private Law Act], 18 December 1987, Art. 194 (Exh. CLA-186).

<sup>274</sup> C-PHB2, ¶ 14.

<sup>275</sup> *Id.*, ¶ 14.

an award rendered pursuant to this Convention as binding’ without subjecting this recognition to any condition.”<sup>276</sup> This includes decisions by arbitral tribunals declining jurisdiction, as such decisions constitute an “award” within the meaning of referred to Art. 54(1). The Claimant thus appears to be acknowledging that, given the terms of the ICSID Convention, a negative decision on jurisdiction by an ICSID tribunal is capable of recognition in Switzerland without the Swiss court or arbitral tribunal needing to confirm the jurisdiction of the foreign court or arbitral tribunal that issued the decision.

189. Second, the Claimant submits that a foreign decision cannot have greater *res judicata* effects in Switzerland than it would have under the *lex fori*, nor greater effects than a domestic award or judgment would have in Switzerland. Unless an international agreement provides otherwise, the *res judicata* effect of a foreign decision is “the lowest common denominator of: (i) [t]he extent of the *res judicata* effect under the law of the court or tribunal that rendered the first decision, which is analysed first; and (ii) [t]he extent of the *res judicata* effect that Swiss law accords to domestic decisions.”<sup>277</sup> However, the Claimant contends that “the ICSID Convention must be considered an international agreement whose terms provide ‘otherwise’, thereby creating an exception to the general rules on *res judicata* under Swiss Law.”<sup>278</sup> This is because the binding effect of an ICSID award is not governed by municipal law, but by Article 53(1) of the ICSID Convention. Accordingly, “when analyzing the *res judicata* effect of an award rendered under the ICSID Convention the question falls to be analyzed solely under this Convention and international law”.<sup>279</sup>
190. As discussed elsewhere in this Award, the Claimant contends that, pursuant to international law principles, “the *Iberdrola I* award does not have preclusive effects such as to prevent this Tribunal from hearing the present case”.<sup>280</sup>
191. Third, the Claimant submits that, “[u]nder Swiss law, *res judicata* attaches to a decision that finally determines a legal dispute”, and thus in principle “only a judgment on the merits generates *res judicata* effects.”<sup>281</sup> However, the SFSC has allowed for a potential exception for decisions on the procedural admissibility of a claim, stating that they can

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<sup>276</sup> *Id.*, ¶ 15, citing C. Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 1126, ¶ 31 (Exh. CLA-71). *See also id.*, p. 1129, ¶ 45: “Even an award holding that there is no jurisdiction may be formally recognized in order to pave the way for non-ICSID proceedings.”

<sup>277</sup> C-PHB2, ¶ 16 (emphasis omitted), citing SFSC decision ATF 4A\_508/2013 of 27 May 2014, ¶ 3.2 (Exh. RLA-127).

<sup>278</sup> C-PHB2, ¶ 20.

<sup>279</sup> *Id.*, ¶ 20.

<sup>280</sup> *Id.*, ¶ 20.

<sup>281</sup> *Id.*, ¶ 23, citing SFSC decision 4A\_374/2014 of 26 February 2015, ¶ 4.3.2.2 (Exh. CLA-181); *see further* SFSC decision BGE 115 II 187 of 2 March 1989, ¶ 3 (Exh. CLA-187); SFSC decision BGE 134 III 467 of 25 June 2008, ¶ 3.2 (Exh. CLA-188); on negative jurisdictional awards generally in Swiss law, *see* B. Berger, F. Kellerhals, *International and Domestic Arbitration in Switzerland*, Berne (3rd ed. Beck/Hart 2014) ¶ 1646 (Exh. CLA-184).

have substantive *res judicata* effect “at most” with regard to the specific ground of admissibility the court decided upon.”<sup>282</sup> Despite asserting this, the Claimant notes that, according to certain commentators, the *res judicata* effects of “a negative jurisdictional decision rendered by a Swiss seated Tribunal may depend on the grounds on which an arbitral tribunal found it lacked jurisdiction”.<sup>283</sup> Even if this were the case, the Claimant contends that it is irrelevant here: the *Iberdrola I* Award determined that Iberdrola’s claims required a decision on national issues law and were thus not treaty claims; consequently, “no aspect of *res judicata* under Swiss law prevents Iberdrola from presenting a different claim not requiring a decision on such national law issues, even if based on the same facts, if that claim gives rise to a treaty claim.”<sup>284</sup> In any event, the Claimant contends that Swiss law accepts that “a case dismissed under jurisdictional grounds in one forum may subsequently be brought in another forum.”<sup>285</sup>

192. Fourth, the Claimant submits that, “under Swiss law, *res judicata* only applies if there are identical claims (subject-matter scope) between identical parties (personal scope)”.<sup>286</sup> Relying on case law of the SFSC, the Claimant submits that the legal basis of the claims is necessarily a “fundamental and meaningful element” to determine whether there is identity of subject-matter scope.<sup>287</sup> As the present claims are treaty claims, the legal basis of the claims is different and the claims are not identical.<sup>288</sup>
193. Fifth, the Claimant notes that, under Swiss law, “only the dispositive part of a decision can ever have *res judicata* effects (i.e., not the reasoning).”<sup>289</sup> However, while not binding, “the reasoning underlying a decision is relevant to determining the scope of *res judicata*”.<sup>290</sup> According to the Claimant, “[t]he dispositive part of the *Iberdrola I* award does not contain anything that could create a *res judicata* effect barring this Tribunal from hearing the present case.”<sup>291</sup> This Tribunal can only consider the reasoning of the *Iberdrola I* award when determining which claims the *Iberdrola I* tribunal declined jurisdiction over, and whether they are identical to the claims submitted here.<sup>292</sup>

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<sup>282</sup> C-PHB2, ¶ 23, citing SFSC 4A\_374/2014 of 26 February 2015, ¶ 4.3.2.2 (Exh. CLA-181).

<sup>283</sup> C-PHB2, ¶25, citing S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press 2016) ¶ 6.185, fn. 282 (Exh. CLA-190).

<sup>284</sup> C-PHB2, ¶ 26.

<sup>285</sup> *Id.*, ¶ 31, citing SFSC decision BGE 134 III 467 of 25 June 2008, ¶ 3.2 (Exh. CLA-188).

<sup>286</sup> C-PHB2, ¶ 28, citing SFSC decision ATF 4A\_508/2013 of 27 May 2014, ¶ 3.3 (Exh. RLA-127); *see also* SFSC decision BGE 125 III 241 of 17 June 1998, ¶ 1 (Exh. CLA-191); SFSC decision BGE 139 III 126 of 25 February 2013, ¶¶ 3.1, 3.2.3 (Exh. CLA-192).

<sup>287</sup> C-PHB2, ¶ 29, citing SFSC decision BGE 139 III 126 of 25 February 2013, ¶ 3.2.2 (Exh. CLA-192).

<sup>288</sup> C-PHB2, ¶ 32(vi).

<sup>289</sup> *Id.*, ¶ 28.

<sup>290</sup> *Id.*, ¶ 30.

<sup>291</sup> *Id.*, ¶ 31(ii).

<sup>292</sup> *Id.*, ¶ 31(iv).

194. Sixth, the Claimant contends that there is no rule under Swiss law of claim preclusion or concentration of claims that would prevent the present claims being determined, and that Swiss law “accepts that a case dismissed under jurisdictional grounds in one forum may subsequently be brought in another forum.”<sup>293</sup>
195. On this basis, the Claimant concludes that even if Swiss law were to apply to this case, this would not prevent this Tribunal from hearing Iberdrola’s claims on the merits. Because the *Iberdrola I* tribunal did not decide that the factual matrix of that case could never give rise to a claim under the BIT, and because the claims in *Iberdrola I* and the present case are not identical, “the required Swiss law conditions for an application of *res judicata* do not exist”.<sup>294</sup> Considering the competing principles of finality of decisions and right to be heard, the Claimant argues that “the delicate balance of justice must be struck by not granting unfounded *res judicata* effects to a negative decision on jurisdiction that if so granted would result in denying Iberdrola from ever having a decision on the merits of its legitimate treaty claims.”<sup>295</sup>

## 2. Concentration of claims

196. For the Claimant, there is no rule of international law establishing the so-called “principle of concentration of claims”. Despite the Respondent’s inaccurate references, international arbitral tribunals have not acknowledged the existence of such a principle. On the contrary, recent decisions confirm that no such principle exists.<sup>296</sup> The Claimant cites in particular *Asylum* and *Haya de la Torre*;<sup>297</sup> *Caratube II*;<sup>298</sup> and *Mobil v. Canada II*.<sup>299</sup>
197. The Claimant further argues that the legal authorities relied upon by the Respondent are inapposite or taken out of context. Indeed, the references to “claim-splitting” are inapposite; the ICJ has never acknowledged the principle of concentration of arguments as an international law rule. The fact that it did not apply it in the *Nicaragua v. Colombia* case and in the *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica* case proves that this rule does not exist.<sup>300</sup>

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<sup>293</sup> *Id.*, ¶31, citing S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶¶ 21-22 (Exh. RLA-126).

<sup>294</sup> C-PHB2, ¶ 33.

<sup>295</sup> *Id.*, ¶ 34.

<sup>296</sup> CM, ¶ 148.

<sup>297</sup> *Asylum Case (Colombia v. Peru)*, Judgment, ICJ Reports 1950 (20 November) (Exh. CLA-044); *Haya de la Torre (Colombia v. Peru)*, Judgment, ICJ Reports 1950 (27 November) (Exh. CLA-018).

<sup>298</sup> *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Award of 27 September 2017 (Exh. CLA-045).

<sup>299</sup> *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility of 13 July 2018 (Exh. CLA-013).

<sup>300</sup> Rejoinder, ¶¶ 114-115.

198. Further, the domestic laws referred to by the Respondent to try to establish the concentration of claims principle do not apply to this dispute.<sup>301</sup> In any event, domestic laws do not show that such principle is a general principle of law. It does not apply as pleaded in three major jurisdictions: in France, where it is inappropriate in international proceedings; in the United Kingdom, where it is limited to cases of abuse of process, and in Germany, where it simply does not exist.<sup>302</sup>
199. As a result, this ground does not bar Iberdrola from submitting its claims.

### 3. Fork in the road

200. As a preliminary matter, the Claimant notes that, because the Respondent has formulated this objection in the alternative to its *res judicata* objection, the fork-in-the-road objection is premised on the fact that Iberdrola presents a different claim in this case than in prior cases. This disposes of the fork-in-the-road argument. Indeed, “if the claims in this arbitration are different from the ones submitted in the prior cases, Iberdrola cannot have exercised a *via electa* in relation to this dispute and claims.”<sup>303</sup>
201. As to the substance of the objection, the Claimant’s position is essentially that (a) Article 11(2) is not a fork-in-the-road clause; (b) even if it was, that clause was not triggered, and (c) Article 26 of the ICSID Convention has no application here.

#### a. Article 11(2) is not a fork-in-the-road clause

202. The Claimant submits that Article 11 “does not establish that the choice of one or the other of the mechanisms by the investor shall be final” and thus “does not prevent an investor that had recourse to an infructuous *via* to go to a second forum to have its claims decided.”<sup>304</sup> Investment treaties resort to techniques limiting access to international arbitration, but these do not originate from a general principle of international law. Hence, for the investor’s choice to be irrevocable, an express rule is needed. Article 11 contains no such express rule. Citing several investment treaty awards, Iberdrola observes that the clause does not state that the investor’s choice will exclude any other option or be irrevocable or definitive, or include other similar wording.<sup>305</sup> By contrast, other BITs

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<sup>301</sup> CM, ¶¶ 161-171.

<sup>302</sup> Rejoinder, ¶¶ 116-130.

<sup>303</sup> CM, ¶ 227.

<sup>304</sup> Rejoinder, ¶ 168.

<sup>305</sup> *Id.*, ¶ 171, citing *Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings of 26 June 2002, ¶ 29 (Exh. CLA-022); *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award of 18 November 2014, ¶¶ 349, 370 (Exh. CLA-143); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, ¶ 157-158 (Exh. CLA-145).



concluded by Spain do provide that the choice of a particular forum is final.<sup>306</sup> Similarly, Guatemala's treaty practice shows an awareness of the variety of wordings and, as a result, of their different implications.<sup>307</sup>

203. The Claimant concludes that had the Contracting Parties "wished to include a fork-in-the-road, they would have clearly expressed such intent",<sup>308</sup> which they did not do.

**b. Even if Article 11(2) was a fork-in-the-road clause, it has not been triggered**

204. Assuming that Article 11(2) was a fork-in-the-road clause, it would only apply to treaty-based claims, as Article 11 only governs jurisdiction "regarding matters regulated by this Agreement".<sup>309</sup> Consequently, the fork-in-the-road clause was not triggered by the *amparo* proceedings brought by EEGSA.<sup>310</sup> It was not triggered either by the ICSID proceedings, because the *Iberdrola I* tribunal found that the Claimant brought domestic law claims rather than treaty claims. Hence, the claims in the two arbitrations are not the same and "[e]ven though in 2008 Iberdrola presented its claims in good faith as treaty claims, the tribunal in *Iberdrola I* ultimately considered they were not."<sup>311</sup> The Respondent's position is contradictory: on one hand, it argues that the Claimant is bringing exclusively domestic law claims, while at the same time contending that they are treaty claims that trigger the fork-in-the-road clause.<sup>312</sup>

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<sup>306</sup> Rejoinder, ¶ 172, citing the Spain-Chile BIT of 2 October 1991 (Exh. CLA-146): (which provides at Article 10(2): "*Una vez que un inversionista haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno y otro de esos procedimientos será definitiva*"); the Spain-Costa Rica BIT of 8 July 1997 (Exh. CLA-147): (which provides at Article IX(3): "*Una vez que el inversor haya remitido la controversia a un tribunal arbitral, esta decisión será definitiva.*").

<sup>307</sup> Rejoinder, ¶ 173, citing the Argentina-Guatemala BIT of 21 April 1998 (Exh. CLA-148) (which provides at Article IX(3): "*Una vez que el inversor hubiera sometido o hubiera acordado someter la controversia al tribunal competente de la Parte Contratante en cuyo territorio se hubiera efectuado la inversión o al tribunal arbitral, la elección de uno u otro procedimiento será definitiva.*"); the Belgo-Luxemburg Economic Union-Guatemala BIT of 14 April 2005 (Exh. CLA-149) (which provides at Article 10(2): "The choice of one dispute settlement mechanism will exclude any other, including the dispute settlement by competent jurisdiction of the State where the investment was made"; the Austria-Guatemala BIT of 16 January 2006 (Exh. CLA-150) (which provides at Article 13: "[A] dispute may not be submitted to international arbitration if a local court in either Contracting Party has rendered its decision on the dispute"); and the Finland-Guatemala BIT of 12 April 2005 (Exh. CLA-151) (which provides at Article 9: "An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral proceedings mentioned in paragraphs 2 (b) to 2 (e) of this Article if, before a judgment has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.").

<sup>308</sup> Rejoinder, ¶ 174.

<sup>309</sup> CM, ¶¶ 229-239.

<sup>310</sup> *Id.*, ¶¶ 240-258; Rejoinder, ¶¶ 182-207.

<sup>311</sup> CM, ¶ 262; Rejoinder, ¶ 216.

<sup>312</sup> Rejoinder, ¶ 217.

205. Further, the Claimant contends that the fork-in-the-road clause can only be triggered where there is identity of parties, object and cause of action.<sup>313</sup> Contrary to the Respondent’s contention, the Tribunal should not focus on the “fundamental basis of the dispute” test articulated in *Pantechniki*.<sup>314</sup> The Claimant appears to agree with the Respondent that the purpose of Article 11 is “avoiding the duplication of proceedings and the risk of conflicting decisions.”<sup>315</sup> However, it is of the view that the broad interpretation of *Pantechniki* does not preserve this purpose better than a clear-cut criteria, and in addition it creates uncertainty, forcing the investor to resort to arbitration instead of seeking to resolve its disputes in the local courts.<sup>316</sup>
206. As a result, “the operation of any fork-in-the-road clause must be analysed dispute by dispute,” and “only the resubmission of the very same dispute will trigger its application.”<sup>317</sup> Moreover, the investor’s choice operates only with respect to the actual investment dispute, not with respect to future disputes. As a result, the investor may choose different dispute mechanisms for different disputes.<sup>318</sup>
207. The Claimant further submits that the purpose of Article 11 is to attract investors through effective protection. With this goal in mind, the “prior choice of a ‘dead-end’ road” cannot rule out other forum options for disputes not affected by *res judicata*.<sup>319</sup>
208. Finally, the Claimant alleges that previous acts by the Respondent contradict its present position. In particular, Guatemala requested the Claimant to exhaust local remedies under Article 26 of the ICSID Convention. This would make no sense if the fork-in-the-road clause operated as the Respondent now alleges.<sup>320</sup>

**c. Article 26 of the ICSID Convention does not bar the present proceedings**

209. The Claimant denies that Article 26 of the ICSID Convention prevents the Tribunal from finding that it has jurisdiction over its claims.
210. According to the Claimant, the Respondent misinterprets Article 26 of the ICSID Convention, whether standing alone or in combination with Article 11 of the Treaty. “Article 26 protects the exclusivity of ICSID arbitration when valid and effective consent

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<sup>313</sup> CM, ¶¶ 241-243.

<sup>314</sup> Rejoinder, ¶ 176.

<sup>315</sup> *Id.*, ¶ 176.

<sup>316</sup> *Id.*, ¶ 177.

<sup>317</sup> *Id.*, ¶ 218.

<sup>318</sup> *Id.*, ¶ 175.

<sup>319</sup> *Id.*, ¶ 221.

<sup>320</sup> *Id.*, ¶ 181.

to such arbitration has been given and continues to exist.”<sup>321</sup> Here there is no consent to ICSID arbitration. Indeed, the Claimant’s consent to arbitration proved ineffective, since it did not match the Respondent’s offer, leading the *Iberdrola I* tribunal to deny jurisdiction. Furthermore, when the investor has consented through the institution of ICSID proceedings, it cannot be subject *ad infinitum* to the jurisdiction of a forum which has expressly refused to exercise that jurisdiction.<sup>322</sup>

211. For the Claimant, the text of Article 26 establishes a presumption of exclusivity in favor of ICSID, which “operates to prevent parties from initiating other proceedings in domestic courts and/or other arbitral *fora*, while consent to ICSID jurisdiction is in place.”<sup>323</sup> This rule presupposes a valid and standing consent to ICSID arbitration.<sup>324</sup> As explained by Prof. Schreuer, “if the tribunal has determined that the Centre does not have jurisdiction because there is no valid consent, Art. 26 does not apply and other remedies may be pursued.”<sup>325</sup> This interpretation is confirmed by the *travaux préparatoires* of Article 26. The *travaux* show that “[t]he drafters of the ICSID Convention intended Article 26 to be an interpretative aid in case of doubt as to whether, once consent to ICSID jurisdiction has been validly given and it is still in place, parallel domestic or international proceedings were permissible.”<sup>326</sup> Citing *Delaume, Alghanim and Perenco*, the Claimant stresses that both doctrine and arbitral practice corroborate that Article 26 is only relevant while ICSID jurisdiction exists. Accordingly, while Article 26 prevents parallel proceedings that cover the same dispute, consent to ICSID arbitration is not “fixed in stone forever more”, and “[t]he stay in favour of ICSID’s exclusive jurisdiction [...] operates only for as long as that such jurisdiction is in being and will not operate in case of a negative finding on jurisdiction.”<sup>327</sup>
212. The Claimant argues that in *Iberdrola I* the tribunal determined that, as presented, the claims did not fall within Guatemala’s offer to arbitrate.<sup>328</sup> As the Claimant’s consent was not effective, there is no exclusivity of ICSID arbitration, and the Claimant is not prevented from bringing this UNCITRAL arbitration.

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<sup>321</sup> C-PHB1, ¶ 5.

<sup>322</sup> *Id.*, ¶¶ 7-8.

<sup>323</sup> *Id.*, ¶ 10.

<sup>324</sup> *Id.*, ¶ 10.

<sup>325</sup> C. Schreuer, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 352 (Exh. CLA-71).

