**LONDON COURT OF INTERNATIONAL ARBITRATION**

**LCIA CASE No. 204865**

**DUNOR ENERGÍA, S.A.P.I. DE C.V.**
**(PLAINTIFF) (Mexico)**
**VS.**
**COMISIÓN FEDERAL DE ELECTRICIDAD**
**(DEFENDANT) (Mexico)**

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# FINAL ARBITRATION AWARD

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MEXICO CITY (Seat of Arbitration)

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ARBITRATION AWARD

LCIA Arbitration CASE No. 204865

Between:

**DUNOR ENERGÍA S.A.P.I. DE C.V. (México)**

(the "Plaintiff")

**vs.**

**COMISIÓN FEDERAL DE ELECTRICIDAD (Mexico)**

(the "Defendant")

**LONDON COURT OF INTERNATIONAL ARBITRATION**

## 1 DEFINITIONS

1. In this Award, in addition to those expressly indicated, the following expressions shall be used with the meaning indicated:

   (i) **Arbitration Agreement**: is the agreement contained in Clause 30.3 of the Contract entitled "PUBLIC WORKS CONTRACT FINANCED AT A FIXED PRICE NO. PIF -039/2015".

   (ii) **Agreement**: is the agreement between the Parties on the Application of Clause 25.5 to fulfill the Purpose of Contract PIF-039/2015, dated September 17, 2018.

   (iii) **Hearing**: is the Virtual Hearing held from January 10 to 14, 2022.

   (iv) **CCF:** is the Federal Civil Code of Mexico.

   (v) **CENACE**: is the National Energy Control Centre.

(vi) **CAP:** is the Provisional Acceptance Certificate.

(vii) **CCF**: is the Federal Civil Code.

(viii) **GNUTC:** Guaranteed Net Unit Thermal Consumption.

(ix) **NWAUTC:** Net Weight Average Unit Thermal Consumption.

(x) **CFE's Counter-Memorial and Counterclaim**: is the Counter-Memorial filed on May 20, 2021 by the Comisión Federal de Electricidad (CFE) to the Complaint filed by Dunor Energía S.A.P.I. de C.V.

(xi) **Dunor's Reply or Reply and Answer to the Counterclaim**: is the Reply Memorial to the Main Claim and Answer to the Counterclaim filed on August 23, 2021 by Dunor Energía S.A.P.I. de C.V. to the Counterclaim filed by the Comisión Federal de Electricidad.

(xii) **Contract:** is the Public Works Contract Financed at a Fixed Price No. PIF-039/2015 dated October 23, 2015.

(xiii) **SPG Contract**: is the Long-Term Service Performance Guarantee Contract for Gas turbine generators entered into between CFE and Siemens Innovaciones, S.A. de C.V., dated June 20, 2016.

(xiv) **Energy Purchase and Sale Contract**: is the Contract entered into between Dunor Energía S.A.P.I. de C.V. and CFE Generación IV, entered into on March 20, 2018.

(xv) **First Amending Agreement:** is the First Amending Agreement to the Public Works Contract Financed at a Fixed Price No. PIF-039/2015, which was held on April 24, 2018[1].

(xvi) **Second Amending Agreement:** is the Second Amending Agreement to the Public Works Contract Financed at a Fixed Price No. PIF-039/2015, which was held on November 23, 2018[2].

(xvii) **Third Amending Agreement:** is the Third Amending Agreement

[1] Appendix to the Complaint, DOC. C-3.
[2] Appendix to the Complaint, DOC. C-4.

to the Public Works Contract Financed at a Fixed Price No. PIF-039/2015, which was held on October 21, 2019[3].

(xviii) **Amending Agreements:** are the First, Second, and Third Amending Agreements concluded by the Parties.

(xix) **Dunor Complaint, Complaint or Complaint Memorial**: is the Complaint filed by Dunor Energía S.A.P.I. de C.V. on February 05, 2021 against the Comisión Federal de Electricidad.

(xx) **CFE's Answer and Counterclaim, Counter-Memorial and Counterclaim or CFE's Answer**: is the Answer to the Complaint and Counterclaim filed by the Comisión Federal de Electricidad on May 20, 2021 against Dunor Energía S.A.P.I. de C.V.

(xxi) **Plaintiff, Contractor, DUNOR, or Dunor Energía:** is Dunor Energía S.A.P.I. de C.V.

(xxii) **Defendant, Contractor/Contratante, CFE or Commission:** is the Comisión Federal de Electricidad.

(xxiii) **Dunor Rejoinder**: is the Rejoinder Memorial to the Counterclaim by Dunor Energía S.A.P.I. de C.V. dated December 12, 2021.

(xxiv) **Rejoinder and Reply to CFE Counterclaim or Rejoinder Memorial and Reply to Counterclaim Memorial**: is CFE's Rejoinder Brief to the Arbitration Claim and Reply to the Counterclaim, dated October 27, 2021.

(xxv) **EY Indirect Cost Report:** is the Report on "Indirect costs incurred by the corporate offices of DUNOR ENERGÍA S.A.P.I DE C.V.", prepared by EY in development of the Agreement, dated August 3, 2020.

(xxvi) **First LAPEM Report:** is Report LAPEM-K3323-105-19 dated August 14, 2019 on the Plant Performance Test.

(xxvii) **Second LAPEM Report:** is Report LAPEM-K3323-095A-19 on the

[3] Appendix to the Complaint, DOC. C-5.

Plant Performance Test dated October 30, 2019.

(xxviii) **LCIA:** is the *London Tribunal of International Arbitration*.

(xxix) **Tender**: is the International Public Tender -LO-018TOQ054-T32-.

(xxx) **LOPSRM:** is the Public Works and Related Services Law.

(xxxi) **Dunor's Closing Submission:** is the Plaintiff's concluding memorial dated April 4, 2022.

(xxxii) **CFE's Closing Submission**: is the Defendant's concluding memorial dated April 4, 2022.

(xxxiii) **EO:** Economic Offer.

(xxxiv) **TO:** Technical Offer.

(xxxv) **Analysis Period or Recognition Period:** period from July 19, 2018 to March 14, 2019, as a result of the impacts and delays incurred in the Execution Program.

(xxxvi) **Expert Cámara:** is the engineer Lorenzo José Cámara Anzures who prepared two expert reports presented by CFE.

(xxxvii) **DATG Expert, DATG, or Moore Expert**: is the expert Roberto Edgar Gallardo López, who prepared two expert reports presented by CFE on behalf of Moore, De Anda, Torres, Gallardo y Cia.

(xxxviii) **EY Expert**: is the expert Ignacio Cortés Castán who, on behalf of Ernst & Young, prepared two financial expert reports that were **presented** by Dunor.