<sup>326</sup> C-PHB1, ¶11, citing Settlement of Investment Disputes First Preliminary Draft of a Convention on the Settlement of Investment Disputes and Nationals of Other States: Annotated Text SID/63-15 (9 August 1963) “Relationship of Arbitration to other Remedies” in *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Volume II-1 Washington D.C. ICSID Publication, 1968) p.162, ¶ 9. (Exh. CLA-169).

<sup>327</sup> C-PHB1, ¶ 34.

<sup>328</sup> *Id.*, ¶ 42.

213. The Claimant further contends that the way in which the Respondent purports to use Article 26 would “at best prevent Iberdrola from obtaining an effective legal remedy for its still undetermined Treaty claims and at worst, lead to a denial of justice to Iberdrola.”<sup>329</sup> Relying on *Casinos Austria*, the Claimant argues that an expansive interpretation of Article 26 “would have the effect of denying a claimant the choice of forum set out in the BIT by requiring Iberdrola to submit its Treaty claims to ICSID or to potentially leave the Claimant with no forum to hear these claims [...] leaving Iberdrola without any effective legal remedy for its undecided treaty claims.”<sup>330</sup>
214. Finally, the Claimant submits that “Article 11(2) of the BIT does not affect or alter the correct interpretation to be given to Article 26.”<sup>331</sup> Concretely, Article 11(2) has two effects *vis-à-vis* Article 26. First, once the investor chooses ICSID as a forum and initiates ICSID proceedings, Article 26 is activated and the ICSID remedy is exclusive.<sup>332</sup> Second, if ICSID determines that it has no jurisdiction (leaving aside the question of *res judicata*), then the investor may choose again between the available forums for the determination of its claim. This is what has happened here.<sup>333</sup>

#### 4. Abuse of process

215. The Claimant argues that it is “simply and transparently trying to have its claims heard and decided on the merits”, and that “[n]o abuse can be found in such legitimate interest.”<sup>334</sup> It also contends that the Respondent presents a distorted notion of the abuse of process doctrine under international law.<sup>335</sup> In particular, the Respondent has distorted the meaning of the *Orascom* decision, where the situation was clearly different: involving “multiple proceedings [...] initiated in parallel for a purely strategic reason by different entities of the same group of companies under different investment treaties”. Here, by contrast, the Claimant started a first arbitration over which jurisdiction was denied and only thereafter did it bring a second arbitration under the same treaty “so that its treaty claims could be finally decided for the first time.”<sup>336</sup> If anything, *Orascom* shows that “the standard of abuse of process is quite high and should not be taken lightly.”<sup>337</sup>

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<sup>329</sup> *Id.*, ¶ 12.

<sup>330</sup> *Id.*, ¶ 44, citing *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction of 20 June 2018, ¶ 332 (Exh. CLA-174).

<sup>331</sup> C-PHB1, ¶ 45.

<sup>332</sup> *Id.*, ¶ 47.

<sup>333</sup> *Id.*, ¶ 48.

<sup>334</sup> CM, ¶ 174.

<sup>335</sup> *Id.*, ¶¶ 174-207.

<sup>336</sup> *Id.*, ¶ 182.

<sup>337</sup> *Id.*, ¶ 184.

216. Moreover, the Claimant underlines that the application of the doctrine of abuse of process to international arbitration is not firmly established.<sup>338</sup> However, assuming that it applies at all in this context, Iberdrola notes that it refers to the abusive exercise of a legally recognized right or, in the words of Prof. Reisman, “the use of a legal process for an unlawful purpose”;<sup>339</sup> the burden of proof lies on the party alleging abuse;<sup>340</sup> and the threshold to show an abuse of process is a high one, as was confirmed by several investment tribunals (*see, e.g., Chevron, Caratube II, Waste Management II, SPP, Renée Rose Levy, Phoenix Action, Churchill Mining, Philip Morris v. Australia, Orascom, among others*).<sup>341</sup>
217. Lastly, the Claimant observes that as found by investment tribunals, in principle the existence of multiple proceedings in and of itself does not constitute an abuse of process, which implies that a party breaches the principle of good faith.<sup>342</sup>
218. Understood in this light, the Claimant contends that the prohibition of abuse of process does not bar its claims. To the extent that it is not pursuing concurrent claims but only this arbitration, and has yet to obtain a single decision on the merits of its treaty claims, the submission of claim that has not yet been resolved cannot qualify as an abuse.<sup>343</sup> Rather, it is the pursuit of a legitimate interest.<sup>344</sup>

#### 5. Article 53 of the ICSID Convention

219. The Claimant denies that its claims violate Article 53(1) of the ICSID Convention. Article 53(1) aims at protecting the finality of awards rendered under the auspices of the ICSID Convention. Citing *Pey Casado I*, it submits that “Article 53 of the Convention provides that the award is not subject to an appeal procedure by a superior adjudication body with the powers to scrutinize the merits of the award, suspend its binding effect during the appeal phase or issue a new decision that replaces the original award.”<sup>345</sup>
220. The Claimant acknowledges that “the award rendered in *Iberdrola I* is *res judicata* on what it decided (that it did not have jurisdiction to entertain what it characterised as local law claims) and cannot be reviewed, as mandated by Article 53 of the ICSID Convention.”<sup>346</sup> However, it argues that “Iberdrola does not seek a review of the content

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<sup>338</sup> *Id.*, ¶ 188; Rejoinder, ¶ 144.

<sup>339</sup> Mem., ¶ 194, citing Reisman Report, ¶ 68.

<sup>340</sup> CM, ¶¶ 187, 206.

<sup>341</sup> *Id.*, ¶ 204.

<sup>342</sup> *Id.*, ¶ 295.

<sup>343</sup> *Id.*, ¶ 207.

<sup>344</sup> *Id.*, ¶ 213.

<sup>345</sup> *Id.*, ¶ 215.

<sup>346</sup> *Id.*, ¶ 217.

of the *Iberdrola I* Award or the subsequent annulment decision.”<sup>347</sup> For the Claimant, any dispute or issue not decided in the award is not affected by Article 53.<sup>348</sup>

221. Citing Schreuer’s commentary to Article 53 of the ICSID Convention,<sup>349</sup> the Claimant further submits that “[i]n the absence of a decision on the merits from the *Iberdrola I* tribunal, Article 53 cannot be used by Guatemala to prevent Iberdrola’s treaty claims being heard by this tribunal”.<sup>350</sup> The Claimant stresses that “the *causa petendi* in the current case is different to that decided in *Iberdrola I* and the *res judicata* rule is not applicable”.<sup>351</sup> The Claimant thus concludes that Article 53 does not prevent the Tribunal from hearing its treaty claims.<sup>352</sup>

## 6. Jurisdiction *ratione materiae*

222. The Claimant insists that the Tribunal has jurisdiction *ratione materiae*, “because [...] this arbitration exclusively involves treaty claims.”<sup>353</sup> It also argues that the Respondent has failed to disprove that Iberdrola’s claims are based on the BIT,<sup>354</sup> the policy considerations advanced by Guatemala are incomplete, biased, and irrelevant to the present dispute,<sup>355</sup> and Guatemala’s “curing defects” reasoning lacks any merit and must be dismissed.<sup>356</sup>

### C. Analysis

#### 1. Preliminary Matters

##### a. Scope and language of this Award

223. As determined in the Decision on Bifurcation, this Final Award deals with the Respondent’s preliminary objections to jurisdiction and to the admissibility of the claims.<sup>357</sup> It also resolves the counterclaim.

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<sup>347</sup> *Id.*, ¶ 217.

<sup>348</sup> *Id.*, ¶ 219.

<sup>349</sup> C. Schreuer, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 1106 (Exh. CLA-71): “The principle of *ne bis in idem* does not apply to the substance of a dispute if the ICSID tribunal has given an award in which it finds that the dispute is not within the jurisdiction of the Center or not within its own competence, in accordance with Arbitration Rule 41(6) [...]. In other words, if an ICSID tribunal declines jurisdiction over a dispute, a party may take that dispute to another forum for a decision on the merits”.

<sup>350</sup> Rejoinder, ¶¶ 161-162.

<sup>351</sup> *Id.*, ¶ 164.

<sup>352</sup> *Id.*, ¶ 165.

<sup>353</sup> Mem., ¶ 265.

<sup>354</sup> Rejoinder, ¶¶ 223-236.

<sup>355</sup> *Id.*, ¶¶ 237-250.

<sup>356</sup> *Id.*, ¶¶ 251-258.

<sup>357</sup> Decision on Bifurcation, ¶ 42.

224. In accordance with paragraph 2.1 of Procedural Order No. 1, the languages of this arbitration are Spanish and English. However, in accordance with paragraph 2.4 of that same Order, this Award has been made in English and is accompanied by a separate Spanish translation. In case of differences between the English and Spanish versions, the English version shall prevail.

**b. Applicable procedural law**

225. As noted in Section 8.1 of the Terms of Appointment, this arbitration is governed by (in the following order of precedence):

- i. The mandatory rules of the law of international arbitration applicable at the seat of the arbitration;
- ii. The 1976 UNCITRAL Arbitration Rules, save where modified by these Terms of Appointment;
- iii. The Terms of Appointment and the procedural rules issued by the Tribunal, as reflected in Procedural Order No. 1 and any amendments thereof.

226. This arbitration is seated in Geneva and as such is subject to the mandatory rules of Swiss international arbitration law enshrined in Chapter 12 of the PILA.

**c. *Iura novit curia***

227. When applying the governing law, be it international or national, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *iura novit curia* – or, more precisely, *iura novit arbiter* – the Tribunal may apply the law of its own motion, provided it seeks the Parties’ views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.<sup>358</sup>

**d. Relevance of prior decisions**

228. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.

229. The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgement it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling contrary grounds, it has a duty to adopt principles established in a series of consistent cases. It further believes that, subject always to the specific text of the BIT, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of international

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<sup>358</sup> SFSC decision 4P.114/2001 of 19 December 2001, ¶ 3a, 20(3) *ASA Bulletin* (2002) pp. 493, 511 and 4A\_214/2013 of 5 August 2013, ¶ 4. *See also, inter alia, Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, ¶ 118; *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment of 7 January 2015, ¶ 295.

investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law.

## 2. Jurisdiction and admissibility

### a. Legal framework

230. The analysis will first set out the legal framework for the review of jurisdiction and admissibility (a below), assess *ex officio* the requirements for jurisdiction over which there is no objection (b below), before addressing the *res judicata* (c) and fork-in-the-road objections (d).
231. The Parties rely on Article 11(3) of the BIT to argue that jurisdiction and admissibility, in particular *res judicata*, are governed by international law and first and foremost the BIT, which is the instrument of the Parties' consent. Article 11(3) of the BIT reads as follows:

***Artículo 11. Controversias entre una Parte Contratante e inversores de la otra parte contratante.***

[...]

3. *El arbitraje se basará en las disposiciones del presente Acuerdo, el derecho nacional de la Parte Contratante en cuyo territorio se ha realizado la inversión, incluidas la reglas relativas a los conflictos de Ley, así como también en las reglas y los principios de derecho internacional que pudieran ser aplicables. (Emphasis added).*

#### **English translation:**

**Article 11. Disputes between a Contracting Party and investors of the other [C]ontracting [P]arty.**

[...]

3. The arbitration shall be governed by the provisions of this Agreement, the national law of the Contracting Party in whose territory the investment was made, including the rules on conflicts of laws, as well as the rules and principles of international law that may be applicable. (Emphasis added).

232. While this clause elects the law to govern “the arbitration”, which could point to a choice made for the arbitration *proceedings*, the bodies of law chosen rather suggest that this is a choice of the substantive law applicable to the merits of the dispute, akin to Article 42(1) of the ICSID Convention. Be this as it may, it is common ground that the Tribunal's jurisdiction is governed by international law and especially by the BIT, be it because the latter is the instrument of the parties' consent or by virtue of Article 11(3) of the BIT.
233. It is also undisputed that the interpretation of the BIT is governed by the customary international law principles on treaty interpretation as codified in the VCLT.



234. The law applicable to the admissibility of the claims before this Tribunal, including the admissibility defense of *res judicata*,<sup>359</sup> deserves further elaboration. Subject to the role of Swiss law to which the Tribunal will revert below, the Parties agree that *res judicata* is governed by international law. The Claimant submits that “[the] Respondent’s *res judicata* objection, including determining what the ICSID tribunal decided” and “to what extent that tribunal’s negative jurisdictional award has preclusive effects over Claimant’s treaty claims, must be determined on the basis of international law”.<sup>360</sup> In the same vein albeit based on different reasoning, the Respondent asserts that “Article 11.3 of the Treaty defines the law applicable to the present arbitration proceedings, including to the issue of *res judicata*. [...] [T]he principle of *res judicata* under international law bars Claimant[] from resubmitting its claims”.<sup>361</sup>
235. In the Tribunal’s opinion, this view is consistent with the nature of admissibility, which “concern[s] the existence, scope and exercise of adjudicative power by the arbitral tribunal”.<sup>362</sup> Hence, it is logical that it be governed by the instrument that creates its adjudicative power, i.e., the BIT.<sup>363</sup> The application of international law is also in conformity with the characteristics of the dispute and the source of the Tribunal’s adjudicatory power: (i) the Tribunal is a body established under an international instrument (the Treaty); (ii) the dispute involves the international responsibility of a State under a treaty; and (iii) the *res judicata* objection aims at preventing the issuance of two international awards on the same issue within the international legal order.
236. At the same time, this arbitration is seated in Geneva and as such is subject to the mandatory rules of Swiss international arbitration law enshrined in Chapter 12 of the PILA. In this respect, the Tribunal notes that the arbitration agreement, composed of the State’s offer contained in the BIT and the investor’s acceptance contained in the Notice

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<sup>359</sup> It is noted that the *res judicata* principle is deemed to pertain to admissibility under international law (*see Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 48 (17 March) (Exhs. CLA-007; RLA-022) and Swiss law (SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.4 (Exhs. RLA-127; RLA-182)).

<sup>360</sup> C-PHB2, ¶ 7.

<sup>361</sup> R-PHB2, ¶¶ 3, 4.

<sup>362</sup> Z. Douglas, *International Law of Investment Claims* (Cambridge University Press 2009) ¶ 131 (Exh. CLA-176).

<sup>363</sup> *See* Z. Douglas, *International Law of Investment Claims* (Cambridge University Press 2009) p. 74 (“Rule 6. The law applicable to an issue relating to the jurisdiction of the tribunal and admissibility of claims and counterclaims is the investment treaty and, where relevant, the ICSID Convention.”)

of Arbitration, meets the form requirement of Article 178(1) PILA,<sup>364</sup> and that the application of the BIT to jurisdiction is in line with Article 178(2) PILA.<sup>365</sup>

237. In answer to questions of the Tribunal, the Parties have commented on the relevance of Swiss law in matters of *res judicata*. For the Respondent, “the law of the seat should be taken into consideration to determine whether or not a future award could be set aside in the jurisdiction serving as the seat of the arbitration proceedings as part of the tribunal’s duty to make every effort to render an award enforceable at law”.<sup>366</sup> The Claimant for its part argues that questions of *res judicata* should be decided solely on the basis of international law, Swiss law being limited to subsequent annulment or enforcement proceedings relating to the Award.<sup>367</sup> In any event, it submits that Swiss law contains a “*renvoi*” to international law with regard to *res judicata* issues of a foreign award.<sup>368</sup> The Claimant relies on a decision of the SFSC pursuant to which “[u]nless an international treaty states otherwise, the *lex fori* determines whether the claim raised before a foreign state court and the claim submitted to a Swiss court are identical”.<sup>369</sup> For the Claimant, the binding effects of an ICSID award are governed exclusively by Article 53(1) of the ICSID Convention,<sup>370</sup> “which must be considered an international agreement whose terms provide ‘otherwise’, thereby creating an exception to the general rules on *res judicata* under Swiss Law”.<sup>371</sup>
238. In essence, the seat of the arbitration being in Switzerland, the forthcoming award may be challenged under Article 190(2) PILA. Swiss case law holds that an award that breaches the principle of *res judicata* is contrary to public policy and may thus be set aside on the basis of Article 190(2)(e), which provides for the annulment of awards that are irreconcilable with public policy.<sup>372</sup>
239. When assessing an alleged breach of the principle of *res judicata* in application of Article 190(2)(e), the SFSC determines the existence and scope of the *res judicata* of the prior foreign judgment or award under that decision’s own law. In the present case, as was

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<sup>364</sup> Article 178(1) PILA provides: “[A]n arbitration agreement is valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text” (Tribunal’s translation).

<sup>365</sup> Article 178(2) PILA provides: “[A]n arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law” (Tribunal’s translation).

<sup>366</sup> R-PHB2, ¶ 5.

<sup>367</sup> C-PHB2, ¶ 8.

<sup>368</sup> *Id.*, ¶ 9 (Answer to Question 2).

<sup>369</sup> *Id.*, ¶ 16; SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.2 (Exhs. RLA-127; RLA-182).

<sup>370</sup> C-PHB2, ¶ 17.

<sup>371</sup> *Id.*, ¶ 20.

<sup>372</sup> SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.1 (Exhs. RLA-127; RLA-182) (referring to ATF 136 III 345 and ATF 128 III 191).

established above, that law would be international law. The SFSC then ascertains that the foreign decision is not given wider *res judicata* effects than those it would enjoy under Swiss law. Or in the words of the SFSC:

Res judicata depends on the law of the state of origin, so it behooves this law to specify the conditions and limits of its effect [...] Therefore, the subjective, objective, and temporal scope of *res judicata* may vary from one legal order to the other. Harmonization in this field must be sought to the extent possible, however, and it is achieved as follows: in Switzerland, a recognized foreign judgment has only the authority it would have if issued by a Swiss court. Thus, a declaratory foreign judgment which could be opposed to third parties according to the law of a state of origin will only enjoy such authority in Switzerland with regard to the parties to the proceedings [...]. Similarly, the *res judicata* effect of a foreign judgment, which could extend to its reasons according to the law of the state of origin, will be admitted in Switzerland only as to the operative part of the judgment [...]. Conversely, a foreign judgment may not produce more effects in Switzerland than it has pursuant to the legal order from which it originates [...]. (Emphasis added).<sup>373</sup>

240. It arises from the decision just quoted and from other authorities<sup>374</sup> that this test only applies if the foreign judgment or award can be recognized in Switzerland. The *Iberdrola I* Award is an ICSID Award and Switzerland is an ICSID Contracting State. As such, Switzerland is bound to recognize an ICSID award under Article 54(1) of the ICSID Convention “as if it were a final judgment of a court in that State”. This requirement is thus met.
241. The Claimant agrees that Swiss law will apply in the event of annulment proceedings, but only if no treaty provides otherwise and it considers that the ICSID Convention, and in particular Article 53(1) constitutes such a treaty. Article 53(1) stipulates that “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention”. It is the source of the binding force of ICSID awards. On the basis of this provision, a dispute resolved by an ICSID award is a *res judicata*, a matter adjudged. It is thus relevant to the first prong of the test developed by Swiss case law, which was just referred to, i.e. to the determination of the existence of *res judicata*. Beyond that, Article 53(1) does not say whether and to what extent a second tribunal seised with a potentially identical claim may or may not entertain that claim.

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<sup>373</sup> SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.2 (Exhs. RLA-127; RLA-182) (referring to Bucher & Bonomi, *Droit international privé* (3rd ed, 2013) n. 254; SFSC decision ATF 139 III 126 ¶ 3.1, p. 128; SFSC decision ATF 136 III 345 ¶ 2.1, p. 348; Knoepfler, Schweizer & Othenin-Girard, *Droit international privé suisse* (3rd ed, 2005) n. 717a).

<sup>374</sup> See S. Schaffstein, “Chapter 18, Part VIII: Res Judicata in International Arbitration”, in: M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioners Guide* (2nd ed., Kluwer Law International 2018) ¶ 31 (Exh. RLA-126); B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli 2015) ¶¶ 1658-1659, 1661, 1664 (Exh. CLA-184); SFSC decision 4A\_508/2010 of 14 February 2011, ¶¶ 3.1, 3.3 (Exh. CLA-185); SFSC decision 4A\_633/2014 of 29 May 2015, ¶ 3.2.3 (Exh. RLA-183).