(xxxix) **SGI Expert**: are the experts Luis Alfonso Moreno Pacheco and Víctor Joaquín Larrazabal Gómez, who on behalf of Sistemas de Gestión Integrados, S.C., prepared two expert reports that were presented by DUNOR.

(xl) **First SGI Expert Report:** is the report prepared by the experts Luis Alfonso Moreno Pacheco and Víctor Joaquín Larrazabal Gómez, on behalf of Sistemas de Gestión Integrados, S.C. that DUNOR accompanied its Complaint.

(xli) **Second SGI Expert Report**: is the report prepared by the experts Luis Alfonso Moreno Pacheco and Víctor Joaquín Larrazabal Gómez, on behalf of Sistemas de Gestión Integrados, S.C. that DUNOR accompanied its Reply.

(xlii) **First EY Expert Report**: this is the expert report prepared by expert Ignacio Cortés Castán on behalf of Ernst & Young, which the Plaintiff attached to its Complaint.

(xliii) **Second EY Expert Report**: is the expert report prepared by expert Ignacio Cortés Castán on behalf of Ernst & Young that accompanied the Plaintiff's Reply.

(xliv) **First Moore Expert Report or DATG Report**: is the expert report prepared by Roberto Edgar Gallardo López on behalf of Moore, De Anda, Torres, Gallardo y Cia, which was attached to CFE's Answer.

(xlv) **Second Moore Expert Report**: is the expert report prepared by Roberto Edgar Gallardo López on behalf of Moore, De Anda, Torres, Gallardo y Cia, which was attached to the Rejoinder and Reply to the Counterclaim filed by CFE.

(xlvi) **First Expert Cámara Report**: is the opinion prepared by Engineer Lorenzo José Cámara Anzures that CFE attached to its Answer.

(xlvii) **Second Expert Cámara Report**: is the opinion prepared by Engineer Lorenzo José Cámara Anzures that CFE attached to its Rejoinder and Reply to the Counterclaim.

(xlviii) **Plant or Power Plant**: is the Combined Cycle Power Plant for the generation of electricity, called 313 CC Empalme II whose construction is the subject of the Contract.

(xlix) **Proposal:** is the Technical Offer and the Economic Offer, presented to the Commission by DUNOR, for the awarding of the Contract.

(l) **RG87**: is the Warranty Claim 87.

(li) **RLOPSRM:** Regulation of the Public Works and Related Services

Law.

(lii) **Parties:** are jointly DUNOR and CFE.

(liii) **Arbitration Rules:** is the Arbitration Rules of the London Court of International Arbitration, effective as of October 01, 2014.

(liv) **GTs:** are gas turbines or gas turbogenerators.

## 2 FULL NAMES, DESCRIPTION AND ADDRESS OF THE PARTIES

### 2.1 Plaintiff

2. The Plaintiff is Dunor Energía S.A.P.I. de C.V., a Mexican corporation.

3. The address and contact details of this company are:

Dunor Energía S.A.P.I. de C.V.
Moliere 13, Piso 8.
Colonia Polanco Chapultepec, Alcaldía Miguel Hidalgo.
Zip Code 11560, Mexico City.
United Mexican States
Tel.: (+52) 55 25 78 48
Fax (+52) 55 25 78 49
Email: garrien@elecnor.com
Diego.desantiago@durofelguera.com

### 2.2 Defendant

The Defendant is the Comisión Federal de Electricidad, a productive enterprise of the Mexican State, exclusively owned by the Federal Government of the United Mexican States, with its own legal personality and assets, which enjoys technical, operational, and management autonomy, as provided in article 2 of the Law of the Comisión Federal de Electricidad, published on August 11, 2014.

4. The address of said Entity is:

Paseo de la Reforma 164, Piso 11
Colonia Juárez; Alcaldía Cuauhtémoc
ZIP Code 06600

Mexico City
Mexico

**2.3 Names of the Representatives of the Parties in the present proceedings and addresses to which notices and communications in this Arbitration shall be sent:**

**2.3.1. Plaintiff's Representatives**

5. The Plaintiff's Representatives are:

Bernardo M. Cremades, Jr.
José María López Useros
Beatriz Franc Miñana
Carlos Molina Esteban
Daniel Acosta Toledo
Emails:
bcr@bcremades.com
jmlopez@bcremades.com
bfranc@bcremades.com
c.molina@bcremades.com
daniel_acosta@me.com

6. The address of these representatives is:

B. Cremades & Asociados.
Calle Goya, 18 – Planta 2
28001, Madrid
Spain
Phone: (+34) 914-237-200
Fax: (+34) 915-769-794

Daniel Acosta Toledo
Retorno Mayorazgo de Luyando 4-13
Colonia Xoco, Alcaldía Benito Juárez
Mexico City 03330

United Mexican States
Tel.: (+52) 55 56045311
Fax: (+52) 55 56045311

### 2.3.2. Defendant's Representatives

7. The Defendant's Legal Representative is:

Alejandro Marín Méndez

8. The address of said representative is:

Attorney General's Office

Paseo de la Reforma 164 Piso 11, Colonia Juárez, Alcaldía Juárez,
Zip Code 06600, Mexico City, Mexico

Similarly, in accordance with the Defendant's request filed on September 1, 2020, any notice or communication must be made to the following persons:

Raúl Armando Jiménez Vázquez
Address: Paseo de la Reforma no. 164, piso 11, Colonia Juárez, Alcaldía Cuauhtémoc, Ciudad de México, C.P. 06600, Mexico
Phone Number: +52 (55) 5229 4400 Ext. 82500
Email:
raul.jimenezva@cfe.mx

Rafael Ángel Serrano Figueroa
Address: Paseo de la Reforma no. 164, piso 11, Colonia Juárez, Alcaldía Cuauhtemoc, Ciudad de México, C.P. 06600, México
Phone Number: +52 (55) 5229 4400 Ext. 82628
Email:
rafael.serrano@cfe.mx

As well as:

Martha Alicia Magdaleno Medina
Phone Number: +52 (55) 5229 4400 Ext. 90005
Email: martha.magdaleno@cfe.mx
Atenas Sebastián Zepeda
Phone Number: +52 (55) 5229 4400 Ext. 82634
Email: atenas.sebastian@cfe.mx
Norma Mireles Fragoso
Phone Number: +52 (55) 5229 4400 Ext. 82681
Email: norma.mirelesf@cfe.mx
Jesús Gerardo Agustín Ortega Téllez
Phone Number: +52 (55) 5229 4400 Ext. 82537
Email: agustin.ortega@cfe.mx
Carlos Alberto Bejarano Torres
Phone Number: +52 (55) 5229 4400 Ext. 82688
Email: carlos.bejarano@cfe.mx
Ricardo Andrés Lara Chávez
Phone Number: +52 (55) 5229 4400 Ext. 82689
Email: ricardo.lara@cfe.mx
Ahuitz Alejandro Sánchez Robles
Phone Number: +52 (55) 5229 4400 Ext. 82364
Email: alejandro.sanchezr@cfe.mx
Antonio Grayeb Cervantes
Phone Number: +52 (55) 5229 4400 Ext. 82661
Email: antonio.grayeb@cfe.mx

### 2.4 Notifications

9. In accordance with paragraph 1.1.3, notifications and communications in these arbitration proceedings are made to the representatives of the Parties indicated in the previous paragraph, to the email addresses indicated in the same section.