242. In summary, the Tribunal understands that, if called upon, the SFSC would ensure that the Tribunal has not given the *Iberdrola I* Award more *res judicata* effects than it would have under Swiss law. Because it has a duty to seek to render an award that is valid under the law of the seat, the Tribunal must thus verify when assessing *res judicata* under international law that it does not reach results that would conflict with Swiss law. As will be seen below, this verification will be unproblematic as the regime of *res judicata* under international and Swiss law reveals no outcome-determinative differences.
243. The jurisdiction of this Tribunal is alleged to be based on Article 11 of the BIT, which reads as follows:

***Artículo 11. Controversias entre una Parte Contratante e inversores de la otra parte contratante.***

1. *Toda controversia relativa a las inversiones que surja entre una de las Partes Contratantes y un inversor de la otra Parte Contratante, respecto a cuestiones reguladas por el presente Acuerdo será notificada por escrito, incluyendo una información detallada, por el inversor a la Parte Contratante receptora de la inversión. En la medida de lo posible las partes en controversia tratarán de arreglar estas diferencias mediante un acuerdo amistoso.*
2. *Si la controversia no pudiera ser resuelta de esta forma en un plazo de seis meses a contar desde la fecha de notificación escrita mencionada en el párrafo 1, la controversia podrá someterse, a elección del inversor:*
  - a) *a los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión; o*
  - b) *a un tribunal de arbitraje ad hoc establecido de acuerdo con el Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Comercial Internacional; o*
  - c) *al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.) creado por el «Convenio sobre el arreglo de diferencias relativas a Inversiones entre Estados y Nacionales de Otros Estados», abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado parte en el presente Acuerdo se haya adherido a aquél. En caso de que una de las Partes Contratantes no fuera Estado Contratante del citado Convenio, la controversia se podrá resolver conforme al Mecanismo Complementario para la Administración de Procedimientos de Conciliación, Arbitraje y Comprobación de Hechos, por la Secretaría del C.I.A.D.I.*
3. *El arbitraje se basará en las disposiciones del presente Acuerdo, el derecho nacional de la Parte Contratante en cuyo territorio se ha realizado la inversión, incluidas las reglas relativas a los conflictos de Ley, así como también en las reglas y los principios de derecho internacional que pudieran ser aplicables.*
4. *La Parte Contratante que sea parte en la controversia no podrá invocar en su defensa el hecho de que el inversor, en virtud de un contrato de*

*seguro o garantía, haya recibido o vaya a recibir una indemnización u otra compensación por el total o parte de las pérdidas sufridas.*

5. *Las decisiones arbitrales serán definitivas y vinculantes para las partes en la controversia. Cada Parte Contratante se compromete a ejecutar las sentencias de acuerdo con su legislación nacional.*

**English translation:**

**Article 11. Disputes between a Contracting Party and investors of the other [C]ontracting [P]arty.**

1. Any dispute relating to investments arising between one of the Contracting Parties and an investor of the other Contracting Party, concerning matters governed by this Agreement shall be notified in writing, including detailed information, by the investor to the Contracting Party receiving the investment. As far as possible, the disputing parties shall endeavour to settle these differences by amicable agreement.
2. If the dispute cannot be settled in this manner within six months from the date of written notice referred to in paragraph 1, the dispute may be submitted, at the choice of the investor:
  - a. to the competent courts of the Contracting Party in whose territory the investment was made; or
  - b. to an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law; or
  - c. to the International Centre for the Settlement of Investment Disputes (ICSID) created by the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States”, opened for signature in Washington on 18 March 1965, when each State party to this Agreement has acceded to it. Should one of the Contracting Parties not be a Contracting State to said Convention, the dispute may be resolved pursuant to the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Procedures by the ICSID Secretariat.
3. The arbitration shall be governed by the provisions of this Agreement, the national law of the Contracting Party in whose territory the investment was made, including the rules on conflicts of laws, as well as the rules and the principles of international law that may be applicable.
4. The Contracting Party that is a party to the dispute shall not invoke in its defence the fact that the investor, by virtue of an insurance contract or guarantee, received or will receive a compensation for the total or part of the losses suffered.
5. Arbitral decisions shall be final and binding for the disputing parties. Each Contracting Party undertakes to enforce such decisions in accordance with its national legislation.

244. It is common ground that this Tribunal is the judge of its own jurisdiction. As the ICJ explained in the *Nottebohm* case, the *Kompetenz-Kompetenz* principle is a “rule consistently accepted by general international law in the matter of international arbitration”, according to which “in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.”<sup>375</sup> This principle is also expressed in Article 186(1) PILA which provides that “[t]he arbitral tribunal shall rule on its own jurisdiction.”<sup>376</sup> It is further enshrined in Article 21(1) of the UNCITRAL Rules 1976.<sup>377</sup>
245. It is less clear whether, faced with a *res judicata* defense, a tribunal should start with the review of such defense or rather discuss its jurisdiction first and only then address *res judicata*. This is because, as set out in the Decision on Bifurcation<sup>378</sup> and accepted by the Claimant,<sup>379</sup> the *res judicata* defense is an objection to the admissibility of the claims. As the ICJ has held, it “consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein.”<sup>380</sup> In theory at least, applying the principle of *Kompetenz-Kompetenz*, the Tribunal should first address whether it has the competence to act, and, if it does, it should then determine whether the claims are admissible, i.e., whether, despite the Tribunal’s having the competence to resolve a claim, there are other legal reasons why that claim cannot be heard.<sup>381</sup>
246. In the Tribunal’s opinion, here this may well be a distinction without a difference. Indeed, while only a tribunal with jurisdiction can review the admissibility of the claims before it, here the admissibility defense refers to issues pertaining to jurisdiction. In reality, it is difficult to keep the two aspects entirely separate when the *res judicata*, that is the matter allegedly finally decided, is precisely the Tribunal’s jurisdiction, or more precisely, its lack of jurisdiction, over the dispute at hand. In a decision to which both Parties refer, the

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<sup>375</sup> *Nottebohm case (Liechtenstein v. Guatemala)*, Judgment on Preliminary Objections, ICJ Reports 1953, pp. 111, 119 (18 November) (Exh. CLA-120).

<sup>376</sup> Article 186(1) (Chapter 12) PILA (Tribunal’s translation).

<sup>377</sup> Article 21(1) of the UNCITRAL Rules 1976: “The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”

<sup>378</sup> Decision on Bifurcation, ¶ 25, noting that the ICJ has held that *res judicata* is an objection to admissibility because it “consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein”.

<sup>379</sup> CM, ¶ 310.

<sup>380</sup> *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 48 (17 March) (Exhs. CLA-007; RLA-022).

<sup>381</sup> L. Boisson de Chazournes, “The Principle of *Compétence de la Compétence* in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals”, in: J. Cogan *et al.* (eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman* (Martinus Nijhoff 2010) p. 1040 (Exh. CLA-123).

SFSC made the same observation after having stressed the “kinship that exists between the issue of jurisdiction and that of *res judicata*”<sup>382</sup> in the following terms:

Thus, the arbitral tribunal, which entertains a claim that has already been the subject matter of a judgment vested with *res judicata* and which issues an award on such claim, even if it does so on the basis of an arbitration agreement and hence cannot be deemed to lack jurisdiction and cannot be sanctioned on the basis of the provision just mentioned [i.e., Article 190(2)(b) which provides that lack of jurisdiction is a ground for annulment], nevertheless ultimately arrogates to itself *ratione materiae* jurisdiction which it lacks.<sup>383</sup>

247. Before proceeding further, the Tribunal must deal with the Claimant’s argument that Guatemala has accepted jurisdiction by filing a counterclaim. In fact, the Respondent has stated that it “is not objecting to the Tribunal’s jurisdiction to decide claims under the Treaty”; its “objection is that these claims have already been decided”.<sup>384</sup> At the same time, however, Guatemala has raised a jurisdictional defense linked to the fork in the road allegedly contained in Article 11(2) of the BIT. Hence, the Tribunal understands that the Respondent does not challenge jurisdiction, except in relation to the fork in the road, and objects on the ground of *res judicata*. In any event, the Tribunal cannot accept that the Respondent has voluntarily submitted to its jurisdiction by conduct through the mere act of raising a counterclaim. Indeed, the counterclaim seeks redress for bringing claims under the Treaty over which the Tribunal is said not to have jurisdiction. Hence, lack of jurisdiction is the very basis for the counterclaim. In the circumstances, one cannot discern how the act of bringing the counterclaim could be deemed a waiver of the jurisdictional objection.
248. Finally, the Tribunal notes that, being seized on the basis of a treaty, it must assess its jurisdiction *ex officio*, which it will proceed to do now.

**b. *Ex officio* assessment of jurisdictional requirements**

249. Subject to *res judicata* and fork in the road, the Respondent does not challenge the Tribunal’s jurisdiction, and rightly so. The BIT requirements are in effect met. One could of course argue that all the requirements provided in the BIT have been dealt with in *Iberdrola I* and therefore must be deemed outside the reach of this Tribunal as a matter of *res judicata*. The Respondent has not advanced this argument and has limited its objection to the nature of the claims at hand. Be this as it may, it would make no difference as there is no conflict among the Parties about the fulfillment of these requirements, the Tribunal shares the Parties’ views, and *Iberdrola I* did not decide to the contrary.

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<sup>382</sup> SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.4 (Exhs. RLA-127; RLA-182) (Tribunal’s translation). In the French original: “*la parenté existant entre le problème de la compétence et celui de l’autorité de la chose jugée*”.

<sup>383</sup> SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.4 (Exhs. RLA-127; RLA-182) (Tribunal’s translation).

<sup>384</sup> Reply, ¶ 256.

250. Indeed, the dispute is between the Republic of Guatemala, one of the Contracting Parties to the BIT, and the Claimant, a corporation incorporated in the Kingdom of Spain, the other Contracting Party to the BIT.<sup>385</sup> The Tribunal thus has *ratione personae* jurisdiction (Article 11(1)).
251. Likewise, the dispute concerns an investment made by the Claimant in the territory of the Respondent, in accordance with Guatemalan law (Articles 11(1) and 12). The Respondent does not dispute the existence of that investment, nor has it argued that the investment was not made in accordance with Guatemalan law.
252. It is similarly undisputed that the dispute between the Parties arose after the BIT's entry into force (Article 12). The Tribunal thus has *ratione temporis* jurisdiction.
253. It is also common ground that the Claimant sent its notice of dispute to the Respondent on 7 February 2017, requesting the Respondent to engage in negotiations for an amicable settlement of the dispute,<sup>386</sup> and sent two further letters requesting amicable negotiations.<sup>387</sup> The Claimant then initiated the present UNCITRAL arbitration on 15 November 2017.<sup>388</sup> Hence, the six-month cooling-off period provided in Article 11(2) has also been complied with.
254. In addition to these requirements, under Article 11(1) of the BIT the Claimant must show that the dispute arises from "matters governed by this Agreement". Further, it is a well-established rule that, when examining their jurisdiction, tribunals must ascertain whether, if proven, the facts alleged may constitute treaty breaches. Differently put, the claims must fulfill the *pro tem* test.<sup>389</sup> The *Iberdrola I* tribunal found that these requirements – which define the subject matter scope of the Tribunal's jurisdiction – were not met, and therefore found that it lacked jurisdiction *ratione materiae*. The question is whether this finding is binding on this Tribunal. This is the point where the analysis of jurisdiction intersects with the issue of *res judicata*.

**c. *Res judicata***

255. Although the Respondent has raised a number of objections to the jurisdiction of the Tribunal and the admissibility of the claims, and the Parties have debated numerous theories and arguments, the essential question which the Tribunal must resolve can be

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<sup>385</sup> The Respondent does not dispute the Claimant's nationality, or that it qualifies as an investor under Article 1(1) of the BIT.

<sup>386</sup> Notice of Arbitration, ¶ 56; Letter of Iberdrola Energía, S.A. sent to the President of Guatemala, 7 February 2017 (Exh. C-009).

<sup>387</sup> Notice of Arbitration, ¶ 57; Letter of Iberdrola Energía, S.A. sent to the President of Guatemala, 17 May 2017 (Exh. C-010); Letter of Iberdrola Energía, S.A. sent to the President of Guatemala, 12 June 2017 (Exh. C-011).

<sup>388</sup> Notice of Arbitration.

<sup>389</sup> See Decision on Bifurcation, ¶ 35, citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Separate Opinion of Judge Higgins, ICJ Reports 2003, ¶¶ 29-32 (6 November) (Exh. RLA-064).



framed in simple terms: Is this Tribunal barred from hearing the claims submitted to it by virtue of a negative jurisdictional decision issued by an ICSID tribunal in respect of the same dispute? If the answer is affirmative, then it puts an end to the inquiry. If it is negative, then the Tribunal will need to examine other defenses raised by the Respondent. In other words, the primary question before the Tribunal is whether the award issued in *Iberdrola I* carries *res judicata* effects, and thus precludes this Tribunal from reopening the jurisdictional question decided by the *Iberdrola I* tribunal.

256. As noted by the ILA, “[t]he term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called ‘triple-identity’ criteria).”<sup>390</sup> Both Parties recognize that *res judicata* is a general principle of law and a principle of international law.<sup>391</sup>
257. The ILA explains that *res judicata* has “a *positive effect* (namely, that a judgment or award is final and binding between the parties and should be implemented, subject to any available appeal or challenge); and a *negative effect* (namely, that the subject matter of the judgment or award cannot be re-litigated a second time, also referred to as *ne bis in idem*)”.<sup>392</sup> As noted in the *Orinoco* case, it means that “a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed”.<sup>393</sup>
258. The decision issued by the *Iberdrola I* tribunal is an award on jurisdiction, more specifically, a negative award on jurisdiction. It is undisputed that the *Iberdrola I* Award did not rule on the merits of the claims, with the exception of the denial of justice claim. Hence, the question is not whether the merits of the claims before this Tribunal have already been decided; it is whether the jurisdiction of an investment tribunal constituted under the BIT over the claims before the present Tribunal has already been decided, thus precluding this Tribunal from reassessing that jurisdictional issue.
259. This question raises a number of sub-issues. Bearing in mind the findings on applicable law reached above, the Tribunal must first ascertain whether a negative ruling on jurisdiction can have *res judicata* effects (i). If this is so, then the requirements for a successful *res judicata* defense must be identified and applied to determine whether the *Iberdrola I* Award carries preclusive effects with respect to this arbitration (ii). This

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<sup>390</sup> F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Interim Report on *Res judicata* and Arbitration”, *International Law Association Conference on International Commercial Arbitration* (2004) p.36 (Exh. CLA-010).

<sup>391</sup> Mem., ¶¶ 171-175; CM, ¶ 28.

<sup>392</sup> F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Interim Report on *Res judicata* and Arbitration”, *International Law Association Conference on International Commercial Arbitration* (2004) p.36 (Exh. CLA-010) (emphasis in original).

<sup>393</sup> *Company General of the Orinoco*, French-Venezuelan Commission, *X Reports of International Arbitral Awards*, 31 July 1905, p. 276 (Exh. CLA-006).

determination will in particular imply a comparison between the claims involved in the negative decision of *Iberdrola I* and those over which this Tribunal is requested to assess jurisdiction. The Tribunal will then conclude as to whether the *res judicata* defense precludes the present claims (iii).

**(i) Can a negative decision on jurisdiction have *res judicata* effect?**

260. The Parties agree – with certain nuances – that negative jurisdictional decisions can have *res judicata* effect. Relying on ICJ jurisprudence, the Respondent submits that “[t]he principle of *res judicata* applies both to arbitral awards on the merits of the dispute and to decisions and awards on jurisdictional objections.”<sup>394</sup> The Claimant submits that “decisions on jurisdiction do not have preclusive effects over merits issues”, but does not deny that negative jurisdictional decisions carry *res judicata* effect.<sup>395</sup> Indeed, the Claimant accepts that “in principle a decision on jurisdiction has *res judicata* effect as regards the matters that it definitively decides [...]”.<sup>396</sup> During the hearing, the Claimant confirmed that the *Iberdrola I* Award is final and binding, but only regarding the issues that it definitively settled (a subject discussed further below).<sup>397</sup>
261. This being so, in reliance on various decisions of international tribunals,<sup>398</sup> the Claimant submits that no *res judicata* bar applies when “the jurisdictional barrier or flaw can be corrected.”<sup>399</sup> In the same vein, the Claimant notes that under Swiss law “[...] the *res judicata* effect of a negative jurisdictional decision rendered by a Swiss seated Tribunal may depend on the grounds on which an arbitral tribunal found that it lacked jurisdiction”.<sup>400</sup> The Respondent for its part “does not dispute the existence of certain jurisdictional defects that may be remedied at a later date”; however, it contends that “the opportunity to ‘cure’ a jurisdictional defect refers exclusively to essential procedural requirements for submitting a dispute to arbitration involving claims that would otherwise be premature”.<sup>401</sup> In the case at hand, “the Claimant’s legal strategy is not a defect that

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<sup>394</sup> Mem., ¶ 173, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, ¶ 138 (26 February) (Exh. RLA-001).

<sup>395</sup> CM, ¶ 47.

<sup>396</sup> CM, ¶ 48.

<sup>397</sup> Transcript, 91:24-92:3.

<sup>398</sup> *Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal of 26 June 2002 on Mexico’s Preliminary Objection concerning the Previous Proceedings, ¶¶ 16, 26-27, 34, 43 (Exh. CLA-022); *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility of 13 July 2018, ¶¶ 193, 208 (Exh. CLA-013); *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶¶ 59, 61 (17 March) (Exhs. CLA-007; RLA-022).

<sup>399</sup> CM, ¶ 51.

<sup>400</sup> C-PHB2, ¶ 25.

<sup>401</sup> Reply, ¶ 90 (emphasis in original).

can be corrected or ‘cured’ in this new arbitration”<sup>402</sup> since it is not a procedural requirement.<sup>403</sup>

262. The Tribunal agrees with the Parties that an award declining jurisdiction in principle carries *res judicata* effects, subject to certain exceptions addressed below (*see* ¶ 267). Under both international law and Swiss law, a negative decision on jurisdiction ends the arbitral proceedings and is thus a final (and binding) award which carries preclusive effects.<sup>404</sup> Article 53 of the ICSID Convention confirms the finality and finding force of ICSID awards.
263. The ILA states in this respect that “[a]s to awards on jurisdiction and subject to the applicable law, the Recommendations [on *res judicata*] do not exclude giving such awards conclusive and preclusive effects.”<sup>405</sup> The same report adds that “[a]n award declining jurisdiction entails a decision that there is no agreement to arbitrate or that the dispute does not fall within the ambit of the arbitration agreement, and accordingly the general jurisdiction of domestic courts may revive.”<sup>406</sup>
264. According to a recent treatise on *res judicata* “the majority of commentators appears to agree that both positive and negative arbitral decisions on jurisdiction constitute ‘genuine arbitral awards’ and should be entitled to the same *res judicata* effects as other arbitral awards.”<sup>407</sup> For instance, Fouchard, Gaillard and Goldman write that “[a] decision on jurisdiction, the applicable law or the principle of liability [...] is a final decision on one aspect of the dispute”, and “should therefore be considered as an award, against which an immediate action to set aside can be brought”.<sup>408</sup> Likewise, Born affirms that “a tribunal’s determination that it lacks jurisdiction should be subject to annulment, recognition and

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<sup>402</sup> *Id.*, ¶ 87 (emphasis in original).

<sup>403</sup> *Id.*, ¶¶ 91-93.

<sup>404</sup> B. Berger & S. Pfisterer, “Objections to the jurisdiction of the arbitral tribunal (Art. 21)”, in: T. Zuberbühler *et al.* (eds.), *Swiss Rules of International Arbitration: Commentary* (2nd ed., Schulthess 2013) ¶ 28. *See also* B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli 2015) ¶ 719; S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press 2016) ¶ 4.80 (Exh. RLA-185); S. Besson & N. Thommesen, “Form and Effect of the Award (Art. 32)”, in: T. Zuberbühler *et al.* (eds.), *Swiss Rules of International Arbitration: Commentary* (2nd ed., Schulthess 2013) ¶ 9.

<sup>405</sup> F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Final Report on *Res judicata* and Arbitration”, *Seventy-second International Law Association Conference on International Commercial Arbitration* (2006) ¶ 20 (Exh. CLA-038).

<sup>406</sup> *Id.*

<sup>407</sup> S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press 2016) ¶ 6.184 (Exh. CLA-190).

<sup>408</sup> E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) ¶ 1357.

preclusive effects as an arbitral award under both national arbitration legislation and international arbitration conventions.”<sup>409</sup>

265. Swiss commentators also opine that a negative award on jurisdiction carries *res judicata* effects. Some suggest that preclusion will depend on the grounds for declining jurisdiction.<sup>410</sup> The following comment by Berger and Kellerhals is instructive:

If an arbitral tribunal with its seat in Switzerland renders an award declining jurisdiction on the grounds that the arbitration agreement is invalid or inexistent or does not cover the subject-matter of the dispute, such decision must be recognised by, and thus is binding upon, any Swiss court or arbitral tribunal with its seat in Switzerland seised at a later date with the same matter between the same parties. Any Swiss authority seised second - whether a state court or an arbitral tribunal - shall thus decide on its jurisdiction without having the authority to re-examine the validity and existence of the arbitration agreement at issue. The same applies if the award declining jurisdiction has been made by an arbitral tribunal with its seat abroad, provided that such award can be recognised in Switzerland under PILS, Art.194 and the [New York Convention]. However, no binding effect emanates from a decision of an arbitral tribunal declining jurisdiction merely on the grounds that the claimant proceeded before the "wrong" arbitral tribunal or the "wrong" arbitral institution (e.g. an arbitral tribunal under the auspices of the ICC instead of the Swiss Chambers' Arbitration Institution).<sup>411</sup>

266. It is thus clear that a decision declining jurisdiction because the tribunal held that the arbitration agreement was invalid or did not cover the subject matter of the dispute is *res judicata* and has a preclusive effect on a second arbitral tribunal seised of the same matter.
267. By contrast, some jurisdictional flaws can be cured with the consequence that an award denying jurisdiction is not preclusive. A jurisdictional defect may be remedied when a procedural requirement was not previously complied with, such as a cooling-off period or waiver. A defect may also be curable when the ground for declining jurisdiction is specific to the first tribunal and does not apply to the second tribunal, for instance, when the claimant has proceeded before the “wrong” arbitral institution; or if an ICSID tribunal declines jurisdiction because either the respondent State or the home State of the investor

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<sup>409</sup> G. B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) p. 2936.

<sup>410</sup> C-PHB2, ¶ 25.

<sup>411</sup> B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli 2015) ¶ 727 (emphasis omitted). See also J-F. Poudret & S. Besson, *Comparative Law of International Arbitration* (Schulthess 2007) ¶ 481 (“[A]wards on jurisdiction [...], be they positive or negative, have *res judicata* effect on the subject of the validity of the arbitration agreement.”) and ¶¶ 475-476; M. Schoot & M. Courvoisier, “Art. 186”, in: «Zwölftes Kapitel: Internationale Schiedsgerichtsbarkeit», H. Honsell *et al.* (eds.), *Basler Kommentar: Internationales Privatrecht* (3rd ed., Helbing Lichtenhahn 2013) ¶ 49 (“[I]f an arbitral tribunal seated abroad issues a positive or negative decision on jurisdiction, this decision is binding on an international arbitral tribunal seated in Switzerland, provided that this decision is recognizable and enforceable in Switzerland in accordance with Art. 194 and Art. V NYC.”) (Tribunal’s translation, emphasis omitted). In respect of an ICSID award, Articles 194 PILA and V New York Convention are inapplicable and the reference should be read to Article 54 ICSID Convention.

is not a party to the ICSID Convention; or because Article 27 of the ICSID Convention has been breached; or because the dispute is about a class of disputes carved out by the respondent State under Article 25(4).

268. In this case, we are not in the presence of any of these categories. Putting to one side for present purposes the fork-in-the-road objection, there was no defect or impediment to the making of the *Iberdrola I* claim, such as the granting of a waiver of other remedies as a condition of submitting the claim to international arbitration<sup>412</sup>. Rather, after hearing the Parties, in particular the Claimant’s arguments that certain Treaty breaches had been made out and the Respondent’s arguments that the Claimant had failed to state a claim based on the Treaty standards, the *Iberdrola I* tribunal denied jurisdiction because it found that the claims as submitted by the Claimant were not “matters governed by the Treaty” as required by Article 11(1). As discussed in more detail below, it found that the facts, as alleged, could not amount to breaches of the Treaty. While the Claimant has argued that the *Iberdrola I* tribunal’s decision was premised on the way in which the Claimant formulated its claims, this is not a jurisdictional flaw that can be remedied. Claimants do not get second opportunities to re-argue their cases simply because their pleadings in the first proceeding were badly formulated.
269. The fact of the matter is that the *Iberdrola I* tribunal held that, even though the Claimant repeatedly described the Respondent’s measures which it sought to impugn as breaches of the Treaty, the dispute brought by the Claimant did not fall within the subject matter scope of the arbitration agreement, and as a result, the tribunal lacked jurisdiction *ratione materiae*. This is a final and binding decision that may carry *res judicata* effects, if the requirements for the application of the *res judicata* principle are met, which is the question to which the Tribunal now turns.

**(ii) Requirements for *res judicata***

270. The Parties agree – and rightly so – that under international law the Tribunal must apply the triple identity test to determine whether the *Iberdrola I* Award has *res judicata* effect for these proceedings ((1) below).<sup>413</sup> They disagree however on whether this test is met here. In this context, the Respondent advocates for an autonomous and flexible approach to the triple identity test.

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<sup>412</sup> The failure to give the required waiver as prescribed in Chapter Eleven of the North American Free Trade Agreement (“NAFTA”) is what precluded the claimant from pursuing its first claim in *Waste Management, Inc. v. United Mexican States*. After the first claim was dismissed, the claimant started a new arbitration request, this time accompanied by the required waiver in proper form. This led the second tribunal to conclude that the defect in *Waste Management I* had been remedied and that the claim could now be heard, thus, *res judicata* did not bar the second proceedings (*see Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal of 26 June 2002 on Mexico’s Preliminary Objection concerning the Previous Proceedings (Exh. CLA-022)).

<sup>413</sup> Mem., ¶¶ 176-177; CM, ¶ 33.

271. Further, the Claimant submits that there is an additional requirement for *res judicata* to apply: the claims raised in the first proceeding must have been “definitively settled” by the previous decision ((2) below).

**(1) Is the triple identity test met?**

272. To establish whether *res judicata* is met, international courts and tribunals<sup>414</sup> have consistently applied the triple identity test, which requires (i) identity of parties (*personae*), (ii) identity of object (*petitum*), and (iii) identity of cause of action or legal grounds (*causa petendi*) between the first and second proceedings.<sup>415</sup> As the ILA explains, for an award to have conclusive and preclusive effects:

- i. “[I]t must have been rendered between the same parties as the parties in the further arbitration proceedings” (identity of parties);<sup>416</sup>
- ii. “[T]he same claim or relief must be sought in the further arbitration proceedings” (identity of object or subject matter);<sup>417</sup> and
- iii. “[T]he claims or relief sought in further arbitration proceedings must be based on the same cause of action as in the prior arbitration proceedings”.<sup>418</sup>

273. The ILA also adds a fourth requirement: “the prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat”.<sup>419</sup> The Parties have not specifically discussed this

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<sup>414</sup> See, for instance, *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Judgment, 1927 PCIJ (Ser. A) No. 13, Dissenting Opinion of Judge Anzilotti, pp. 23-24 (16 December) (Exhs. CLA-011; RLA-008); *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 55 (17 March) (Exhs. CLA-007; RLA-022); A. Reinisch, “The Use and Limits of *Res judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes”, *The Law and Practice of International Courts and Tribunals* 3 (2004) pp. 61-62 (Exh. RLA-033); K. Hobér, “*Res Judicata* and *Lis Pendens* in International Arbitration”, *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 2014) p. 121 (Exh. CLA-025); F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Interim Report on *Res judicata* and Arbitration”, *International Law Association Conference on International Commercial Arbitration* (2004) pp. 36, 56 (Exh. CLA-010); F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Final Report on *Res judicata* and Arbitration”, *Seventy-second International Law Association Conference on International Commercial Arbitration* (2006) ¶ 29 (Exh. CLA-038).

<sup>415</sup> Mem., ¶¶ 176-177; CM, ¶ 33.

<sup>416</sup> F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Final Report on *Res judicata* and Arbitration”, *Seventy-second International Law Association Conference on International Commercial Arbitration* (2006) ¶ 44 (Exh. CLA-038).

<sup>417</sup> *Id.*, ¶ 42.

<sup>418</sup> *Id.*, ¶ 43.

<sup>419</sup> *Id.*, ¶ 29. The Report decided not to retain an additional requirement previously identified by the Interim Report on *Res judicata*, namely that “the arbitration proceedings in which the *res judicata* issue is raised, must pertain to the same legal order as the prior award”. *Id.*, ¶¶ 29-30.

requirement; however, it is indisputable that the *Iberdrola I* Award is final, binding, and capable of recognition in Switzerland, as was already mentioned above.

274. As the Parties recognize, Swiss courts apply a similar test to determine if a previous decision is *res judicata*, but limited to the following two requirements: (i) identity of the parties and (ii) identity of the subject matter of the dispute.<sup>420</sup> The identity of the subject matter is defined by reference to the facts and the request for relief without requiring identity of cause of action.<sup>421</sup> In other words, it is sufficient that the same parties have already submitted the same request for relief based on the same facts to another court.<sup>422</sup>
275. Applying the more stringent test found in international law, the Tribunal finds that there is triple identity between the *Iberdrola I* proceedings and the present proceedings for the following reasons. If that test is met, the requirements of Swiss law will necessarily be fulfilled too.
276. *First*, it is undisputed that there is identity of parties, as both cases involve Iberdrola Energía S.A. as the claimant and the Republic of Guatemala as the respondent.
277. *Second*, it is also undisputed that there is identity of object or *petitum*.<sup>423</sup> The *Iberdrola I* Award being a decision on jurisdiction, the question arises whether one must focus on the *petitum* on the merits or on the (implied) request to uphold jurisdiction over the dispute. In reality, both probably should be addressed: jurisdiction, because the present objection aims at a jurisdictional decision, and merits, and because jurisdiction can only be defined by reference to a substantive dispute.
278. Starting with the substantive *petitum*, in both cases the Claimant requested the tribunal to hold that Guatemala had violated Article 3 of the Treaty and to order the State to pay compensation. Specifically, in *Iberdrola I*, the Claimant sought the following relief with regard to the merits:

*Por todo lo anterior, Iberdrola solicita del Tribunal:*

- I. *Que declare que la República de Guatemala ha incumplido sus obligaciones internacionales por haber infringido las disposiciones del Tratado.*
- II. *Específicamente, que declare que las acciones atribuidas a Guatemala constituyen, alternativamente, una expropiación según el art. 5 del Tratado o un incumplimiento de sus obligaciones de protección de la inversión de Iberdrola conforme al art. 3 del Tratado, en particular de*

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<sup>420</sup> C-PHB2, ¶¶ 13, 28; R-PHB2, ¶¶ 11-13.

<sup>421</sup> B. Berger & F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd ed., Stämpfli 2015) ¶¶ 1649-1651 (Exh. CLA-184).

<sup>422</sup> SFSC decision 4A\_508/2013 of 27 May 2014, ¶ 3.3 (Exhs. RLA-127; RLA-182) (referring to ATF 139 III 126).

<sup>423</sup> The Respondent has argued as much (Mem., ¶¶ 186-189) and the Claimant has not disputed it.

*otorgar un tratamiento justo y equitativo a las inversiones de Iberdrola, y/o de proporcionarles plena protección y seguridad jurídica, y/o de no interferir en la inversión mediante medidas arbitrarias, y/o de observar sus obligaciones contraídas por escrito en relación con las inversiones. [...].*<sup>424</sup>

279. In turn, in its Notice of Arbitration in this case, the Claimant requested the following request for relief:

*Por las razones expuestas, la Demandante solicita al Tribunal que se constituya que: [...]*

*(ii) Declare que Guatemala ha violado el artículo 3 del Tratado, en particular las obligaciones de otorgar un tratamiento no menos favorable que el requerido por el Derecho internacional, de otorgar un trato justo y equitativo, y de no adoptar medidas arbitrarias o discriminatorias; [...].*<sup>425</sup>

280. With regard to the jurisdictional *petitum*, the Claimant has requested the tribunal in both cases to assert jurisdiction over the dispute on the basis of Article 11(1) of the Treaty.<sup>426</sup> Further, in both cases the factual matrix is identical.<sup>427</sup> This implies that the Claimant requested the *Iberdrola I* tribunal to uphold its jurisdiction in relation to claims, facts and an arbitration agreement all of which are identical to those invoked in the case at hand.
281. *Third*, there is identity of cause of action. The legal ground invoked by the Claimant as basis for the Tribunal's jurisdiction in both cases is identical, namely Article 11(1) of the Treaty. More specifically, the basis for the Tribunal to assess its jurisdiction is the Parties' consent to submit their investment dispute to arbitration, which results from the Respondent's offer found in Article 11(1) of the Treaty and from the Claimant's acceptance of such offer through the filing of the Request for Arbitration. The fact that the *Iberdrola I* arbitration was conducted under different arbitration rules than the present case is not relevant. Indeed, the jurisdiction of the Tribunal does not arise from the arbitration rules chosen by the Claimant, but from Article 11(1) of the Treaty and the Parties' consent to arbitrate.
282. There is also identity of cause of action with regard to the merits. In both cases, the Claimant has invoked the same legal basis for the claims, namely, a breach of Article 3 of the Treaty. While the Claimant admits so much, it argues that there is no identity of

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<sup>424</sup> Iberdrola's Post-Hearing Brief in *Iberdrola I*, 17 October 2011, pp. 121-122 (Exh. R-030).

<sup>425</sup> Notice of Arbitration, ¶ 174.

<sup>426</sup> Iberdrola's Counter-Memorial on Objections to Jurisdiction and Admissibility in *Iberdrola I*, 25 February 2010, p. 55 (Exh. R-032); CM, ¶ 315.

<sup>427</sup> CM, ¶ 88 (acknowledging that "the different claims arise from the same factual matrix"); *see also* Reinisch Report, ¶ 19 ("It is obvious and undeniable that the two proceedings which involve the same parties are closely linked. In fact, the same claimant is bringing the current proceedings against the same Respondent State, referring essentially to the same facts.")



cause of action,<sup>428</sup> because the *Iberdrola I* tribunal held that the claims were grounded on national law, as opposed to international law.

283. The Tribunal cannot uphold that argument. To determine whether there is identity of cause of action, the legal authorities confirm that what must be compared are the legal grounds *relied upon* by the claimant in support of the relief sought.<sup>429</sup> The characterization of that legal ground by the *Iberdrola I* Award is thus irrelevant. As the Respondent argues, the requirement of identity of cause of action bars the Claimant from raising the same claim a second time “in a new light.”<sup>430</sup> Indeed, as stated above, the way in which the Claimant previously sought to argue its claims of breach of international law cannot now be characterized as a curable jurisdictional defect.
284. The Respondent also argues in the alternative that what matters is whether the claims in *Iberdrola I* were based on the facts alleged in this second arbitration,<sup>431</sup> which the Claimant has admitted is the case.<sup>432</sup> It submits that “the contemporary trend in international arbitration is an autonomous and flexible approach to *res judicata*”<sup>433</sup> and that “[i]nstead of rigid identity tests, an overall assessment of the parties involved, the legal grounds invoked, the objects pursued and the underlying facts will be necessary in order to avoid a multiplication of proceedings with its inherent danger of conflicting outcome”.<sup>434</sup> While the Claimant has also endorsed a less formalistic approach to *res judicata*,<sup>435</sup> it disagrees with the Respondent’s attempt to focus only on the parties to the

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<sup>428</sup> C-PHB2, ¶¶ 32-34.

<sup>429</sup> K. Hobér, “*Res Judicata* and *Lis Pendens* in International Arbitration”, *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff Publishers 2014) pp. 304-305 (Exh. CLA-025) (“The third element of the identity test is identity of legal grounds. When reference is made to “legal ground” (*causa petendi*), it is a reference to the legal principle, or rule, and/or the statutory or treaty provision relied on in support of a prayer for relief (*petitum*). If the same legal ground is relied upon in the second dispute, it will be barred because of *res judicata*”); S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford University Press 2016) ¶ 2.120 (“The cause is the foundation relied upon by the claimant in support of a claim [...] More specifically, the cause is often described as a claim’s legal foundation. There is thus identity of cause if the same rights and legal arguments are relied upon in both proceedings”).

<sup>430</sup> Reply, ¶ 44, citing B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius Publications 1987) p. 346 (Exh. RLA-116).

<sup>431</sup> Reply, ¶¶ 48-51.

<sup>432</sup> CM, ¶ 88 (acknowledging that “the different claims arise from the same factual matrix”); *see also* Reinisch Report, ¶ 19 (“It is obvious and undeniable that the two proceedings which involve the same parties are closely linked. In fact, the same claimant is bringing the current proceedings against the same Respondent State, referring essentially to the same facts.”).

<sup>433</sup> Reply, ¶ 34, citing B. Hanotiau, “*Res Judicata* and the ‘Could Have Been Claims’”, in: N. Kaplan & M. J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) pp. 294-295 (Exh. RLA-117).

<sup>434</sup> Reply, fn. 44, citing A. Reinisch, “The Use and Limits of *Res judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes”, *The Law and Practice of International Courts and Tribunals* 3 (2004) p. 72 (Exh. RLA-033).

<sup>435</sup> Rejoinder, ¶¶ 42-43.

dispute and the underlying facts, arguing that the scope of *res judicata* “is also limited by the object of the claims (the relief sought) and fundamentally by their legal basis (i.e., the *causa petendi*).”<sup>436</sup>

285. Having held that the formal triple identity test is met, the Tribunal can dispense with entering this debate. However, for the sake of completeness, it notes that if it were to adopt a less formalistic test, it would likewise reach the conclusion that the subject matter of the dispute is identical.

**(2) Was the Tribunal’s jurisdiction *ratione materiae* “definitively settled” by the *Iberdrola I* tribunal?**

286. In reliance on ICJ jurisprudence,<sup>437</sup> the Claimant asserts that a further requirement must be fulfilled for the *Iberdrola I* Award to carry *res judicata* effects over the present proceedings: the claims brought in the later proceedings must have been finally decided in the prior action.<sup>438</sup> According to the Claimant’s expert Prof. Reisman, the application of *res judicata* in public international law “is confined to the preclusion of claims that not only have been raised but have been decided with finality in the earlier judgment”.<sup>439</sup> As a result, the *res judicata* objection requires the Tribunal “to review in detail the prior award in order to determine whether or not the object of the claim or claims before it had been definitively decided by the prior tribunal.”<sup>440</sup>
287. For the Claimant, the task is to “compar[e] what was decided in the *Iberdrola I* award and what claims have been submitted here”.<sup>441</sup> To do so, it adds that “it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgement in question”.<sup>442</sup> In this respect, *Iberdrola* contends that “the tribunal in *Iberdrola I* did not decide any treaty claims, characterizing the claims before it as Guatemalan law claims”.<sup>443</sup> The Respondent denies that the *res judicata* authority of an

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<sup>436</sup> *Id.*, ¶ 68.

<sup>437</sup> See *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶¶ 59, 61, 75-76 (17 March) (Exhs. CLA-007; RLA-022); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment on Jurisdiction of the Court, ICJ Reports 2018, ¶¶ 68-69 (2 February) (Exh. CLA-012).

<sup>438</sup> CM, ¶ 38.

<sup>439</sup> Reisman Report, ¶ 53.

<sup>440</sup> *Id.*, ¶ 54.

<sup>441</sup> Rejoinder, ¶ 106.

<sup>442</sup> CM, ¶ 39, citing *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 61 (17 March) (Exhs. CLA-007; RLA-022) (emphasis omitted).