## 3 COMPOSITION OF THE ARBITRAL TRIBUNAL

10. The Arbitral Tribunal is composed of:

### 3.1 Co-arbitrator appointed by the Plaintiff:

11. The Plaintiff appointed Mr. Roberto Hernández García as co-arbitrator.

12. The address and contact details of co-arbitrator Roberto Hernández García are as follows:

Phoebus 29. Col. Crédito Constructor.
03940, Alcaldía Benito Juárez, Mexico City
Mexico
Email: rhernandez@comad.com.mx

### 3.2 Co-arbitrator appointed by the Defendant:

13. The Defendant appointed Mr. Guillermo Estrada Adán as co-arbitrator.

14. The address and contact details of co-arbitrator Guillermo Estrada Adán are:

Reforma 42, Casa 1
Mexico City
Mexico
Email: guillermo.estrada@unam.mx

### 3.3 President of the Arbitral Tribunal

15. The Parties appointed Mr. Juan Pablo Cárdenas Mejía as President of the Tribunal.

16. The address and contact details for the Presiding Arbitrator, Juan Pablo Cárdenas Mejía, is as follows:

Avenida Calle 72 No 6-30, Piso 11
Bogota D.C. Colombia
Phone: + 571 2551017 Ext. 101
Email: jpcm2001@yahoo.com

## 4 ARBITRATION AGREEMENT

17. The Arbitration Agreement is set forth in Clause 30.3 of the Contract. This provision states the following:

> "*30.3 Arbitration. All disputes arising in connection with this Contract, other than disputes which pursuant to Clause 30.2, shall be decided exclusively and finally in accordance with the Arbitration Rules of the London Tribunal of International Arbitration, by 3 (three) Arbitrators; one chosen by each of the Parties; the third arbitrator shall be appointed by the Parties or by the arbitrators already appointed and in the absence of agreement by the London Tribunal of International Arbitration (hereinafter LCIA), The Arbitrators shall preferably have knowledge of Mexican law. The seat of arbitration shall be Mexico City, Federal District, and shall be conducted in Spanish. The Applicable Law governing the merits of the arbitration and, by default, the procedure insofar as the LCIA Arbitration Rules are omitted, shall be as provided in Clause 30.1. As for the procedure, if the Rules of the London Court of International Arbitration are omitted, the Rules determined by the Parties or, failing that, the Arbitral Tribunal, shall apply. The arbitration proceedings shall be confidential and any Person participating therein shall observe confidentiality. The foregoing confidentiality shall be maintained as long as the competent authority does not require disclosure in accordance with the Applicable Law. It is understood that the Arbitral Tribunal shall accept as binding the determinations – if any – of the Expert with respect to technical or administrative aspects within the limits of the mandate of such Expert*."

## 5 APPLICABLE LAW

18. In accordance with Clause 30.1 of the Contract, "*This Contract shall be governed by and construed in accordance with LOPSRM and the other Federal Laws of Mexico".* There is no dispute as to the applicable law between the Parties.

## 6 SEAT OF ARBITRATION

19. As agreed in the Arbitration Agreement referred to, the seat of arbitration is Mexico City (Mexico).

## 7 LANGUAGE OF THE ARBITRATION

20. According to Clause 30.3 of the Contract, the arbitration proceeding "*shall be conducted in Spanish language*".

## 8 APPLICABLE PROCEDURAL RULES

21. As agreed by the Parties in the Contract, the applicable procedural rules are those contained in the Arbitration Rules of the London Court of International Arbitration, in force as of 2014, and in the procedural orders or directives issued by the Arbitral Tribunal.

## 9 PROCEDURAL BACKGROUND

22. On August 25, 2020, DUNOR filed its request for arbitration, in which Mr. Roberto Hernández García was appointed as arbitrator.

23. On September 22, 2020, the Comisión Federal de Electricidad submitted its Response to the Request for Arbitration, by which it appointed Mr. Guillermo Enrique Estrada Adán as arbitrator.

24. By communication dated October 19, 2020, the LCIA informed Mr. Juan Pablo Cárdenas that the Parties had appointed him as president of the Tribunal.

25. The persons appointed as arbitrators accepted their appointments.

26. By email dated October 27, 2022, the LCIA informed the Parties that, in accordance with Article 5 of the Arbitration Rules, the LCIA Court appointed Roberto Hernández García, Guillermo Enrique Estrada Adán and Juan Pablo Cárdenas to form the Arbitral Tribunal in this arbitration, chaired by Juan Pablo Cárdenas.

27. On November 23, 2020, after consultation with the Parties, Procedural Order No. 1 was issued, by which the Procedural Calendar was adopted and decisions were made regarding the presentation of briefs, evidence, procedural orders, deadlines, and confidentiality.

28. By Procedural Order No. 2, of January 15, 2021, the deadline for filing the Arbitration Claim was extended until February 5, 2021.

29. By Procedural Order No. 3, of February 03, 2021, the Procedural Calendar was

modified.

30. On February 5, 2021, the Plaintiff filed its Complaint Memorial.

31. On May 20, 2021, the Defendant filed its Counter-Memorial and Counterclaim.

32. On May 31, 2021, the Parties submitted their requests for the production of documents.

33. On June 21, 2021, the Parties submitted their respective Replies to the Objections to the Requests for Production of Documents.

34. On July 2, 2021, the Tribunal issued Procedural Order No. 4 by which it decided the requests for discovery filed by each of the Parties and objected to by their counterpart.

35. On August 23, 2021, the Plaintiff filed its Reply Memorial to the Main Claim and Answer to the Counterclaim.

36. By Procedural Order No. 5, dated October 6, 2021, the Procedural Calendar was modified.

37. On October 27, 2021, the Defendant filed its Rejoinder to the Arbitration Claim and Reply to the Counterclaim.

38. On December 12, 2021, the Plaintiff filed its Rejoinder to the Counterclaim.

39. By Procedural Order No. 6, dated December 17, 2021, the Tribunal determined that the Hearing of the present process would be held virtually and provisions were adopted on the way in which the Hearing would be developed.