<sup>443</sup> Rejoinder, ¶ 106.

award is limited to what the tribunal decided “expressly or by necessary implication”,<sup>444</sup> but does not dispute that the Tribunal must establish what the first tribunal definitively resolved. The Respondent further accepts that the reasoning behind the operative part of the award must be taken into account for purposes of establishing the scope of *res judicata*.<sup>445</sup>

288. The Claimant is correct in pointing out that under international law *res judicata* will only bar a second adjudication if the claims before the second court or tribunal have been “definitively settled” in the first proceedings. The ICJ has recalled this requirement in two recent decisions, *Nicaragua v. Colombia* and *Costa Rica v. Nicaragua*, in the following terms:

It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.<sup>446</sup>

[F]or *res judicata* to apply in a given case, the Court ‘must determine whether and to what extent the first claim has already been definitively settled’ [...] for ‘[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it’.<sup>447</sup>

289. It is equally correct, as both Parties agree, that not only the operative part of a judgment or award has *res judicata* authority, but that the second court or tribunal may consult the reasons to elucidate the meaning of the operative part.<sup>448</sup> This is particularly true in the case of negative decisions on jurisdiction, where the operative part may not state which jurisdictional requirement was deemed to be lacking.
290. Accordingly, the Tribunal must now review the operative part of the *Iberdrola I* Award, if necessary in light of the relevant reasons, to establish whether the claims raised in this arbitration were definitively settled in the ICSID proceedings.

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<sup>444</sup> Reply, ¶ 55. See CM, ¶ 35, citing *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment on Jurisdiction of the Court, ICJ Reports 2018, ¶ 68 (2 February) (Exh. CLA-012).

<sup>445</sup> Mem., ¶ 196; Reply, ¶ 56. Both Parties acknowledge that, under Swiss law, only the operative part of a decision has *res judicata* effect, but that a subsequent court or tribunal may take into consideration the reasoning to interpret the operative part (C-PHB2, ¶ 28; R-PHB2, ¶¶ 21-24).

<sup>446</sup> *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 59 (17 March) (Exhs. CLA-007; RLA-022) (emphasis added).

<sup>447</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment on Jurisdiction of the Court, ICJ Reports 2018, ¶ 68 (2 February) (Exh. CLA-012) (emphasis added).

<sup>448</sup> *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 61 (17 March) (Exhs. CLA-007; RLA-022).

291. The operative part of the *Iberdrola I* Award provides as follows:

*El Tribunal Arbitral, de conformidad con los Artículos 41, 48 y 61 del Convenio del CIADI y las Reglas 28, 41 y 47 de las Reglas de Arbitraje, por unanimidad resuelve:*

*1. Aceptar la excepción a la jurisdicción del CIADI y a la competencia del Tribunal presentada por la República de Guatemala, con respecto a las peticiones de la Demandante de que se declare la ocurrencia de una expropiación; la violación del estándar de trato justo y equitativo; la violación de la obligación de proporcionar plena protección y seguridad; la violación de la obligación de no interferir en la inversión y la obligación de Guatemala de cumplir las obligaciones contraídas en relación con las inversiones de la Demandante;*

*2. Denegar la pretensión de la Demandante de que la República de Guatemala incurrió en este caso en actos de denegación de justicia;*

*3. Declarar que la Demandante debe asumir la totalidad de sus propios costos y la totalidad de los costos en que incurrió la Parte Demandada que ascienden a la suma de USD \$5.312.107.<sup>449</sup>*

292. As is evident from the language just quoted, the *Iberdrola I* Award granted the Respondent's objection to jurisdiction over the claims for expropriation, FET, full protection and security, and the impairment and umbrella clauses. It is clear that the claims over which jurisdiction is denied are Treaty claims. To understand whether the denial is due to a defect that can be remedied,<sup>450</sup> one must turn to the body of the Award.

293. The *Iberdrola I* Award records that the Respondent raised a defense of lack of jurisdiction *ratione materiae* because the dispute was contractual and regulatory in nature and did not concern matters governed by the Treaty as required by the Treaty's dispute settlement clause:

*a. Iberdrola somete al Tribunal un desacuerdo cuya base esencial es regulatoria y contractual y que no puede calificarse como controversia según el Tratado. Consecuentemente, no hay jurisdicción ratione materiae.*

[...]

*Según la Demandada, sus excepciones se refieren a la jurisdicción ratione materiae del Tribunal y se basan, en gran parte, en el hecho de que la Demandante no ha sometido al Tribunal una reclamación 'respecto a cuestiones reguladas en el Tratado,' como dispone su Artículo 11. [...] <sup>451</sup>*

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<sup>449</sup> *Iberdrola I* Award, p. 127 (Exh. C-004).

<sup>450</sup> See ¶¶ 266-268 above.

<sup>451</sup> *Iberdrola I* Award, ¶¶ 259-260 (Exh. C-004).

294. A review of the analysis contained in the *Iberdrola I* Award shows that that tribunal granted this objection. It held that the facts as alleged, if proven, could not constitute Treaty breaches.<sup>452</sup> It reached this conclusion because, in its opinion, Iberdrola’s claims, except for the denial of justice claim which was adjudicated, concerned matters of Guatemalan law.<sup>453</sup> Not being Treaty claims, the relief sought by the Claimant fell outside the scope of the arbitration provision embodied in Article 11 of the Treaty, which applies only to disputes in relation to investments between a Contracting Party and an investor of the other Contracting Party “*respecto a cuestiones reguladas por el presente Acuerdo*”. The *Iberdrola I* tribunal made its determination after Iberdrola was given a full opportunity to make its case both before, during and after the hearing. The tribunal even expressly requested Iberdrola for a statement in its post-hearing brief about “*las supuestas violaciones al Tratado que se habían dado, en qué consistían y mediante cuáles actos específicos se habían concretado*”.<sup>454</sup>
295. To fully understand why the *Iberdrola I* tribunal declined jurisdiction, it is helpful to quote the relevant passages of the analysis in full:

[349] *Como bien se puede observar en los diferentes escritos y alegaciones formuladas a lo largo de este arbitraje, la sustentación de la Demandante de la alegada violación de Guatemala de los estándares del Tratado se basa en las diferencias de interpretación de las normas de la República de Guatemala y de las fórmulas económicas para calcular el VAD que tuvieron EEGSA y la CNEE, durante el proceso de revisión tarifaria para el quinquenio 2008 - 2013. Más allá de etiquetar las actuaciones de la Demandada, la Demandante no presenta un razonamiento claro y concreto sobre cuáles son, a su juicio, los actos de imperio de la República de Guatemala que, en derecho internacional, podrían constituir violaciones del Tratado. En las alegaciones de la Demandante, el Tribunal no encuentra más que una discusión de derecho local, que no tiene competencia para retomar y volver a resolver como si fuera una corte de apelación. [...]*

[350] *Para el Tribunal Arbitral es claro, como se expondrá más adelante, que un tribunal internacional no tiene competencia por el solo hecho de que una de las partes del proceso afirme que el derecho internacional ha sido vulnerado. En un caso como el planteado por la Demandante en este arbitraje, el Tribunal únicamente tendría jurisdicción si esta hubiera demostrado que los hechos que alegó, de ser probados, podrían constituir una violación del Tratado. Según se analiza a continuación, la Demandante no demostró esa premisa básica y se limitó a someter a la consideración del Tribunal una controversia de derecho nacional guatemalteco.*

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<sup>452</sup> *Id.*, ¶ 350.

<sup>453</sup> *Id.*, ¶¶ 351, 354 (“*más allá de la calificación que la Demandante dio a los temas controvertidos, la parte sustancial de esos temas y, sobre todo, de las controversias que la Demandante pide al Tribunal que resuelva, se refieren al derecho guatemalteco*”).

<sup>454</sup> *Id.*, ¶ 353.

[351] *Como lo afirmó el Tribunal y lo acredita el expediente, más allá de la calificación que la Demandante dio a los temas controvertidos, la parte sustancial de esos temas y, sobre todo, de las controversias que la Demandante pide al Tribunal que resuelva, se refieren al derecho guatemalteco. En los distintos escritos presentados durante el arbitraje, las Partes debatieron in extenso sobre la forma en la que debían interpretarse determinadas disposiciones del derecho guatemalteco, y particularmente, las disposiciones de la LGE y el RLGE.*

[...]

[353] *Por la forma en que se desarrollaron el debate y las audiencias y por los temas que se plantearon, este proceso semejaba más un arbitraje comercial internacional que uno de inversión. Por ello, el Tribunal de manera expresa solicitó a las Partes un pronunciamiento sobre las supuestas violaciones al Tratado que se habían dado, en qué consistían y mediante cuáles actos específicos se habían concretado. En su Escrito Posterior a la Audiencia, la Demandante, si bien vuelve a citar las normas del Tratado y a referirse a decisiones de otros tribunales internacionales, se siguió centrando en las diferencias de interpretación, según el derecho guatemalteco, de los temas tantas veces mencionados en el presente laudo. El Tribunal reitera que más allá de etiquetar las conductas de la CNEE como violatorias del Tratado, no planteó la Demandante una controversia bajo el Tratado y el derecho internacional, sino un debate técnico, financiero y jurídico sobre disposiciones del derecho del Estado demandado.*

[...]

[355] *En resumen, la Demandante pide al Tribunal que actúe como juez de instancia para definir el debate que se dio de acuerdo con el derecho guatemalteco y que le conceda la razón en su interpretación de cada uno de los asuntos debatidos, de manera que, a partir de esa decisión de este Tribunal Arbitral, la Demandante pueda construir y reclamar una violación de los estándares del Tratado.*

[356] *Para el Tribunal es evidente que la controversia planteada por la Demandante en este arbitraje versa sobre derecho nacional guatemalteco y que la simple mención del Tratado y la calificación de las actuaciones de Guatemala que hace Iberdrola, conforme a los estándares de ese Tratado, no basta para que la controversia se convierta en una sobre “cuestiones reguladas” por el Tratado.*

[357] *Según se señaló, la Demandante no demostró que si su posición en cuanto a las diferencias de derecho local que originaron este conflicto fuera la correcta, la consecuencia sería que la Demandada vulneró el Tratado o el derecho internacional. Tal demostración es necesaria para que el CIADI pueda tener jurisdicción y el Tribunal competencia. Así parece reconocerlo la propia Demandante, quien afirmó que “... no se trata de demostrar elementos suficientes para que el Tribunal decida preliminarmente si hay o no una violación de las normas del Tratado (eso es cosa del fondo), sino que se trata de comprobar que los hechos*

*alegados, de ser ciertos, podrían constituir una violación de las normas del Tratado”.*

[358] *El debate de derecho internacional que se dio durante este proceso fue meramente teórico, referente a la procedencia de la aplicación a este caso de lo resuelto en algunos laudos que la Demandante citó, así como sobre el contenido de los estándares de protección. Sin embargo, en definitiva, no hay en los escritos de la Demandante una conexión entre los hechos que alega y los estándares que invoca, ni una materialización del hecho o hechos de imperio que, a la luz del derecho internacional, podrían haber sido considerados violaciones de sus derechos según el Tratado.*

**English translation:**

[349] As may be observed in the various submissions and pleadings provided throughout this arbitration, the Claimant’s foundation for the alleged violation of the Treaty standards by Guatemala is based on the discrepancies between EEGSA and the CNEE during the tariff-setting process for the 2008-2013 term on the interpretation of the norms of the Republic of Guatemala and the economic formulas to calculate the VAD. Beyond labelling the Respondent’s actions, the Claimant does not present a clear and specific reasoning as to which are, in its view, the acts of *imperium* of the Republic of Guatemala which, under international law, could amount to Treaty violations. In the Claimant’s pleadings, the Tribunal can only find a discussion about domestic law, which it has no competence to resume and resolve again as if it were a court of appeals. [...]

[350] It is clear to the Tribunal, as will be explained below, that an international tribunal does not become competent merely because one of the parties to the proceedings states that there has been a breach of international law. In a case as the one raised by the Claimant in this arbitration, the Tribunal would only have jurisdiction had the Claimant demonstrated that the facts it alleged, if proven, could amount to a Treaty violation. As analyzed below, the Claimant did not demonstrate this basic premise and simply submitted a dispute about Guatemalan domestic law for the Tribunal’s consideration.

[351] As stated by the Tribunal and reflected on the record, beyond the Claimant’s characterization of the disputed matters, the essential part of these matters and, especially, of the disputes that the Claimant asks the Tribunal to resolve, concern Guatemalan law. In the various written submissions filed during the arbitration, the Parties discussed broadly how certain provisions of Guatemalan law, and particularly, of the LGE and the RLGE, should be interpreted.

[...]

[353] Based on how the discussion and the hearings developed and the matters that were raised, this proceeding resembled an international commercial arbitration rather than an investment one. Thus, the Tribunal expressly requested a statement from the Parties on the alleged

violations of the Treaty that had taken place, what they entailed and through which specific actions they had materialized. In its Post-Hearing Brief, the Claimant, while again quoting the provisions of the Treaty and referring to the decisions of other international tribunals, continued focusing on the differing interpretations, according to Guatemalan law, of the matters repeatedly mentioned in the present award. The Tribunal reiterates that beyond labelling the CNEE's conduct as a Treaty violation, the Claimant did not bring a dispute under the Treaty and international law, but rather a technical, financial and legal debate on the legal provisions of the respondent State.

[...]

[355] In summary, the Claimant asks the Tribunal to act as an instance judge to settle the debate that took place in accordance with Guatemalan law and that it sides with the Claimant's interpretation of each of the disputed matters, such that, based on that decision of this Arbitral Tribunal, the Claimant may build and claim a violation of the Treaty standards.

[356] It is evident to the Tribunal that the dispute raised by the Claimant in this arbitration revolves around Guatemalan domestic law and that simply mentioning the Treaty and characterizing Guatemala's actions as Iberdrola has done, pursuant to the standards in that Treaty, is insufficient for the dispute to become one about "matters governed" by the Treaty.

[357] As was noted, the Claimant did not demonstrate that if its position with regard to the discrepancies on domestic law that gave rise to this conflict was correct, the consequence would be that the Respondent breached the Treaty or international law. Such demonstration is necessary for ICSID to have jurisdiction and for the Tribunal to be competent. The Claimant seems to acknowledge as much by stating that "... it is not about proving sufficient elements for the Tribunal to preliminarily decide whether or not there is a violation of the provisions in the Treaty (that is a question for the merits), but rather about verifying that the alleged facts, if true, could amount to a violation of the provisions in the Treaty".

[358] The debate on international law that took place during this proceeding was merely theoretical, related to the appropriateness of applying the findings of some awards that the Claimant cited to this case, as well as about the content of the protection standards. However, in sum, there is no connection in the Claimant's written submissions between the facts it alleges and the standards it invokes, nor there is an embodiment of the act or acts of *imperium* which, in light of international law, could have been considered as violations of its rights according to the Treaty.<sup>455</sup>

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<sup>455</sup> *Id.*, ¶¶ 349-351, 353, 355-358 (Tribunal's translation, emphasis added).



296. The excerpts quoted demonstrate that having heard the evidence, the *Iberdrola I* tribunal *decided* that these claims were not capable of amounting to Treaty breaches and consequently did not fall within the ambit of the Treaty’s arbitration clause. Hence, the matter “definitively settled” in the *Iberdrola I* Award, to use the ICJ’s words, is the existence of jurisdiction pursuant to Article 11 of the Treaty over the same Treaty claims as the ones before this Tribunal.
297. In spite of the content of the *Iberdrola I* Award just described, the Claimant contends that the findings in that decision were premised on the manner in which the Claimant had formulated its claims. According to the Claimant, the *Iberdrola I* tribunal “did not conclude that the factual matrix at the origin of the dispute could not give rise to treaty claims, but that, as formulated by Iberdrola, the claims in *Iberdrola I* were local law claims premised on the violation of local law with respect to which the tribunal lacked jurisdiction to make a ruling.”<sup>456</sup>
298. That contention is ill-conceived. As was already stressed, the *Iberdrola I* tribunal considered that the Claimant did not establish that the facts, as alleged, could amount to violations of the Treaty.<sup>457</sup> More specifically, the tribunal observed that “in the Claimant’s written submissions there [was] no connection between the facts it alleged and the standards it invoked, nor did they point to the act or acts of *imperium* that, pursuant to international law, could have been characterized as violations of its rights under the Treaty.”<sup>458</sup> While the tribunal’s reasoning was based on a lack of “connection” between the facts and the treaty breaches involved, the conclusion was clear: the Claimant failed to show that the facts alleged could constitute breaches of the Treaty. The *Iberdrola I* tribunal’s finding was the result of an assessment of the factual matrix of the case. It was not based on the formulation of the claims. In any event, even if the *Iberdrola I* tribunal had been influenced by that formulation, that would make no difference to the outcome of the present proceedings, because the formulation of a claim is not a curable defect, and the claims are the same treaty claims in both cases, as was established earlier.
299. For the avoidance of doubt, the Tribunal emphasizes that its conclusion is in conformity with the ICJ decisions in *Nicaragua v. Colombia* and *Costa Rica v. Nicaragua*.
300. In its 2016 judgment in the first case, the Court considered and rejected Colombia’s objection to Nicaragua’s claim based on the alleged *res judicata* effect of the Court’s prior 2012 judgment in which the Court determined that it was “not in a position to delimit” a continental shelf boundary.<sup>459</sup> The Court framed the issue before it as a question of admissibility in the following terms:

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<sup>456</sup> CM, ¶ 122.

<sup>457</sup> *Iberdrola I* Award, ¶ 350 (Exh. C-004).

<sup>458</sup> *Id.*, ¶ 358 (Tribunal’s translation).

<sup>459</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, ¶ 129 (19 November).

In particular, the Court will determine whether subparagraph 3 of the operative clause of its 2012 Judgment must be understood as a straightforward dismissal of Nicaragua's request for lack of evidence, as Colombia claims, or a refusal to rule on the request because a procedural and institutional requirement had not been fulfilled, as Nicaragua argues.<sup>460</sup>

301. The clear implication of this passage was the Court's acceptance that if it had earlier considered the claim and dismissed it for lack of evidence, *res judicata* would bar a second attempt by Nicaragua to seek adjudication. If, on the other hand, the Court had previously refused to rule on the request because a procedural and institutional requirement had not been fulfilled, *res judicata* would not bar the second submission.
302. Seeking to establish the meaning of the 2012 judgment, the Court focused its analysis on whether or not Nicaragua had previously put the Court into the position of being able to adjudicate Nicaragua's claims namely by inquiring whether Nicaragua had complied with the precondition in the United Nations Convention on the Law of the Sea ("UNCLOS") for seeking a delimitation of the continental shelf between Nicaragua and Colombia in the area beyond 200 nautical miles of the Nicaragua coast. The Court looked beyond the *dispositif* of the 2012 Judgment and reviewed the reasoning in order to ascertain whether it was *res judicata*.
303. This review led the Court to conclude that it had dismissed Nicaragua's claim in 2012 "because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS".<sup>461</sup> In other words, "delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its continental shelf".<sup>462</sup> This information had not been provided in 2012, with the result that "[t]he Court thus did not settle the question of delimitation in 2012, because it was not, at that time, in a position to do so".<sup>463</sup> In the meantime, in 2013, Nicaragua had provided the missing information. Consequently, the Court considered that "the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua [...] ha[d] been fulfilled in the present case", i.e. in the proceedings leading to the 2016 judgment.<sup>464</sup>
304. This makes clear that the Court accepted Nicaragua's submission of the continental shelf delimitation in 2016 because it could *not* have considered it in 2012 due to Nicaragua's non-compliance with UNCLOS' precondition to the submission of such a claim. Having complied with that condition precedent, Nicaragua's right to have its claim heard by the

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<sup>460</sup> *Delimitation of the Continental Shelf (Nicaragua v. Colombia)*, Judgment on Preliminary Objections, ICJ Reports 2016, ¶ 74 (17 March) (Exhs. CLA-007; RLA-022).

<sup>461</sup> *Id.*, ¶ 84. See also *id.*, ¶¶ 79-83.

<sup>462</sup> *Id.*, ¶ 85.

<sup>463</sup> *Id.*, ¶ 85.

<sup>464</sup> *Id.*, ¶¶ 86-87.

Court was perfected. In other words, the Court was now put into a position where it could resolve what it could not resolve in the earlier proceeding.

305. The same kind of analysis is made in the 2018 Judgment in *Costa Rica v. Nicaragua*. Costa Rica’s contention that the earlier judgment of the Court had *res judicata* effect was rejected because the issue that was put before the Court in the later case had been *excluded* from the Court’s consideration in the earlier 2015 decision. Indeed, a review of that earlier judgment showed that “no decision was taken by the Court in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded. This mean[t] that it [was] not possible for the issue of sovereignty over that part of the coast to be *res judicata*.”<sup>465</sup>
306. The situations leading the Court to deny the application of *res judicata* in these two judgments stand in stark contrast to the present case. Indeed, there is no contention in this arbitration that there was an unsatisfied condition precedent to the submission of the Treaty claims to ICSID such that the *Iberdrola I* tribunal could not have been seised of the Treaty claims now before this Tribunal (as in *Nicaragua v. Colombia*).<sup>466</sup> Nor did the *Iberdrola I* tribunal hold that part of the international law claims were carved out from its consideration and therefore left open for adjudication by the present Tribunal (as in *Nicaragua v. Costa Rica*). Hence, in reliance on the Court’s jurisprudence, the only valid conclusion in the present circumstances is that the binding force of the *Iberdrola I* Award established by Article 53 of the ICSID Convention must be recognized.

**(iii) Conclusion on *res judicata***

307. For these reasons, the Tribunal finds that the *Iberdrola I* Award definitively settled the question as to whether the claims brought in the present arbitration relate to “matters governed by the Treaty” under Article 11(1). The *Iberdrola I* tribunal’s decision was that they did not, and as a result, it determined that it had no jurisdiction *ratione materiae*. Having been definitively settled in the *Iberdrola I* Award, this Tribunal cannot revisit jurisdiction. It must therefore deny jurisdiction over the present claims.
308. The Tribunal has reached this conclusion on the basis of international law, but notes that it is not inconsistent with Swiss law. In the Tribunal’s view, the *Iberdrola I* award has the same *res judicata* effect in Switzerland as it has under international law.

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<sup>465</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment on Jurisdiction of the Court, ICJ Reports 2018, ¶ 69 (2 February) (Exh. CLA-012).

<sup>466</sup> In the investment treaty context, *see also Waste Management, Inc. v. United Mexican States [II]*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings of 26 June 2002 (Exh. CLA-022), referred to in fn. 412 above. In that case, the first tribunal held that the claimant’s failure to provide a valid waiver of other remedies as a condition for the submission of the NAFTA claim was not compliant with the requirements of NAFTA Chapter Eleven and therefore dismissed the claim. After the claimant cured the defect by filing a second waiver in proper form, the new tribunal held that it was in a position to hear the dispute on the merits because the prior tribunal had not done so – it having merely decided that no valid waiver had been given.

309. While the Tribunal has noted the Claimant’s assertions of unfairness and denial of justice, the fact is that *res judicata* pursues an important policy objective, namely, avoiding that the same issues be litigated over and over again and thereby ensuring legal certainty. As noted by the ICJ, “the principle of *res judicata* [...] protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal”.<sup>467</sup> Similarly, the ILA writes that “[t]he rationale for the *res judicata* doctrine finds expression in two Latin maxims: *Interest reipublicae ut sit finis litium* (‘it is in the public interest that there should be an end of litigation’) [and] *Nemo debet bis vexari pro una et eadem causa* (‘no one should be proceeded against twice for the same cause’)[.] The former is a matter of public policy, and the latter is a matter of private justice”.<sup>468</sup> All these objectives are relevant in international investment arbitration.
310. The contrary solution would open the floodgates. It would put into question the finality of arbitral awards and threaten legal certainty, as dissatisfied investors could file their claims multiple times in the hope that a new tribunal would uphold jurisdiction. Obviously, decisions declining jurisdiction because of a failure to meet a procedural requirement or because the ground to deny jurisdiction was specific to the first tribunal, would not bar claimants from refileing the claim once the defect had been corrected. These exceptions to the *res judicata* authority of negative jurisdictional decisions provide the necessary safeguards to ensure access to justice and avoid unfairness.
311. In light of this result, the Tribunal could end its inquiry here. However, because it is the basis of the counterclaim, the Tribunal will review the defenses linked to the fork-in-the-road clause.

**d. Fork in the road**

312. The Respondent also contends that Article 11(2) of the Treaty is a fork-in-the-road clause, and that this fork in the road has been triggered not once, but twice by the Claimant. In addition, it argues, even if the Tribunal were to find that the fork in the road has not been triggered, that Article 26 of the ICSID Convention precludes the Claimant from bringing this UNCITRAL proceeding.
313. The Claimant’s position is essentially that Article 11(2) is not a fork-in-the-road clause. Even if it was, that clause was not triggered by EEGSA’s domestic proceedings or by the *Iberdrola I* proceedings, and in any event, Article 26 of the ICSID Convention has no application here.

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<sup>467</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment on Jurisdiction of the Court, ICJ Reports 2018, ¶ 68 (2 February) (Exh. CLA-012).

<sup>468</sup> F. De Ly (Chairman) and A. Sheppard (Rapporteur), “ILA Interim Report on *Res judicata* and Arbitration”, *International Law Association Conference on International Commercial Arbitration* (2004) p. 36 (Exh. CLA-010).

314. To rule on this objection, the Tribunal must thus decide whether Article 11(2) is a fork-in-the-road provision (ii); if it was triggered (iii); and if Article 26 of the ICSID Convention precludes the present proceedings (iv). Before turning to these questions, the Tribunal will address the Claimant's preliminary argument that the Respondent's fork-in-the-road objection fails because of its alternative nature (i).

**(i) The Claimant's preliminary argument**

315. As a preliminary matter, the Claimant contends that, because the Respondent has formulated it in the alternative to its *res judicata* objection, the fork-in-the-road objection is premised on the fact that Iberdrola is presenting a different claim in this case than in prior cases. According to the Claimant, this disposes of the fork-in-the-road argument: "[i]f the claims in this arbitration are different from the ones submitted in the prior cases, Iberdrola cannot have exercised a *via electa* in relation to this dispute and claims."<sup>469</sup>

316. The Respondent opposes this submission. It agrees that, if *res judicata* and fork in the road were equivalent concepts interpreted as the Claimant does, a fork-in-the-road clause could not give rise to an alternative objection. However, it is of the view that these concepts are not equivalent, nor should they be interpreted as the Claimant proposes.

317. The Tribunal does not understand that the Respondent's fork-in-the-road objection is premised on the present claims being different from those submitted in prior cases. It understands the Respondent's position to be that the claims advanced in *Iberdrola I* are identical to the ones brought here. On this basis, the Respondent's primary objection is that the claims have already been decided and as such are precluded by *res judicata*. Alternatively, should the Tribunal reject this objection, it is the Respondent's submission that the Claimant is attempting to litigate the same dispute before a third forum in violation of Article 11(2) of the BIT.

318. The Tribunal does not consider these alternative arguments to be incompatible. As addressed below, the concepts of *res judicata* and fork in the road are different and require different elements to be met.

**(ii) Is Article 11(2) a fork-in-the-road provision?**

319. The Respondent submits that Article 11(2) of the Treaty is a fork-in-the-road clause, which provides that an investor of the other Contracting State may only have recourse to one forum to resolve a dispute that may arise with the host State under the Treaty. For Guatemala, this article provides for three alternative and at the same time exclusive dispute settlement options, which is shown by the use of the expression "at the choice of the investor" and of the conjunctive "or".<sup>470</sup>

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<sup>469</sup> CM, ¶ 227.

<sup>470</sup> Mem., ¶ 260.

320. The Claimant disputes that Article 11(2) contains a fork-in-the-road clause. It contends that this provision “does not establish that the choice of one or the other of the mechanisms by the investor shall be final” and thus “does not prevent an investor that had recourse to an infructuous *via* to go to a second forum to have its claims decided.”<sup>471</sup> The Claimant explains in this context that investment treaties usually resort to one of two limiting techniques: they either require the investor to choose a method of dispute resolution *ab initio* and estop it from subsequently relitigating the dispute in another *forum*, or they allow the investor to pursue all domestic remedies, but once the investor chooses investment arbitration, it must waive its rights to pursue another form of dispute settlement.<sup>472</sup> It notes that neither of these techniques originates from a general principle of international law, so in order to make the investor’s choice irrevocable, an express rule is needed. However, Article 11 contains no such express rule. Finally, Iberdrola draws attention to the treaty practice of both Contracting States, asserting that they later expressly so stated when they intended the choice of forum to be irrevocable.
321. To interpret Article 11(2), the Tribunal must resort to the rules of treaty interpretation contained in Articles 31 and 32 of the VCLT. Accordingly, it must interpret the Treaty in good faith giving the terms their ordinary meaning in their context and in light of the object and purpose of the Treaty.<sup>473</sup>
322. In doing so, it must consider other agreements, instruments, or rules specified in paragraphs 2 and 3 of Article 31, as well as any special meaning the Contracting Parties intended to give to a term (Article 31(4)). Under Article 32, the Tribunal may consider supplementary means of interpretation to confirm the meaning of the Treaty resulting from the application of the rules just described, or to determine its meaning if these rules lead to a result that is ambiguous or obscure, or manifestly absurd or unreasonable.
323. The relevant language is found in Article 11(2) of the Treaty and reads as follows:
- Si la controversia no pudiera ser resuelta de esta forma en un plazo de seis meses a contar desde la fecha de notificación escrita mencionada en el párrafo 1, la controversia podrá someterse, a elección del inversor:*
- a) a los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión; o
- b) a un tribunal de arbitraje ad hoc establecido de acuerdo con el Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Comercial Internacional; o
- c) al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.) [...] (Emphasis added)

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<sup>471</sup> Rejoinder, ¶ 168. (NB: The Claimant first made this argument in its Rejoinder).

<sup>472</sup> *Id.*, ¶ 169, citing C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive principles* (2nd ed., Oxford 2017) ¶ 4.68 (Exh. CLA-075).

<sup>473</sup> VCLT, Art. 31(1) (Exh. RLA-044).

**English translation:**

If the dispute cannot be resolved in this manner within a term of six months from the date of written notice mentioned in paragraph 1, the dispute may be submitted, at the choice of the investor:

a) to the competent courts of the Contracting Party in whose territory the investment was made; or

b) to an ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or

c) to the International Centre for Settlement of Investment Disputes (ICSID) [...]. (Emphasis added)

324. Looking first at the ordinary meaning of the terms, it is clear that the text gives the investor a choice. It is equally clear that it does not expressly say whether an investor who has made use of the right to choose with respect to a given dispute can later make another choice or not for the same dispute. In other words, it does not explicitly state whether the choice afforded is revocable or irrevocable. Yet, the ordinary meaning of the terms “*a elección del inversor*” and of the conjunction “*o*” implies that the investor must choose one or the other mechanism, as opposed to two or three.
325. According to the Dictionary of the Spanish Royal Academy, the term “*elección*” (“choice”) is defined as the action and effect of choosing (“*elegir*”).<sup>474</sup> The Dictionary defines the verb “*elegir*” as “[*e*]scoger o preferir a alguien o algo para un fin”,<sup>475</sup> i.e. to choose or prefer someone or something for a purpose. The term “*escoger*” does not help much, as it is a synonym of “*elegir*”, but the term “*preferir*” (to prefer) is telling, as it implies a selection whereby one option is preferred to others, which are not selected. The use of the disjunctive conjunction “or” (“*o*”) confirms and reinforces the alternative nature of this choice, as it “denotes a difference, separation or alternative between two or more persons, things or ideas”, or is used “before each of two or more opposed terms”.<sup>476</sup> Or in simpler terms, “or” is not “and”. Hence, the Tribunal comes to the conclusion that the ordinary meaning of the words signifies that, once an investor has made a choice, he cannot make another one for the same dispute. The right to choose a forum afforded by the Treaty has been exercised and is thereby exhausted. While the clause does not expressly say that the choice cannot be renewed or is irrevocable, that is the unavoidable consequence of the words used.

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<sup>474</sup> “*elección*”, *Diccionario de la lengua española de la Real Academia Española* (“1. f. Acción y efecto de elegir”). The Tribunal considers the other meanings listed to be inapplicable (see <<https://dle.rae.es/?id=ETNnC6h>>).

<sup>475</sup> “*elegir*”, *Diccionario de la lengua española de la Real Academia Española* (“1. tr. Escoger o preferir a alguien o algo para un fin”).

<sup>476</sup> “*o*”, *Diccionario de la lengua española de la Real Academia Española* (“1. conj. disyunt. Denota diferencia, separación o alternativa entre dos o más personas, cosas o ideas. [...] 2. conj. disyunt. U[sada] generalmente ante cada uno de dos o más términos contrapuestos.”).

326. The context of the provision does not lead to a different conclusion. In fact, there is not much that the Tribunal can turn to as context: there are no other pertinent Treaty clauses; the Treaty has no annexes; nor have the Parties pointed to any instruments that might qualify as context under Article 31(2) of the VCLT, or that must be taken into account under Article 31(3) of the VCLT. The Tribunal is thus left with the location of the provision and the Preamble. In terms of its location, Article 11(2) is part of the clause governing dispute resolution between an investor and the Contracting Party, but this does not assist in characterizing the choice of forum given to the investor. Nor does the Preamble provide useful guidance: it is limited to stating that the Contracting Parties “[w]ish[] to intensify economic cooperation in the mutual benefit of both countries”; “[i]ntend[] to create favorable conditions for investments made by investors of each of the Contracting Parties in the territory of the other”, and “[r]ecogniz[e] that the promotion and protection of investments in accordance with this Agreement stimulates initiatives in this field.”<sup>477</sup>
327. While it does not strictly qualify as context, the Claimant argues that the Contracting Parties’ treaty practice reveals that, when they intended a choice to be irrevocable, they provided so expressly. It stresses that both Spain and Guatemala have signed treaties including express language of irrevocability but did not do so in this case. This argument does not carry the Claimant very far. It is true that the clause could have been written in stronger terms, but it is indisputable that the provision uses the words “or” and “at the choice of the investor”. The fact that this Treaty included no explicit language as to the irrevocable nature of the choice once made does not deprive the existing words of their ordinary meaning, and the Tribunal does not consider that it was necessary to add mention of irrevocability ‘for greater certainty’ in order to confirm what is already clear from the text as drafted.
328. Moreover, this reading of Article 11(2) is consistent with the object and purpose of the fork-in-the-road clause. The Parties generally agree – correctly so – that such object and purpose is to “avoid [...] the duplication of proceedings and the risk of conflicting decisions.”<sup>478</sup> As noted by Douglas, “[t]he rationale underpinning the ‘fork in the road’ provision in investment treaties is clearly the avoidance of multiple proceedings in multiple fora in relation to the same investment dispute. In more colloquial terms, it is designed to prevent the investor having several bites at the cherry.”<sup>479</sup> The Claimant rightly emphasizes that this rationale applies only to a ‘true’ fork-in-the-road provision, i.e., when there is “a clear and unequivocal manifestation of will” from the contracting

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<sup>477</sup> BIT, Preamble, (Exh. C-001) (Tribunal’s translation).

<sup>478</sup> Transcript., 55:3-8; Rejoinder, ¶¶ 176-177, where the Claimant notes that the Respondent defines the object and purpose of Article 11(2) as “avoiding the duplication of proceedings and the risk of conflicting decisions”, with which the Claimant “generally agrees.” See also Rejoinder, title to Section 7.2 (“Article 11’s purpose is to avoid parallel litigation on the same investment dispute and, thus, contradictory decisions”).

<sup>479</sup> Z. Douglas, *International Law of Investment Claims* (Cambridge University Press 2009) ¶ 321 (Exh. RLA-149).



parties that the choice of forum is irrevocable.<sup>480</sup> The Tribunal concurs in the sense that the interpretation of the Treaty under the rules of the VCLT must show an intent to provide only one choice for a given dispute. That is precisely the result of the interpretation exercise just conducted.

329. That being said, the fork-in-the-road clause at Article 11(2) is only triggered when the investor attempts to submit the same “dispute” (“*controversia*”) to second forum.

**(iii) What type of disputes trigger the fork-in-the-road clause? Has the fork-in-the-road provision been triggered?**

330. The Parties appear to agree that the essential criterion to assess whether the fork-in-the-road clause is triggered is whether the investor has submitted the “same dispute” to more than one forum. They disagree, however, on the test to determine the identity of the dispute.
331. Relying *inter alia* on *H&H* and *Pantehniki*, the Respondent submits that the dispute need not meet the triple identity test; it suffices that “the respective claims share the same fundamental basis”, specifically that the dispute is based on the same facts and subject matter<sup>481</sup> and the relief sought is the same in both proceedings.<sup>482</sup> For Guatemala, the Claimant has already submitted the same dispute, arising from the same factual matrix, to two other *fora*, i.e., to the Guatemalan courts and to ICSID. As a result, it is precluded from resubmitting this dispute before this UNCITRAL Tribunal.
332. By contrast, the Claimant contends that the clause can only be triggered by treaty-based disputes, because the “dispute” must be “regarding matters regulated by this Agreement”, as required by Article 11(1).<sup>483</sup> It thus argues that neither the domestic proceedings initiated by EEGSA nor *Iberdrola I* triggered the application of the clause. The Claimant further contends that, for the fork in the road to be triggered, the dispute must meet the triple identity test. According to the Claimant, there was no identity of parties or cause of action between *Iberdrola I* and the domestic proceedings.
333. The Tribunal agrees with the Claimant that the term “dispute” in Article 11(2) must be read in conjunction with the definition given in Article 11(1). Thus, Article 11(2) only deals with disputes regarding matters governed by the Treaty (“*respecto a cuestiones reguladas por el presente Acuerdo*”), and only these disputes trigger the fork-in-the-road clause. Consequently, the fork-in-the-road provision has not been triggered by EEGSA’s

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<sup>480</sup> Transcript, 109:5-18.

<sup>481</sup> Mem., ¶¶ 262-266 (emphasis omitted), relying on *H&H Enterprises Investments, Inc. v. The Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award of 6 May 2014, ¶¶ 365, 367-368 (Exh. RLA-043); *Pantehniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, ¶ 61 (Exh. RLA-046); *Philip Morris Brands Sàrl and Others v. The Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction of 2 July 2013, ¶ 113 (Exh. RLA-047).

<sup>482</sup> Mem., ¶ 264.

<sup>483</sup> CM, ¶¶ 229-239.

domestic litigations. Those litigations did not involve claims under the Treaty, they dealt with issues of national law.

334. Whether the clause was triggered by the *Iberdrola I* arbitration is a different question. The Claimant denies it because the *Iberdrola I* tribunal decided that the dispute did not relate to matters governed by the Treaty and thus did not fall under the scope of Article 11, which necessarily means that it cannot trigger the fork in the road in Article 11(2). The Claimant further contends that the dispute must meet the triple identity test. For the same reason, the Claimant submits that there is no identity of causes of action between the present claims and those brought in *Iberdrola I*. As noted above, the Respondent argues that it is sufficient for both disputes to share the same fundamental basis, which is the case here.
335. The Tribunal can dispense with deciding which test should apply to the identity of dispute in the context of the fork in the road. Indeed, it has already affirmed that the more stringent test, the triple identity test, was fulfilled. Indeed:
- i. It is undisputed that there is identity of parties;
  - ii. There is also identity of *petitum*: in both proceedings, the Claimant has requested a declaration that Article 3 of the Treaty had been breached, together with compensation;<sup>484</sup>
  - iii. There is finally identity of cause of action. It is evident from the Claimant's pleadings in *Iberdrola I* that the Claimant invoked breaches of the Treaty before that tribunal. In reality, the Claimant concedes this point when it states that "[e]ven though in 2008 Iberdrola presented its claims in good faith as treaty claims, the tribunal in *Iberdrola I* ultimately considered they were not."<sup>485</sup>
336. The fact is that the Claimant has already submitted a treaty-based dispute to an ICSID tribunal (option Art. 11(2)(c) under the Treaty) and is now attempting to resubmit the same treaty dispute to this UNCITRAL Tribunal (option Art. 11(2)(b) under the Treaty). In other words, the Claimant has already made one forum choice for this dispute and now seeks to make another choice for the same dispute. This course of action contradicts the purpose of Article 11(2), which the Claimant expressly acknowledges is "to avoid parallel litigation on the same investment dispute and, thus, contradictory decisions".<sup>486</sup> The fact that the *Iberdrola I* tribunal found that the claims were domestic law claims and not treaty claims does not change the fact that the Claimant invoked the Treaty as the basis for its claims. Nor does it alter the analysis conducted above, where the Tribunal concluded that the two arbitrations involve the same dispute.