40. By email, dated December 29, 2021, the Tribunal indicated that taking into account the requests of the Parties, the statements of the experts Luis Alfonso Moreno Pacheco, Víctor Joaquín Larrazábal Gómez, Ignacio Cortés Castán, José Lorenzo Cámara Anzures, and Roberto Edgar Gallardo López would be received. In that communication, the Plaintiff also requested that engineer Mr. Gorka Arrien Echeverría be allowed to be cross-examined. In this regard, the Tribunal noted that in the evidentiary opportunities the Plaintiff did not present the statement of engineer Gorka Arrien Echeverría nor did it indicate the need to receive it, for which reason, the Tribunal did not consider it pertinent at that time

to receive the statement of engineer. Gorka Arrien Echeverria. The Tribunal added that, in any event, it could subsequently order the receipt of such a statement if it found it relevant to deciding the case. It is expressly noted that the Plaintiff did not object to the Tribunal's decision in any formal manner on this particular aspect.

41. The Hearing was held virtually between January 10 and 14, 2022, it was recorded, and the transcript reviewed by the Parties is part of the file.

42. During the first day of the Hearing of the current proceedings, the Plaintiff's representation contested the Defendant's presentation and Opening Statement by all the intervening persons who are engineers or accountants and are not lawyers. The foregoing, because it considers that what the Defendant is trying to do is to introduce witness and expert statements *"through the back door"*.

43. By Procedural Order No. 7, of February 7, 2022, the Tribunal decided to deny the Plaintiff's request to deprive the Defendant's Opening Statement of effect, notwithstanding that, as explained below, said allegations were in no case considered as evidence or determining factor for the considerations and decisions contained in this Award.

44. By email of February 8, 2022, the Plaintiff acknowledged receipt of Procedural Order No. 7, of February 7, 2022, indicating that it understands that it was mistakenly dated 2021, and filed an objection for the appropriate procedural purposes.

45. By Procedural Order No. 8 of March 16, 2022, the Tribunal clarified that the date of Procedural Order No. 7 is February 7, 2022 and decided "*To maintain Procedural Order No. 7 clarifying, as set forth in the body of this Procedural Order, the scope and effects of the Opening Statements presented during the hearing, which will not be considered as evidence, since they do not have such nature*".

46. On April 4, 2022, both the Plaintiff and the Defendant filed their Closing Submissions.

47. In a communication dated April 8, 2022, the Plaintiff stated that in Section VIII – Petitions, specifically in section F, of the Closing Submissions, the Commission requests: "*Declare that in connection with the attention of Warranty Claim No. 87,*

*the Defendant is entitled to the immediate renewal of the Operational Guarantee and that its omission is covered by the Performance Guarantee".* In this regard, the Plaintiff pointed out that the Tribunal should dismiss said request because "*Both the mere declaratory claim and the constitutive one had to be asserted via Counterclaim, at the appropriate procedural time. In both cases, CFE requests specific rulings from the Arbitral Tribunal. They are not, as is adversely intended , material exceptions or mere defenses."* It added that today, there is no claim regarding RG-87, to which the petition refers.

48. On May 4, 2022, the two Parties filed their written submissions on costs.

49. In a communication dated May 9, 2022, the Defendant declared that it complied with Procedural Order No. 6 as indicated in said communication.

50. By communication dated May 13, 2022, the Plaintiff informed "*the Tribunal of the agreement reached by the Parties, which partially affects the claims submitted to the Arbitral Tribunal".* To that end, it stated the following:

> *"On May 12, 2022, the Commission and Dunor reached a written agreement addressing 'the scope and cost of the Contractor's outstanding Minor Deficiencies and Warranty Claims'. The Parties also agreed that it would be the Plaintiff who would inform the Arbitral Tribunal of such agreement, which will be subsequently confirmed by the Commission. Derived from the foregoing, the Parties agree to exclude from the decision of the Arbitral Tribunal in the Final Award the following sections:*
>
> *a) Section III.D of the Complaint Memorial, dated February 5, 2021, relating to "Closure of Minor Deficiencies and Breach of the Duty to reduce the Performance Guarantee";*
>
> *b) Section III.E(b)(4) of the Complaint Memorial, "Associated Financial Expenses. . . and the Refusal to Reduce the Performance Guarantee";*
>
> *c) Paragraph 417, subparagraph (iv) of the Petition of the Complaint Memorial;"*

51. By communication dated May 13, 2022, the Tribunal informed the Parties that it expected to issue the award terminating the arbitral proceedings by the last week of July 2022.

52. By email dated May 23, 2022, the Defendant responded to the Plaintiff's brief dated May 13, 2022 by stating that it "*confirms the agreement between the Parties to exclude from the arbitration award those items set forth in the Plaintiff's Letter*".

53. On May 24, 2022, the Plaintiff submitted its Written Observations on CFE's Costs Submission.

54. In a communication dated July 22, 2022, the Tribunal informed the Parties: *"The Tribunal wishes to inform you that it continues to work on the award, but unfortunately it is not possible to finalize it by the scheduled date. The Tribunal expects to be able to finalize the award in the week ending August 12, 2022".*

## 10 BACKGROUND OF THE DISPUTE

55. The background to the present case can be summarized as follows:

56. As a result of the Tender on October 23, 2015, the Parties concluded the Contract. The agreed price was US$ 396,997,949.52 (Three hundred and ninety-six million nine hundred and ninety-seven thousand nine hundred forty-nine US dollars 52/100 cy)[4].

57. The Scheduled Date for the Provisional Acceptance of the Power Plant was scheduled for April 28, 2018[5].

58. Notwithstanding the foregoing, this date was modified by the Parties through the formalization of three Amending Agreements, whose purpose was to extend the Dates of Critical Events as follows: i). With the First Amending Agreement, the Dates of Critical Events established in Appendix 3 of the Contract were extended by 19 days, including the date of the Provisional Acceptance; (ii). Through the

[4] Counter-Memorial and Counterclaim, No. 61
[5] Complaint Memorial, No. 67.

Second Amending Agreement, it was agreed to extend by 93 days these Dates of Critical Events established in Appendix 3 of the Contract, including the Scheduled Provisional Acceptance Date; (iii). Finally, with the Third Amending Agreement, the Parties agreed to extend by 208 days the Scheduled Provisional Acceptance Date, which was set for March 14, 2019[6].