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<sup>484</sup> See ¶¶ 277-280 above.

<sup>485</sup> CM, ¶ 262; Rejoinder, ¶ 216.

<sup>486</sup> See fn. 478 above.

337. For these reasons, the Tribunal finds that the fork in the road contained at Article 11(2) was triggered by the submission of *Iberdrola I* to ICSID arbitration. The Claimant already chose one forum to submit the treaty dispute now before this Tribunal. Consequently, under the terms of Article 11(2), it is prevented from now resorting to this UNCITRAL Tribunal.

**(iv) Article 26 of the ICSID Convention**

338. Having reviewed the Parties' submissions on Article 26 of the ICSID Convention, the Tribunal does not find that it assists it in determining the Respondent's fork-in-the-road objection, or its jurisdiction in general. That said, the Tribunal will address the Parties' arguments for the sake of completeness.

339. The Respondent contends that, even if Article 11(2) of the Treaty were not a fork-in-the-road provision, Article 26 of the ICSID Convention would preclude the Claimant from bringing this UNCITRAL arbitration. The Tribunal understands the Respondent's argument essentially to be that Article 26 sets out an exclusive forum for the resolution of investment disputes, such that if an investor chooses to arbitrate its dispute under the ICSID Convention, it waives its right to seek another remedy before another forum, and the Claimant waived its right to submit its dispute before this UNCITRAL tribunal because it consented to ICSID arbitration in *Iberdrola I*.<sup>487</sup>

340. Article 26 reads as follows:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a conditions of its consent to arbitration under this Convention. (Emphasis added)

341. Pursuant to its own terms, Article 26 applies when the parties have consented to ICSID arbitration. Unless stated otherwise, such consent is exclusive of any other remedy, including domestic litigation and non-ICSID arbitration. As Schreuer explains, this means that "once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID."<sup>488</sup>

342. Importantly, the effect of Article 26 only "operates from the moment of valid consent."<sup>489</sup> In the context of a treaty arbitration, this requires an offer of arbitration from the respondent State contained in the relevant treaty, and an acceptance from the claimant investor, usually given when filing for arbitration with ICSID. That said, as Schreuer comments, consent will only be deemed valid if the Secretary-General does not refuse to

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<sup>487</sup> R-PHB1, ¶¶ 31-32.

<sup>488</sup> C. H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 351, ¶ 2 (Exh. RLA-058bis).

<sup>489</sup> *Id.*

register the request for arbitration because it is manifestly outside the Centre's jurisdiction or if the arbitral tribunal does not render a decision of lack of jurisdiction:

Art. 26 applies from the moment of consent [...]. If ICSID arbitration has been instituted, there will be a finding by the Secretary-General in accordance with his or her screening power under Art. 36(3) or a decision on jurisdiction by the tribunal under Art. 41. If the Secretary-General has found that, because of a lack of consent, the dispute is manifestly outside the jurisdiction of the Centre or if the tribunal has determined that the Centre does not have jurisdiction because there is no valid consent, Art. 26 does not apply and other remedies may be pursued.<sup>490</sup>

343. In this case, the *Iberdrola I* tribunal declined its jurisdiction (and the *ad hoc* annulment committee refused to annul that award). By declining jurisdiction, the *Iberdrola I* tribunal found that there was no valid consent to ICSID arbitration, because the Claimant's acceptance did not match the Respondent's offer to arbitrate. As a result, Article 26 cannot preclude the Claimant from seeking other remedies. Whether or not the investor can bring its claim to another forum will depend on the terms of the relevant treaty (for instance, whether it provides for a fork in the road), or on whether a new claim is barred by *res judicata*. The Tribunal thus agrees with the Claimant that "Article 26 does not resolve the parties' dispute in the present case"; "[r]ather[,] the case must be analysed through the prism of the correct principles of *res judicata*",<sup>491</sup> which the Tribunal has done above.

**e. Objection based on Article 53 of the ICSID Convention**

344. In the alternative, the Respondent contends that, by bringing this arbitration, the Claimant has breached Article 53 of the ICSID Convention, with the result that this Tribunal has no jurisdiction to hear the Claimant's claims. As the Tribunal has already decided that it lacks jurisdiction, it will only briefly address this objection, in particular because it is closely linked to *res judicata*.

345. The Respondent argues that, as a result of Article 53, "the forms of recourse established in the ICSID Convention are exclusive of each other [and] do not include the possibility of appealing the factual or legal findings of an ICSID tribunal".<sup>492</sup> For the Respondent, the Claimant has exhausted the available remedies against the *Iberdrola I* award by seeking the annulment of this award before the *ad hoc* committee.<sup>493</sup> By initiating this arbitration and requesting this Tribunal to reopen the jurisdictional findings of the

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<sup>490</sup> *Id.*, p. 352, ¶ 6.

<sup>491</sup> C-PHB1, ¶¶ 53-54.

<sup>492</sup> Mem., ¶ 293.

<sup>493</sup> *Id.*, ¶ 298.

*Iberdrola I* tribunal, says Guatemala, the Claimant has breached Article 53 of the ICSID Convention, with the result that this Tribunal lacks jurisdiction.<sup>494</sup>

346. The Claimant denies that Article 53 applies in the case at hand. Relying on Schreuer's commentary to Article 53 of the ICSID Convention,<sup>495</sup> the Claimant submits that "[i]n the absence of a decision on the merits from the *Iberdrola I* tribunal, Article 53 cannot be used by Guatemala to prevent *Iberdrola*'s treaty claims being heard by this tribunal".<sup>496</sup>
347. Article 53 of the ICSID Convention reads in pertinent part as follows:
- (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
348. The first part of Article 53(1) states that an ICSID award is final and binding. As was stressed earlier, this statement is the basis for the binding force of ICSID awards and, hence, for its *res judicata* authority.<sup>497</sup> Accordingly, to the extent that the Respondent's objection relies on the binding nature of ICSID awards, it calls for the same conclusion as that reached with regard to the *res judicata* objection.
349. The Respondent appears, however, to rely on the second part of the first sentence of Article 53(1), pursuant to which ICSID awards "shall not be subject to any appeal or to any other remedy except those provided for in [the ICSID] Convention." The Respondent's submission seems to be that the *Iberdrola I* Award was already subject to the remedy allowed by the ICSID Convention, namely, annulment under Article 52, and that by requesting this Tribunal to revisit the *Iberdrola I* tribunal's jurisdictional decision, the Claimant is impermissibly attempting to bring a new recourse against the *Iberdrola I* Award. Relying on *RSM*, the Respondent submits that this would breach Article 53 of the ICSID Convention.
350. To the extent that this is the Respondent's argument, the Tribunal cannot agree. This arbitration is not an appeal or recourse against the *Iberdrola I* Award. It is a separate proceeding over which the Tribunal lacks jurisdiction, because it raises claims identical to those presented in the *Iberdrola I* arbitration.

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<sup>494</sup> *Id.*, ¶¶ 299-300, citing *RSM Production Corporation and Others v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010, ¶ 7.1.9 (Exh. RLA-041).

<sup>495</sup> C. H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 1106, ¶ 32 (Exh. CLA-071): "The principle of *ne bis in idem* does not apply to the substance of a dispute if the ICSID tribunal has given an award in which it finds that the dispute is not within the jurisdiction of the Centre or not within its own competence, in accordance with Arbitration Rule 41(6) [...]. In other words, if an ICSID tribunal declines jurisdiction over a dispute, a party may take that dispute to another forum for a decision on the merits".

<sup>496</sup> Rejoinder, ¶¶ 161-162.

<sup>497</sup> C. H. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press 2009) p. 1099, ¶ 10 (Exh. CLA-071).

### 3. Conclusion on jurisdiction and admissibility

351. In conclusion, the Tribunal holds that it lacks jurisdiction over the present dispute because the submission of the dispute in this arbitration is irreconcilable with the principle of *res judicata* and, alternatively, because it breaches the fork-in-the-road provision embodied in the Treaty. While out of an abundance of caution the Tribunal has addressed the further objections related to breaches of Articles 26 and 53 of the ICSID Convention because of their links with the two prior objections, it considers that, in light of the outcome reached, it can dispense with resolving the other defenses raised, i.e. the doctrine of concentration of claims and arguments, the rule prohibiting an abuse of right, and the defense that Iberdrola cannot reformulate its claims under the Treaty in this arbitration.<sup>498</sup>

## VI. COUNTERCLAIM

### A. The Respondent's position

352. The counterclaim is linked to the Respondent's fork-in-the-road objection. The Respondent argues that, by abusively initiating multiple proceedings against it, the Claimant has violated the Treaty's fork-in-the-road clause provided at Article 11(2). In reliance on Articles 19(3) and (4) of the 1976 UNCITRAL Rules, the Respondent thus brings a counterclaim seeking a declaration of breach and compensation for the injury which is suffered as a result of such breach.
353. The Respondent submits that the Tribunal has jurisdiction over the counterclaim, which is admissible (1) and well-founded (2). As a preliminary matter, the Respondent denies that by submitting the counterclaim it has accepted the Tribunal's jurisdiction or waived any of its objections to admissibility,<sup>499</sup> a matter that was resolved earlier.<sup>500</sup>

#### 1. The Tribunal has jurisdiction over the counterclaim and the counterclaim is admissible

354. The Respondent submits that the Tribunal has jurisdiction to decide the counterclaim for the following reasons.<sup>501</sup>
355. First, the Respondent submits that the Parties have consented to arbitrate this counterclaim and that the UNCITRAL Rules allow counterclaims. More specifically, the Respondent argues that, through Article 11 of the Treaty and the Claimant's Notice of Arbitration, the Parties have consented to have this Tribunal decide on "all disputes [...]"

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<sup>498</sup> See ¶¶ 92-93 above.

<sup>499</sup> Transcript, 118:10-14 ("[T]he fact that we made a counterclaim doesn't mean that we recognize the jurisdiction of this Tribunal to adjudicate this case again or not to accept any admissibility objection we have made in this case.").

<sup>500</sup> See ¶ 247 above.

<sup>501</sup> Mem., ¶¶ 348-353.

concerning matters governed by this Agreement.” Relying on *Urbaser* (which interpreted a similar provision in the Spain-Argentina BIT), the Respondent contends that Article 11 is neutral as to the identity of the parties, and there is nothing in the Treaty that prevents the State party from submitting a dispute. Accordingly, there is no reason why the party acting first should prevent the other from raising a counterclaim.<sup>502</sup>

356. In response to the Claimant’s arguments, the Respondent clarifies that it “does not dispute the fact that the Treaty only allows an investor to initiate an arbitral proceeding against the State”, and admits that “[a]ny other reading would contradict the language, object and purpose of the Treaty.”<sup>503</sup> However, “there is nothing in the Treaty that prevents the State, once a claim has been filed against it, from filing claims ‘regarding matters governed by this Agreement’”<sup>504</sup> This is precisely what has happened here: the Claimant filed a claim against the Respondent. By doing so, argues Guatemala, the Claimant breached the fork in the road in Article 11(2) of the Treaty, which is a “matter governed by this Agreement” as required by the first paragraph of the same provision.<sup>505</sup> As a result, the Respondent acquired the right to file a counterclaim with regard to the Claimant’s breach of Article 11(2) of the Treaty.<sup>506</sup>
357. Contrary to the Claimant’s contention, there is nothing in the Treaty limiting these “matters” to violations of substantive standards of the Treaty by the host State.<sup>507</sup> Relying on *Paushok* and *Saluka*, the Respondent contends that “the language of the treaty, read in conjunction with the UNCITRAL Rules, is sufficiently broad to include counterclaims by the State given that the word ‘disputes’ also encompasses counterclaims.”<sup>508</sup>
358. Second, the counterclaim is “intimately linked to the claim submitted by Iberdrola.”<sup>509</sup> The Respondent accepts that “a legitimate counterclaim must have a close connection with the primary claim to which it is a response.”<sup>510</sup> Here, the counterclaim and the main claim are closely connected, as both Parties cite Article 11 of the Treaty. While the

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<sup>502</sup> *Id.*, ¶ 351, citing *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, ¶ 1143 (Exh. RLA-088).

<sup>503</sup> Reply, ¶ 260.

<sup>504</sup> *Id.*, ¶ 260.

<sup>505</sup> *Id.*, ¶¶ 260 and 268.

<sup>506</sup> *Id.*

<sup>507</sup> Reply, ¶¶ 260-262.

<sup>508</sup> *Id.*, ¶ 263, citing *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, ¶ 868 (Exh. CLA-090); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Arbitration under UNCITRAL Rules, Award on Jurisdiction and Liability of 28 April 2011, ¶ 12 (Exh. CLA-093); *Saluka v. Czech Republic*, Arbitration under UNCITRAL Rules (PCA), Decision on Jurisdiction on the Counterclaim of the Czech Republic of 7 May 2004, ¶¶ 36, 39, 61 (Exh. RLA-091).

<sup>509</sup> Reply, ¶ 264.

<sup>510</sup> Mem., ¶ 352, citing *Saluka v. Czech Republic*, Arbitration under UNCITRAL Rules (PCA), Decision on Jurisdiction on the Counterclaim of the Czech Republic of 7 May 2004, ¶ 61 (Exh. RLA-091).

Claimant alleges that it has complied with paragraphs 1 and 2 of this provision, the Respondent requests a declaration that it has not, together with an order to pay damages.

359. Third, the Respondent notes that Article 19 of the UNCITRAL Rules expressly provides for counterclaims.<sup>511</sup>
360. Fourth, citing *David Aven v. Costa Rica* and the Claimant's expert Prof. Reisman, the Respondent argues that "once an arbitral proceeding is initiated against the State, the admission of related counterclaims is the proper and efficient decision."<sup>512</sup>
361. Fifth, relying on *Urbaser*, the Respondent submits that, once the requirements of consent and connection have been met, there is no need to meet other admissibility requirements (such as notice or cooling off periods). Indeed, demanding that the requirements of notice and cooling off periods be met at this stage would be inefficient.<sup>513</sup>

## 2. The counterclaim has merit

362. As to the merits of the counterclaim, the Respondent argues that it suffered harm caused by the Claimant's conduct. The Respondent seeks full reparation of the damages caused by the Claimant's violation of the Treaty's fork-in-the-road provision, and moral damages.
363. With respect to its first head of damages, Guatemala submits that, by abusively submitting the same dispute to three of the fora identified in Article 11(2) (and in particular, by resubmitting its claims before this Tribunal after an ICSID arbitration), the Claimant has breached the Treaty's fork-in-the-road provision. As a consequence of the principle of full reparation, the Respondent must be placed in the position in which it would have been had the Claimant not violated that provision. Specifically, had the Claimant not resubmitted its claims, the Respondent would not be incurring significant legal fees.<sup>514</sup> Therefore, the Respondent requests that Iberdrola be ordered to pay all of the amounts incurred for the costs and legal expenses of this arbitration.

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<sup>511</sup> Mem., ¶ 354, citing Articles 19(3) and 19(4) of the UNCITRAL Rules 1976, which provide:

"3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off."

<sup>512</sup> Reply, ¶ 261, citing *David R. Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, ¶¶ 740-742 (Exh. RLA-166); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman dated 28 December 2011 (Exh. RLA-167).

<sup>513</sup> Reply, ¶¶ 265-266.

<sup>514</sup> Mem., ¶¶ 358-361; Reply, ¶¶ 268-273.



364. The Respondent also asserts that the counterclaim must be distinguished from its request for an order of costs. The legal basis of the counterclaim is not Articles 38 and 40 of the UNCITRAL Rules. As a result, the counterclaim cannot be examined with the discretion that Article 40 of the UNCITRAL Rules confers upon tribunals deciding on costs.
365. Guatemala further alleges that, by initiating dispute settlement proceedings over the same dispute for the fourth time over a period of ten years, the Claimant has inflicted a moral damage to the State, which must be compensated with an amount no less than US\$2 million.<sup>515</sup>
366. Contrary to the Claimant's contentions, the Respondent maintains that it has clearly identified the damages it has suffered, being its legal costs in the current proceedings and moral damages (which are difficult to quantify, but no less real).<sup>516</sup>
367. Finally, the Respondent contends that any award on the counterclaim must bear pre-award interest running from the termination of the annulment proceedings as well as post-award interest at a reasonable rate.
368. In the alternative, the Respondent requests a full award on costs. This request is dealt with in Section VII below.

### **B. The Claimant's position**

369. The Claimant submits that the Tribunal lacks jurisdiction over the counterclaim (1). In addition, according to Iberdrola, the Respondent has not raised an actual counterclaim (2) and, in any event, the purported counterclaim lacks merit (3). Finally, the Claimant also argued that Guatemala had submitted to this Tribunal's jurisdiction by raising a counterclaim, an argument dealt with earlier.<sup>517</sup>

#### **1. The Tribunal lacks jurisdiction over the Respondent's counterclaim**

370. The Claimant submits that the Respondent has the burden of showing that its counterclaim is within the Tribunal's jurisdiction and that it is admissible in an international investment arbitration, and that it has failed to do so.<sup>518</sup>
371. First, the Claimant submits that the BIT does not allow States to submit claims against investors,<sup>519</sup> and thus the counterclaim falls outside of the Tribunal's jurisdiction *ratione materiae*.<sup>520</sup> Contrary to the Respondent's arguments, Article 11 of the BIT is not similar to Article 10 of the Argentina-Spain BIT, on which the *Urbaser* tribunal ruled. The

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<sup>515</sup> Mem., ¶ 362.

<sup>516</sup> Reply, ¶¶ 268-273.

<sup>517</sup> See ¶ 247 above.

<sup>518</sup> Rejoinder, ¶ 260.

<sup>519</sup> CM, ¶¶ 270-280.

<sup>520</sup> Rejoinder, ¶ 260.

Claimant highlights that the Argentina-Spain BIT provides that the notice of a dispute can be submitted before domestic courts “upon one of the parties’ request”. Similarly, either party may choose the relevant fora. By contrast, the Guatemala-Spain BIT stipulates that a dispute must be notified “by the investor to the Contracting Party”. This expression allows no other interpretation but that only investors are allowed to submit claims under that BIT. Similarly, under paragraph 2 it is for the investor to choose the relevant forum. Given this language, Article 11 cannot be construed as allowing State parties to submit claims against foreign investors.

372. The Claimant alleges that the Guatemala-Spain BIT bears a greater resemblance to the Pakistan-Turkey BIT, which was held not to allow counterclaims by the *Karkey* tribunal, or to the Greece-Romania BIT, with respect to which the *Spyridon Roussalis* tribunal reached a similar conclusion.<sup>521</sup>
373. Second and in the alternative, the Claimant observes that the counterclaim is “totally unconnected to the main claim”.<sup>522</sup> International investment tribunals have interpreted Article 19(3) of the UNCITRAL Rules as allowing the submission of counterclaims by States as long as they are allowed to do so by the applicable BIT. However, as noted by the *Saluka* tribunal, “they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response”. Accordingly, still in the words of the *Saluka* tribunal, “a legitimate counterclaim must have a close connection with the primary claim to which it is a response”.<sup>523</sup>
374. According to the Claimant, the close connection requirement implies that “[a] substantive, genuine link must exist between the main claims and the counterclaim.”<sup>524</sup> Here, the Respondent has failed to show this link. Article 11(2) of the Treaty only provides rights for the benefit of investors (i.e., the freedom to select the forum to settle an investor-State dispute), but does not establish a substantive obligation. The Respondent’s counterclaim is not linked to the claims (which relate to breaches of the Treaty by the State’s sovereign actions during a tariff setting process) in any way. The Respondent’s purported counterclaim is a generic claim that could be filed against any claimant who presents a claim under an international investment agreement that the Respondent deems to be abusive. As a result, it does not meet the condition set in Article 19(3) of the UNCITRAL Rules.<sup>525</sup>

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<sup>521</sup> CM, ¶¶ 276-280.

<sup>522</sup> *Id.*, ¶¶ 281-287.

<sup>523</sup> CM, ¶ 282, citing *Saluka Investments BV v. The Czech Republic*, Arbitration under UNCITRAL Rules (PCA), Decision on Jurisdiction over the Czech Republic’s Counterclaim of 7 May 2004, ¶ 39 (Exh. CLA-092).

<sup>524</sup> CM, ¶ 286.

<sup>525</sup> Rejoinder, ¶ 262.

## 2. The Respondent has failed to submit a proper counterclaim

375. In the alternative, should the Tribunal consider that the Respondent may submit a counterclaim under the BIT, it is the Claimant's argument that the Respondent is not a valid counterclaim for the following reasons.
376. First, the Respondent has not followed the notification procedure (notification in writing) and cooling-off period (six months from the date of the written notice) established in Article 11 of the BIT.<sup>526</sup>
377. Second, the Respondent has not raised issues regulated under the BIT, as required by Article 11. More specifically, it points to no BIT obligation that the Claimant supposedly breached. According to Iberdrola, "for an international wrongful act to occur, an international obligation must exist in the first place."<sup>527</sup> Article 11(2) of the BIT, which is the basis of the counterclaim creates no substantive obligation; it merely provides a series of dispute settlement mechanisms from which the investor may choose when presenting its claims under the Treaty. Interpreting such options as "obligations" goes against the rules of treaty interpretation of the VCLT. As a result, the Claimant has breached no BIT obligation that could give rise to liability.<sup>528</sup>
378. Third, the Claimant argues that the Respondent has failed to substantiate and quantify its counterclaim. Relying on *Amto*, the Claimant submits that claims for costs do not require a counterclaim: as the issue of costs is necessarily settled in the main proceedings, ancillary proceedings are not required.<sup>529</sup> As to the moral damages claim, the Respondent gives no explanation on its legal basis on the facts give rise to such an entitlement, and on how the initiation of these proceedings has resulted in any harm to Guatemala.<sup>530</sup>

## 3. In the alternative, the counterclaim lacks merit

379. Finally, the Claimant observes that Guatemala grounds its counterclaim on the "abusive conduct of the Claimant in filing multiple procedures against it".<sup>531</sup> However, the Claimant has demonstrated that there has been no such abuse of process.
380. Consequently, should the Tribunal consider that Guatemala submitted a true counterclaim over which there is jurisdiction, the Claimant submits that the Tribunal must dismiss the

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<sup>526</sup> CM, ¶¶ 293-295.

<sup>527</sup> Rejoinder, ¶ 263.

<sup>528</sup> *Id.*

<sup>529</sup> CM, ¶¶ 303, 305, citing *Amto v. Ukraine*, SCC Case No. 080/2005, Final Award of 26 March 2008, ¶ 116 (Exh. CLA-099).

<sup>530</sup> CM, ¶¶ 306, 302, citing *Oxus Gold v. Uzbekistan*, Arbitration under UNCITRAL Rules, Final Award of 17 December 2015, ¶ 922 (Exh. CLA-098); Rejoinder, ¶ 264.

<sup>531</sup> CM, ¶ 308, citing Mem., ¶ 347.

counterclaim for the same reasons as it should dismiss the Respondent's abuse of process objection.<sup>532</sup>

381. As to the purported violation of the fork-in-the-road clause, the Claimant contends that it "did not and could not breach Article 11(2) of the BIT."<sup>533</sup>

### C. Analysis

382. To recall, the Treaty dispute resolution clause embodied in Article 11 reads in pertinent part as follows:

*Toda controversia relativa a las inversiones que surja entre una de las Partes Contratantes y un inversor de la otra Parte Contratante, respecto a cuestiones reguladas por el presente Acuerdo será notificada por escrito, incluyendo una información detallada, por el inversor a la Parte Contratante receptora de la inversión. [...]*

2. [...] *la controversia podrá someterse, a elección del inversor:*

[...]

c) *al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.) [...].*

#### **English translation:**

Any dispute relating to investments arising between one of the Contracting Parties and an investor of the other Contracting Party, concerning matters governed by this Agreement shall be notified in writing, including detailed information, by the investor to the Contracting Party receiving the investment. [...]

2. [...] the dispute may be submitted, at the choice of the investor:

[...]

c) to the International Centre for the Settlement of Investment Disputes (ICSID) [...]. (Emphasis added)

383. In addition, Article 19(3) of the 1976 UNCITRAL Rules contains the following rules on counterclaims:

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

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<sup>532</sup> CM, ¶¶ 308-309.

<sup>533</sup> *Id.*, ¶ 305.

384. It does not appear seriously disputed – and rightly so – that an investment tribunal has jurisdiction over a counterclaim if two requirements are satisfied, i.e. the disputing parties have given their consent to arbitrate counterclaims and there is a close connection between the claims and the counterclaim.<sup>534</sup> In addition, the question arises whether a tribunal may rule on a counterclaim when it does not entertain the claim because the latter is outside its jurisdiction or inadmissible.
385. The first of these requirements relates to consent to arbitration as it is circumscribed in the host State’s offer found in Article 11 of the BIT<sup>535</sup> and the investor’s acceptance included in its Notice of Arbitration.
386. According to Article 11(1) and (2), what can be submitted to arbitration is a dispute relating to an investment between an investor of one Contracting State and the other Contracting State concerning matters governed by the Treaty and such dispute can only be brought to arbitration by the investor. It is thus clear from the wording of the dispute settlement clause, which constitutes the offer to arbitrate, that the Contracting Parties only envisaged claims initiated by the investor. This language also circumscribes the investor’s acceptance of the offer and, hence, the consent to arbitrate (in the meaning of a meeting of the minds). The limitation is understandable as the Treaty provides for rights in favor of the investor, not for obligations (this being said without considering here the Respondent’s theory that the fork in the road creates an obligation of the investor). The Tribunal can discern no other elements in the Treaty that, applying the rules of interpretation of the VCLT, could be deemed to indicate consent to the submission of counterclaims. As a result, it cannot hold that Iberdrola submitted to this Tribunal’s jurisdiction over counterclaims when it filed this arbitration.
387. The Respondent accepts that only the investor can start an arbitration, but submits that it is entitled to react by raising a counterclaim.<sup>536</sup> Nothing in the Treaty, so it says, bars it from doing so. In support, it relies on several decisions and on Article 19(3) of the UNCITRAL Rules.<sup>537</sup>

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<sup>534</sup> See for instance *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, ¶ 1118 (Exh. RLA-088); *Saluka v. Czech Republic*, Arbitration under UNCITRAL Rules (PCA), Decision on Jurisdiction on the Counterclaim of the Czech Republic of 7 May 2004, ¶ 39 (Exh. RLA-091); *Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, ¶ 407 (Exh. RLA-168).

<sup>535</sup> For the proposition that consent to the submission of counterclaims must be found in the treaty’s dispute settlement clause, see for instance *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, ¶ 866 (Exh. CLA-090); *Saluka v. Czech Republic*, Arbitration under UNCITRAL Rules (PCA), Decision on Jurisdiction on the Counterclaim of the Czech Republic of 7 May 2004, ¶ 60 (Exh. RLA-091); *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, ¶ 1143 (Exh. RLA-088); *Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, ¶¶ 408-410 (Exh. RLA-168); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award of 22 August 2017, ¶ 1011 (Exh. CLA-088).

<sup>536</sup> Reply, ¶¶ 260 ff.; Rejoinder on the Counterclaim, ¶¶ 6-7.

<sup>537</sup> Mem., ¶¶ 354-356; Reply, ¶¶ 259-263; Rejoinder on the Counterclaim, ¶¶ 12-13.

388. Article 19(3) of the UNCITRAL Rules, which is quoted in full above, states that the respondent may make a counterclaim “arising out of the same contract” in the statement of defence or at a later stage in the arbitration if authorized. It fulfils the same function as Article 46 of the ICSID Convention and ICSID Arbitration Rule 40, which provide that the tribunal shall determine counterclaims “arising directly out of the subject matter of the disputes” provided they are “within the scope of the consent of the parties” and the jurisdiction of the Centre. Bearing these provisions in mind, the issue is whether, as a result of the reference to specific arbitration rules in the BIT, Article 19(3) of the UNCITRAL Rules (or for this matter Article 46 of the ICSID Convention) are incorporated into the arbitration agreement in such a manner that consent to the submission of counterclaims is achieved.
389. Faced with this question, the tribunal in *Goetz v. Burundi II*, citing Prof. Reisman’s dissent to the award in *Roussalis v. Romania*, expressed the opinion that “when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue”.<sup>538</sup> The Tribunal has difficulty following this line of reasoning in a situation such as the present one and the one in *Roussalis*, where the wording of the Treaty provision indicates, to the contrary, that only the investor can claim.<sup>539</sup> While the Tribunal agrees that arbitration rules referred to in a treaty are incorporated by reference, this is only to the extent that they are not contradicting the treaty. This was the case *Aven v. Costa Rica*, another decision on which

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<sup>538</sup> *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2. Award of 21 June 2012, ¶ 279, citing *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman dated 28 December 2011 (Exh. RLA-167).

<sup>539</sup> In *Roussalis*, the limitation arose from the description of the disputes submitted to arbitration:

In this respect, Article 9 of the BIT provides in its relevant parts that:

“Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way [...]

If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration”(emphasis added).

Pursuant to the interpretation rules of Article 31 of the Vienna Convention and the above quoted ICSID decision, the Tribunal in its majority considers that the references made in the text of Article 9(1) of the BIT to “*disputes ... concerning an obligation of the latter*” undoubtedly limit jurisdiction to claims brought by investors about obligations of the host State. Accordingly, the BIT does not provide for counterclaims to be introduced by the host state in relation to obligations of the investor. The meaning of the “dispute” is the issue of compliance by the State with the BIT.

*Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, ¶¶ 868-869 (Exh. CLA-090).

the Respondent relies. There, the treaty arbitration clause was neutral as to the party entitled to bring proceedings and allowed for claims for breach of investment agreements in addition to breaches of investment protections under the treaty.<sup>540</sup> However, if there is a contradiction between the arbitration rules and the treaty language (as is the case here), the treaty prevails.

390. This being so, the majority of decisions give prevalence to the treaty language over the arbitration rules when it comes to establishing consent to arbitrate counterclaims.<sup>541</sup> The award in *Karkey v. Pakistan* is instructive. The relevant treaty in that case contained a dispute resolution clause similar to the present one in the sense that it was broad in the definition of disputes, but expressly limited access to arbitration to the investor. The *Karkey* tribunal held the following views:

References to the “investor” highlighted above in the dispute resolution clause of the BIT means that the BIT is intended to enable arbitration only at the initiative of the investor. The BIT imposes no obligation on investors, only on the Contracting State.

The BIT contains no particular or general language that would enable the Tribunal to conclude, if interpreted in accordance with the Vienna Convention on the Law of Treaties, that the arbitral agreement between Pakistan and Karkey includes consent by Karkey to the submission of counterclaims by Pakistan.<sup>542</sup>

391. On this basis, the Tribunal comes to the conclusion that the Treaty wording showing that only the investor is entitled to file claims must prevail over any contrary meaning that the arbitration rules to which the Treaty refers may suggest. As a result, the Tribunal lacks jurisdiction over the counterclaim and can dispense with analyzing the requirement of close connection. It can also dispense with reviewing whether a counterclaim may stand

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<sup>540</sup> Article 10.16 of the Dominican Republic – Central America – United States Free Trade Agreement, dated 5 August 2004.

<sup>541</sup> In addition to *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011 (Exh. CLA-090) ¶¶ 868-869; see also *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award of 22 August 2017 (Exh. CLA-088) ¶¶ 1013-1015; *Rusoro Mining v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, ¶ 627; *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award of 17 December 2015, ¶ 948 (Exh. CLA-098); *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award of 18 April 2017, ¶¶ 153-154. The legal position is different when the Treaty expressly provides for counterclaims and possibly also when it is silent on their admissibility. In such cases, tribunals tend to accept that the respondent state has standing to bring a claim or a counterclaim before an investment arbitral tribunal. This is for instance the case in *Saluka v. Czech Republic*, Arbitration under UNCITRAL Rules (PCA), Decision on Jurisdiction on the Counterclaim of the Czech Republic of 7 May 2004, ¶ 39 (Exh. RLA-091); *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, ¶ 354 (Exh. CLA-096); *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, ¶ 1144 (Exh. RLA-088); *Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, ¶¶ 407 ff. (Exh. RLA-168); *Tethyan Copper Company PTY Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, ¶ 1418.

<sup>542</sup> *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award of 22 August 2017, ¶¶ 1007, 1013-1015 (Exh CLA-088).

when the claim is rejected for lack of jurisdiction (on the basis of the fork in the road) or for lack of admissibility (on the ground of *res judicata*). Finally, it need not determine the merits of the counterclaim, namely whether the existence of a fork in the road gives rise to a compensable claim in case of breach.

392. Finally, while the Tribunal appreciates that counterclaims are a useful procedural tool to promote the concentration of claims and thus enhance the efficiency of the dispute settlement system, it notes that its role is limited to applying the treaty on the basis of which it is seized in accordance with its terms. It cannot go beyond or else it would engage in policy choices which are the domain of the States.

## VII. COSTS

### A. Article 38 of the UNCITRAL Rules

393. Article 38 of the UNCITRAL Rules deals with the costs of the arbitration and provides as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

394. Thus, Article 38 of the UNCITRAL Rules recognizes broadly three categories of costs and expenses: (i) tribunal costs, comprising of the fees and expenses of the Arbitral Tribunal and Secretary; (ii) costs for legal representation and assistance, comprising of the legal fees and witness related costs incurred by the Parties; and (iii) administrative costs, comprising here of the fees and expenses of the PCA, including hearing and other expenses.



**B. Cost advances**

395. In accordance with Article 41 of the UNCITRAL Rules and Section 14 of the Terms of Appointment, each Party has made advances in the amount of EUR 225,000 to cover the fees and expenses of the Tribunal and the cost of registry services.
396. Accordingly, the total advance paid by the Parties amounts to EUR 450,000.

**C. Tribunal and administrative costs**

397. The members of the Tribunal have collectively spent a total of 534.6 hours as follows: Prof. Pierre-Marie Dupuy, 79 hours; J. Christopher Thomas QC, 127.6 hours; and Prof. Kaufmann-Kohler, 328 hours. In the Terms of Appointment, it was agreed that the Tribunal's time would be compensated at an hourly rate of EUR 550 exclusive of VAT, where applicable.
398. In the same period of time, the Secretary of the Tribunal has spent a total of 266 hours. In the Terms of Appointment, it was agreed that the Secretary would be compensated at an hourly rate of EUR 280 exclusive of VAT, where applicable.
399. The Tribunal and the Secretary have incurred expenses in the amount of EUR 13,255.24.
400. The PCA has charged fees in the amount of EUR 30,270 for the administration of the case and its registry services.
401. Other costs, such as hearings expenses, including IT costs, catering, court reporting and interpretation services, as well as the translation of procedural documents and the Award, amount to EUR 34,610.65.
402. Thus, the total costs of the proceedings amount to EUR 446,645.89. As a result, the unexpended balance of the deposit amounts to EUR 3,354.11. In accordance with section 14.4 of the Terms of Appointment, the Tribunal directs that this amount be returned to the Parties in equal shares (i.e. EUR 1,677.05 each).
403. In accordance with Article 41(5) of the UNCITRAL Rules, the PCA shall render an accounting to the Parties of the deposits received after the issuance of this Award.

**D. The Claimant's Statement of Costs**

404. In its Statement of Costs, the Claimant claimed the following costs:<sup>543</sup>

<b>Concept</b>	<b>Amount in EUR</b>
Uría Menéndez Abogados, S.L.P. - Legal fees and related expenses	366,755.80
Advance to the PCA on costs and administrative expenses	225,000
Expert Reports by A. Reinisch and W.M. Reisman	112,956.24
Costs related to the Hearing on Jurisdiction	6,606.52
<b>TOTAL</b>	<b>EUR 711,318.56</b>

405. The Respondent submitted no observations on this statement of costs.<sup>544</sup>

406. Thus, the Claimant's costs for legal representation and assistance, excluding the advances paid to the PCA to cover the costs of the proceedings, amount to EUR 486,318.56.

**E. The Respondent's Statement of Costs**

407. In its Statement of Costs, the Respondent claimed the following costs:<sup>545</sup>

<b>Concept</b>	<b>Amount in USD</b>
Dechert LLP - Legal fees (total)	1,071,009.80
Advance to the PCA on costs and administrative expenses (total)	258,447.50
Administrative expenses (total)	131,232.13
<b>TOTAL</b>	<b>USD 1,460,689.43</b>

408. The Claimant submitted the following observations on the above statement of costs:

<sup>543</sup> Claimant's Statement of Costs (corrected), 9 July 2019.

<sup>544</sup> Respondent's letter to the Tribunal of 16 July 2019.

<sup>545</sup> Respondent's Statement of Costs, 8 July 2019.

The Parties' statements of costs diverge remarkably. Both the legal fees and the costs relating to the Hearing incurred by Claimant are a fraction of those incurred by Respondent.

Claimant has conducted this arbitration with prudence and austerity, which is reflected in its statement of costs. For instance, the costs of Claimant's in-house representation have not been included in the submission. Should the Tribunal decide that Claimant's treaty claims should be heard, Claimant will maintain the same approach on costs until the issuance of the award.<sup>546</sup>

409. Thus, the Respondent's costs for legal representation and assistance, excluding the advances paid to the PCA to cover the costs of the proceedings, amount to USD 1,202,241.93.

#### **F. Allocation of costs**

410. Article 40 of the UNCITRAL Rules provides in relevant part:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

411. Both Parties have requested that the other Party be ordered to bear all costs incurred in connection with the proceedings, plus interest.<sup>547</sup>

412. Subject to the costs of legal representation of the successful party which are dealt with in Article 40(2), the principle enshrined in Article 40(1) of the UNCITRAL Rules is that costs should follow the event. Hence, since jurisdiction has been denied, the Claimant should bear the arbitration costs other than the Respondent's legal fees. The Tribunal sees no reason to proceed to a different cost allocation under the circumstances.

413. As for the legal fees of the Party which prevailed, the Tribunal is free under Article 40(2) to apportion them as it considers appropriate. The central question before this Tribunal was whether the finding of the *Iberdrola I* tribunal according to which Iberdrola's claims were outside the subject matter scope of its jurisdiction was binding on this Tribunal. As may be gathered from the analysis above, this is a question raising genuine and complex issues of *res judicata*. It can thus hardly be said that the Claimant's choice to raise this issue in front of this Tribunal was illegitimate, frivolous or abusive. The Tribunal recalls,

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<sup>546</sup> Claimant's letter to the Tribunal of 16 July 2019.

<sup>547</sup> Notice of Arbitration, ¶ 174 (iv); CM., ¶ 315 (iv); Rejoinder, ¶ 271 (vi); Mem., ¶ 368 (f); Reply, ¶ 279 (f).

nonetheless, that it has also held that the claims were precluded by virtue of the fork-in-the-road provision at Article 11(2) of the Treaty, meaning that the Claimant would not have succeeded on its claims even if it had prevailed on *res judicata*.

414. Having considered all the relevant circumstances, the Tribunal comes to the conclusion that the Claimant shall bear the entirety of the costs of the proceedings, as fixed in Section VII.C above (i.e. EUR 446,645.89); and shall reimburse EUR 223,322.95 to the Respondent for the costs met from the Respondent's share of the deposit. The Claimant shall also bear one third of the Respondent's costs for legal representation and assistance and shall thus pay USD 400,747 to the Respondent.
415. The Respondent has also requested interest on costs, but has failed to provide a legal basis for such request or indicate an appropriate rate, and thus the Tribunal must dismiss this request.

## VIII. DECISION

416. For the reasons set out above, the Tribunal decides as follows:

- i. It cannot entertain the claims brought by Iberdrola Energía, S.A. on the ground of lack of admissibility or jurisdiction;
- ii. It lacks jurisdiction over the Counterclaim;
- iii. The Claimant shall bear the costs of the arbitration in the amount of EUR 446,645.89 and shall reimburse EUR 223,322.95 to the Respondent for the costs met from the Respondent's share of the deposit;
- iv. The Claimant shall pay USD 400,747 to the Respondent in compensation of its costs for legal representation and assistance;
- v. All other requests for relief are dismissed.

Seat of the arbitration: Geneva, Switzerland

Date: 24 August 2020

The Arbitral Tribunal



J. Christopher Thomas QC



Professor Pierre-Marie Dupuy



Professor Gabrielle Kaufmann-Kohler

(Presiding Arbitrator)