59. The Parties signed the Provisional Acceptance Act on August 14, 2019[7].

60. During the negotiation of the Second Amending Agreement, the Plaintiff invoked the application of Clause 25.5. of the Contract, which provides:

> *"In the event that the originally agreed Scheduled Provisional Acceptance Date of the Power Plant is delayed for a period of 60 (sixty) Days (either, continuous or cumulative) due to Governmental Force Majeure, or the events contemplated in the Clause, this Contract shall automatically be terminated with respect to the affected Work on the date occurring 30 (thirty) days after the expiration of such 60 (sixty) Day period unless within such 30 (thirty) Day period the Parties enter into a written agreement on terms and conditions which shall reasonably compensate the Contractor for reasonable and documented direct Work-related expenses which the Contractor may incur"*

61. In view of the above, the Parties concluded the Agreement[8], whose purpose was to agree on the "*terms and conditions which shall reasonably compensate the Contractor for reasonable and documented direct Work-related expenses which the Contractor may incur"* as a result of the application of Clause 25.5 of the Contract.

62. On February 12, 2020, the Minutes of Acknowledgement of Reimbursement for Financial Expenses, Insurance, and Guarantees of the Project were signed[9], where the Parties reconciled part of the concepts corresponding to this item. In this vein, the Defendant acknowledged the amount of US$ 9,662,588.15 (Nine million six hundred and sixty-two thousand five hundred and eighty-eight US dollars 15/100 cy) out of the US$ 11,735,667.69 (Eleven million seven hundred and thirty-five thousand six hundred and sixty-seven US dollars 69/100 cy)

[6] Counter-Memorial and Counterclaim, No. 63-67.
[7] Appendices to the Complaint, Doc. C-53.
[8] Counter-Memorial and Counterclaim, No. 71.
[9] Appendix to the Complaint, Doc-31.

requested by the Plaintiff.

63. Subsequently, CFE considered appropriate the recognition of the Agency Commission for an amount of US$ 30,405.41, (Thirty thousand four hundred and five US dollars 41/100 cy) which the Plaintiff maintains has not been paid.

64. Although the Minutes were signed, there are discrepancies related to: i. the interest of the claims with the Related Parties for an amount of US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and one US dollars 68/100 cy) (Agreement 3 of the Minutes) and ii. administrative expenses associated with the novations including the Structuring Commissions and Agency fees in the amount of US$ 1,361,253.50. (One million three hundred and sixty-one thousand two hundred and fifty-three US dollars 50/100 cy) (Agreement 4 of the Minutes).[10]

65. In addition, the Plaintiff points out that, in relation to the expenses of Personnel Management and Field Administration, the Defendant has been delaying payments for these concepts.

66. The Plaintiff further submits that according to section 3.3. of the Agreement, CFE had to compensate DUNOR for damages for the Administration Expenses and Central Office Structure, for an amount of US$ 2,975,708 (Two million nine hundred and seventy-five thousand seven hundred and eight US dollars), and which the Plaintiff affirms that CFE has not recognized[11].

67. Likewise, the Plaintiff requests the recognition of expenses derived from Third-Party Claims in accordance with section 3.5 of the Agreement, which provides that CFE must compensate DUNOR for the expenses derived from "*the claims of suppliers and subcontractors by the Contractor*".[12] It adds that after having carried out at CFE's request the reclassification of a series of invoices from section 3.2 of the Agreement to section 3.5, there is a discrepancy between the Parties on the amount to be recognized and paid by CFE.

68. For its part, the Defendant, in its Answer, maintains that DUNOR claims the economic consequences resulting from its longer stay in the worksite for reasons

[10] Reply and Answer to the Counterclaim, No. 33-49.
[11] Reply and Answer to the Counterclaim, No. 96.
[12] Reply and Answer to the Counterclaim, No. 133.

not attributable to the Parties, and in respect of which the Commission has not denied its merit, but has pointed out that the documentation submitted by the Plaintiff does not comply with the spirit of the Agreement because it included (i) expenses outside the recognition period; (ii) unsettled invoices; (iii) expenses that were not eligible for recognition; (iv) unreasonable expenses; (v) expenses without documentary support; and (vi) expenses that were not directly related to the affected part of the work.[13]

69. A discussion has also arisen between the Parties relating to DUNOR's duty to deliver the Requested Spare Parts pursuant to clause 4.1(p) of the Contract, which states that "*the Contractor is obliged to deliver the Spare Parts, Tools, and Special Equipment pursuant to Clause 21.5 of the OPF Contract".* In this regard, there is a disagreement regarding the scope of this obligation/duty and its compliance by the Contractor.

70. Another dispute that has arisen between the Parties is related to the application of Degradation Curves to the Results of the Performance Tests of the Power Plant. The call for Tender establishes the obligation to perform Service, Operation and Performance Tests to the Power Plant in accordance with the Execution Program and Appendix 13 of the Contract. These tests were scheduled for April 27, 2018, however, in accordance with clause 12.3 (a) and (b) of the Contract, the Parties entered into three Amending Agreements in which the Project's Execution Program was modified – which stipulated that between the First Synchronization of the GTs and the Scheduled Provisional Acceptance Date there would be a 5-month period – and therefore, such Performance Tests were conducted 8 months later than originally planned[14].

71. DUNOR maintains that Degradation Curves should be used for the Performance Tests, as these curves represent correction factors that reflect the deterioration or wear suffered by the turbines due to the additional operating time.[15] On the contrary, CFE considers that the Degradation Curves cannot be applied due to what is expressly prohibited and provided by the Contract.

[13] Counter-Memorial and Counterclaim, No. 279.
[14] Complaint Memorial, No. 213.
[15] Reply and Answer to the Counterclaim, No. 352.

72. Another topic raised in the Complaint refers to the Closure of Minor Deficiencies and Reduction of the Performance Guarantees. However, in a brief dated May 13, 2022, the Plaintiff reported that an agreement had been reached with CFE which refers to *the "scope and cost of the Minor Deficiencies and Warranty Claims pending to be addressed by the Contractor",* so that any decision regarding the Minor Deficiencies and the breach of the duty to reduce the Performance Guarantees was to be excluded from the Tribunal's Decision. . This was confirmed by the Defendant. Those claims have therefore fallen outside the scope of the present arbitral proceedings.

73. Another aspect regarding which CFE raised a dispute relates to the payment of the electricity supplied for the Construction, Testing, and Commissioning of the Power Plant. In relation to this point, a contract was concluded by DUNOR and CFE Generación IV, but according to CFE, DUNOR owes the payment of various invoices and claims payment.

## 11 CLAIMS SUBMITTED TO THE ARBITRAL TRIBUNAL

### 11.1 Plaintiff's Claims – DUNOR

74. In its Request for Arbitration, the Plaintiff requested the Arbitral Tribunal to issue an Arbitration Award pursuant to clause 30 of the Contract, in which it:

> *"(i) considers this Request for Arbitration to be filed and the accompanying documents;*
>
> *"(ii) declares that it has jurisdiction over the Defendant;*
>
> *"(iii) declares that the Defendant has breached the Contract;*
>
> *"(iv) orders the Defendant to proceed with the administrative closure of the Minor Deficiencies;*
>
> *"(v) directs the Defendant to pay the Plaintiff at least $27,047,372.51 plus applicable taxes;*
>
> *"(vi) orders the Defendant to pay the Plaintiff all legal costs and other expenses*

*arising out of this arbitration proceeding;*

*"(vii) orders that all amounts payable by the Defendant to the Plaintiff shall accrue pre-award and post-award interests (or, alternatively, from the date of the condemnatory award), except for costs and other legal expenses arising from these arbitration proceedings, which shall accrue interests from the date of the potential condemnatory award; and*

*"(viii) grants the Plaintiff any additional relief it deems appropriate by law".*

75. In its Complaint, Plaintiff DUNOR requested the Arbitral Tribunal to issue an Arbitration Award pursuant to clause 30 of the OPF Contract in which it:

*"(i) considers this brief and the accompanying documents to have been submitted and, likewise, the allegations contained therein;*

*"(ii) declares that it has jurisdiction over the Defendant;*

*"(iii) declares that the Defendant has breached the Contract;*

*"(iv) orders the Defendant to proceed with the administrative closure of the Minor Deficiencies;*

*"(v) orders the Defendant to pay Dunor at least US$ 26,249,202.29 plus applicable taxes;*

*"(vi) orders the Defendant to pay Dunor all costs and other legal expenses arising from of this arbitration proceeding;*

*"(vii) orders that all amounts payable by the Defendant to Dunor bear interest pre-award and post-award (or, alternatively, from the date of the condemnatory award) in accordance with the Financial Expense Rate, except for* costs *and other legal expenses arising from these arbitration proceedings, which shall accrue interest from the date of the potential condemnatory award; and*

*"(viii) grants the Plaintiff any additional relief it deems appropriate by law".*

76. In its Reply, DUNOR requested that the Arbitral Tribunal:

*"(i) considers this brief and the accompanying documents to have been submitted and, likewise, the allegations contained therein;*

*(ii) declares that it has jurisdiction over the Defendant in relation to Dunor's claims*

---

*under the OPF Contract;*

*(iii) declares that the Defendant has breached the Contract and the Agreement;*

*(iv) declares that it has no jurisdiction over the Counterclaim or, alternatively, dismiss the Counterclaim;*

*(v) orders the Defendant to proceed with the administrative closure of the Minor Deficiencies and the corresponding reduction of the Performance Guarantee;*

*(vi) orders Defendant to pay Dunor at least US$ 26,675,306.49 plus applicable taxes;*

*(vii) orders the Defendant to pay Dunor all costs and other legal expenses arising out of this arbitration;*

*(viii) orders that all amounts payable by the Defendant to Dunor bear interest pre-award and post-award (or, alternatively, from the date of the condemnatory award) in accordance with the Financial Expense Rate, except for costs and other legal expenses arising from these arbitration proceedings, which shall accrue interests from the date of the potential condemnatory award; and*

*(ix) grants the Plaintiff any additional relief it deems appropriate by law"*.

Finally, in its Closing Submission, DUNOR requested:

*"(i) considers this brief and the accompanying documents to have been submitted and, likewise, the allegations contained therein;*

*(ii) in connection with the Main Claim, declares that it has jurisdiction over the Defendant with respect to Dunor's claims under the OPF Contract;*

*(iii) declares that the Defendant has breached the Contract and the Agreement;*

*(iv) declares that it has no jurisdiction over the Counterclaim, which is based on a contract other than the OPF Contract;*

*(v) orders the Defendant to proceed with the administrative closure of the Minor Deficiencies and the corresponding reduction of the Performance Guarantee;*

*(vi) orders the Defendant to pay Dunor at least US$ 27,505,045.96 plus applicable taxes;*

---

*(vii) orders the Defendant to pay Dunor all costs and other legal expenses arising out of this arbitration;*

*(vii) orders that all amounts payable by the Defendant to Dunor shall bear pre-award and post-award interest (or, alternatively, from the date of the potential condemnatory award) in accordance with the Financial Expense Rate, except for costs and other legal expenses arising from these arbitration proceedings, which shall bear interests from the date of the potential condemnatory award;*

*(ix) grants the Plaintiff any additional relief it deems appropriate by law"*.

77. However, in view of the above claims, it must be taken into account that, in a brief of May 13, 2022, the Plaintiff stated that the Parties had reached an agreement by which Section III.D of the Complaint Memorial, of February 5, 2021, relating to the "*Closure of Minor Deficiencies and Breach of the Duty to Reduce the Performance Guarantee"* was excluded from the Tribunal's decision; (b) Section III.E(b)(4) of the Claim Memorial, "*Associated Financial Expenses . . . to the Refusal to Reduce the Performance Guarantee"*, and paragraph 417, subparagraph (iv) of the Petition of the Complaint Memorial. By email dated May 23, 2022, the Defendant confirmed "*the agreement concluded between the Parties to exclude from the Arbitration Award those points set forth in the Plaintiff's Letter".* Consequently, those claims have been excluded from the scope of the present arbitration proceedings.

### 11.2 CFE's claims

78. In its Response to the Request for Arbitration, the Defendant requested that the Arbitral Tribunal decide as follows:

*"(a) Dunor is found to have breached the Contract as it has failed to deliver the relevant Requested Spare Parts,*

*b) Dunor's breach of the Contract is declared in relation to the Guaranteed Values obtained from the Performance Tests.*

*c) Consequently, it is decreed that the discounts and conventional penalties applied by this Commission to the Plaintiff were made in accordance with the Contract and do not violate it.*

*d) Order Dunor to indemnify CFE for damages suffered as a result of breaches of its contractual obligations.*

*e) Order Dunor to pay the amounts resulting from the concepts contained in the Counterclaim.*

*f) Order Dunor to pay all costs and expenses incurred in these arbitration proceedings;*

*g) Order Dunor to pay interest at the Financial Expense Rate (as defined in the Contract), in respect of the amounts indicated in the preceding paragraphs, from the date on which they become liquid and payable until the date on which they are paid".*

79. In its Counterclaim, CFE requested:

*"a) That the Arbitral Tribunal orders DUNOR to pay in favor of CFE the amount of $ 9,113,673.45 (Nine million one hundred thirteen thousand six hundred and seventy-three pesos 45/100 M.N.), for the sale of electricity pursuant to the Energy Contract, corresponding to the year 2019.*

*"b) That the Arbitral Tribunal orders DUNOR to pay in favor of CFE the financial expenses generated due to the non-payment of the amount indicated above, for the sale of electricity under the Energy Contract, corresponding to the year 2019."*

80. In its Rejoinder, CFE requested the Tribunal:

*"A. That the Arbitral Tribunal has jurisdiction to resolve the present dispute raised in the Counter-Memorial and Counterclaim and in the present Memorial.*

*"B. Order DUNOR to pay in favor of the Commission the amount of $ 9,113,673.45 (Nine million one hundred thirteen thousand six hundred and seventy-three pesos 45/100 M.N.), for the sale of electricity pursuant to the Energy Contract, corresponding to the year 2019.*

*"C. Order DUNOR to pay in favor of the Commission the financial expenses generated due to the non-payment of the amount indicated above, for the sale of electricity pursuant to the Energy Contract, corresponding to the year 2019".*

81. Finally, in its Closing Submission, CFE requested:

*"A. That the Arbitration Tribunal declare itself competent to resolve the present dispute.*

*"B. All of the Plaintiff's claims must be rejected.*

*"C. Declare that the Commission has complied with the terms of the Contract in the execution of the discounts made for the non-delivery of the Requested Gas Turbogenerator Spare Parts indicated in Section 7.2.11.1. of the Call for Tenders and subsequent Appendix to the Contract.*

*"D. Declare inadmissible the application of Degradation Curves to the Gas Turbines and the legality and appropriateness of the discounts applied by the Commission against the breach of the Guaranteed Values incurred by DUNOR.*

*"E. Declare inadmissible the reduction of the Performance Guarantee.*

*"F. "Declare that in connection with the attention of Warranty Claim No. 87, the Defendant is entitled to the immediate renewal of the Operational Guarantee and that its omission is covered by the Performance Guarantee."*

*"G. Declare that the terms of Agreement 25.5 must be fully complied with by the Parties and that only the amounts justified, documented, reasonable, and directly related to the Project should be recognized.*

*"H. Absolve the Commission from the payment of the damages claimed by DUNOR as they are unfounded and the basis for their collection has not been proven.*

*"I. Absolve the Commission from the payment of the Financial Expenses claimed by DUNOR.*

*"J. Order the Plaintiffs to pay the amount of $9,113,673.45 (nine million one hundred and thirteen thousand six hundred and seventy-three pesos 45/100 M.N.) for the sale of electricity pursuant to the Energy Contract corresponding to the year 2019, as well as the related financial expenses generated on the date of its payment.*

*"K. Order the Plaintiffs to pay the costs and expenses incurred by the Defendant in connection with the legal defense of the Commission and the conduct of the arbitration proceedings".*

## 12 CONSIDERATIONS OF THE ARBITRAL TRIBUNAL ON THE MATTERS BEFORE IT

82. In view of the foregoing, the Tribunal proceeds to analyze each of the Parties' claims. For the purposes of the Tribunal's analysis, the position of the Parties is

set out below:

### 12.1 DUNOR's Claims

83. In accordance with the Complaint and the Reply submitted by DUNOR, the claims are based on the following aspects:

1. **Economic Consequences of the Application of Clause 25.5.**
    1. Financial expenses, Insurances, Guarantees
    2. Personnel Management and Field Administration Expenses
    3. Administration Expenses and Central Office Structure
    4. Third-Party Claims Expenses
2. **Obligation to Deliver Spare Parts**
3. **Application of Degradation Curves to the Performance Tests**
4. **Financial Expenses**
5. **Other damages**

#### 12.1.1 The Tribunal's Jurisdiction

84. The first thing the Tribunal finds is that the Plaintiff seeks a declaration that the Tribunal has jurisdiction over the Defendant.

85. In this regard, the Tribunal finds that the Defendant has not challenged the jurisdiction of the Tribunal, therefore, in line with the Plaintiff's request, the Tribunal will be declared to have full jurisdiction over the Defendant in relation to the claims made by both Parties, except those that were excluded by the Parties in accordance with the brief dated May 13, 2022, to which reference has been made.

#### 12.1.2 Default in payment resulting from the Application of Clause 25.5. of the Contract

86. DUNOR submits that the Commission has not paid in full, or on time, the

expenses incurred by DUNOR in accordance with the Agreement, thereby breaching clause 25.5 of the Contract and sections 3.1, 3.2, 3.3, 3.5, and 6.1 of the Agreement.

87. In particular, DUNOR refers to breaches related to Financial Expenses, Insurances and Guarantees; Expenses for Personnel Management and Field Administration; Administration Expenses and Central Office Structure and for Third-Party Claims Expenses.

88. For the purposes of deciding, the Tribunal considers it pertinent to make some general considerations, to subsequently examine each of the items claimed.

#### 12.1.2.1 General Framework

89. Clause 25.5 of the Contract provides:

> *"25.5 Termination in Case of Delay in the Scheduled Provisional Acceptance Date. In the event that the originally agreed Scheduled Provisional Acceptance Date of the Plant is delayed for a period of 60 (sixty) Days (whether continuous or cumulative), due to Governmental Force Majeure or the events contemplated in the Clause, this Contract shall automatically terminate with respect to the affected Work on the date that occurs 30 (thirty) Days after the expiration of such 60 (sixty) Day period, unless within such 30 (thirty) day period the Parties reach a written agreement on the terms and conditions that will reasonably compensate the Contractor for any reasonable and documented expenses directly related to the Works, in which the Contractor may incur (which shall include the servicing of the Contractor's Indebtedness in connection with the Financial Arrangements and any similar financing provided by any of the Participants or any of their Affiliates) as a consequence of any delay beyond the 60 (sixty) Days caused by the reasons set forth in this Clause. In the event that this Contract is terminated with respect to the Power Plant in accordance with this Clause 25.5, the Commission shall pay the Contractor the applicable Termination Value within 30 (thirty) Days following the date of termination"* (emphasis added).

90. Pursuant to this clause, in the event that the Scheduled Provisional Acceptance Date is delayed for a period of 60 days for the reasons indicated therein, the Parties may reach a written agreement on the terms and conditions to recover the expenses that meet the following requirements: 1. That they are directly related to the Works; 2. That they are reasonable; 3. That they are documented; and 4. That they result from any delay beyond the 60 days period.

91. In development of the above, the Parties concluded the "*Agreement between the Parties on the Application of Clause 25.5 to Fulfill the Purpose of the Contract PIF-039/2015*."

92. In said Agreement,[16] the Parties included in paragraph "*3. DESCRIPTION OF THE ITEMS TO BE RECOGNIZED DIRECTLY RELATED TO THE WORKS, WHICH ARE REASONABLE AND DOCUMENTED, AS WELL AS THE DESCRIPTION OF THE DOCUMENTATION TO BE SUBMITTED BY THE CONTRACTOR TO ACCREDIT THE FOLLOWING ITEMS; HOWEVER, IF APPLICABLE, THE GUIDELINES SECTION MUST BE COMPLIED WITH.*

93. The items included were the following:

> *3.1 FINANCIAL, INSURANCES, AND GUARANTEES.*
>
> *3.2 PERSONNEL MANAGEMENT AND FIELD ADMINISTRATION EXPENSES.*
>
> *3.3 ADMINISTRATION COSTS AND STRUCTURE OF CENTRAL OFFICES*
>
> *3.4 …*[17]
>
> *3.5 THIRD-PARTY CLAIMS*

94. With respect to each of these points, rules were established by the Parties, so the Tribunal will analyze each of them to determine the merits of the Contractor's claims, as the Parties have done throughout the process.

### 12.1.2.2 Financial Expenses, Insurances, and Guarantees

[16] Doc C-033 Agreement Between the Parties on the Application of Clause 25.5
[17] This paragraph included the "*METHODOLOGY FOR THE THIRD PARTY TO BE CONTRACTED, SO THAT THE THIRD PARTY TO BE CONTRACTED, IS IN A CONDITION TO ACCREDIT THE INDIRECT EXPENSES OF CENTRAL OFFICES ACCORDING TO CLAUSE 25.5 OF CONTRACT PIF-039/2015 OF PROJECT 313 CC EMPALME II, WITH THE OBJECTIVE OF ADDING THE OTHER ITEMS OF THE AGREEMENT*".

#### 12.1.2.2.1 Plaintiff's position

95. In its Complaint, DUNOR states that, pursuant to Section 3.1 of the Agreement, the Commission was obligated to pay DUNOR for the Financial Expenses, Insurances and Guarantees incurred by the Contractor due to delays in the execution of the Project not attributable to the Contractor[18].

96. The Defendant points out that as of the signing of the Minutes dated February 12, 2020 (the "*Minutes"*), the Parties agreed to conciliate most of the concepts corresponding to this item. Therefore, once CFE recognized the amount of US$ 9,662.558.15 (Nine million six hundred sixty-two thousand five hundred fifty-eight U.S. dollars 15/100 cy) of the total amount of US$ 11,735.667.69 (Eleven million seven hundred and thirty-five thousand six hundred and sixty-seven US dollars 69/100 cy) requested by DUNOR; said amount was paid 14 days late, for this reason the Plaintiff alleges that it is owed financial expenses that CFE is obligated to pay amounting to US$ 12,833.31[19] (Twelve thousand eight hundred and thirty-three US dollars 31/100 cy).

97. The Plaintiff states that, subsequently, CFE recognized an amount of US$ 30,405.41 (Thirty thousand four hundred and five US dollars 41/100 cy) for the Agency Commission.

98. Therefore, the controversial issues are limited to: i) the interest on receivables from Related Parties amounting to US$ 419,801.68 (Four hundred and nineteen thousand eight hundred one US dollars 68/100 cy), and ii) the Structuring and Agency Commissions for an amount of US$ 1,361,253.50 (One million three hundred sixty-one thousand two hundred and fifty-three US dollars 50/100 cy). The foregoing results in the total sum of US$ 1,781,055.18[20] (One million seven hundred and eighty-one thousand fifty-five US dollars 18 /100 cy), of which the EY Expert recognizes the origin of the sum of US$ 1,777,576.56 (One million seven hundred and seventy-seven thousand five hundred seventy-six US dollars 56/100 cy).[21] In view of the foregoing, the Plaintiff states that the total amount

[18] Complaint, para. 76.
[19] Complaint, para. 80.
[20] Complaint, para. 82.
[21] Complaint, para. 83.

claimed is US$ 1,807,981.97 (One million eight hundred and seven thousand nine hundred and eighty-one US dollars 97/100 cy), which corresponds to the amount already indicated by the EY Expert and US$ 30,405.41 (Thirty thousand four hundred and five US dollars 41/100 cy)[22].

99. Regarding the first item requested - i.e., interest on receivables from related Parties - the Plaintiff argues that CFE presumes that the credit was used to cover Indirect Costs of Additional Works, a concept that was not reconciled due to the lack of support for the payment of interest, which would imply that there was a breach of the "verification" attribute[23]. In response to this argument, DUNOR maintains that it is clear from the EY Expert Report that the Commission did have all the necessary support to verify the payment of interest on receivables from Related Parties, this is: (i) the Commercial Loan Agreement granted by Duro Felguera and Elecnor to DUNOR, which includes the interest payable on a principal of US$ 6,850,000.00 (Six million eight hundred and fifty thousand US dollars 00/100 cy); (ii) proof of interest payment with Related Parties incurred during the Analysis Period through the CaixaBank account; (iii) the accounting record in DUNOR's system of the payment of interest to Duro Felguera and Elecnor incurred in the Analysis Period and, (iv) the invoices issued by Duro Felguera and Elecnor corresponding to the interest charges accrued during the Analysis Period for the commercial loan[24]. It points out that it is not true that the Commission did not have the necessary support and that, on the contrary, DUNOR has complied with the verification requirements laid down in section 3.1 of the Agreement[25]. Finally, it adds that the DATG Expert, upon reviewing the documents and information received, concludes that the requirement of proof of the total amount of US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and one U.S. dollars 68/100 cy) claimed, is met[26].

100. In addition, the Plaintiff points out that the Commission misinterprets the statements of its Expert, alleging that the DATG Expert would have indicated that

[22] Complaint para. 84.
[23] Reply and Answer to the Counterclaim, para. 33.
[24] Reply and Answer to the Counterclaim, paras. 35 and 36.
[25] Reply and Answer to the Counterclaim, para. 37.
[26] Reply and Answer to the Counterclaim, para. 38.

a reimbursement to the Contractor in the amount of US$ 318,334.72 (Three hundred and eighteen thousand three hundred and thirty-four US dollars 72/100 cy) is due if the "*Rate stated in the Economic Proposal*" is considered, i.e., USD 6 months +200 basis points. However, a correct reading of the DATG Expert's Report reveals that he does not question the reasonableness of the amount of US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and one US dollars 68/100 cy) claimed by DUNOR. Instead, the expert refers to the fact that, if all the conditions for reimbursing this amount are not met, at least, interest should be repaid at the original rate of the Contract, amounting this partial acknowledgment to US$ 318,334.72 (Three hundred and eighteen thousand three hundred and thirty-four US dollars 72/100 cy).[27]

101. In addition, the Plaintiff maintains that the Commission argues that DUNOR had not demonstrated that it had exhausted the financing included in its Economic Offer amounting to US$ 22,986,181.00 (Twenty-two million nine hundred and eighty-six thousand one hundred and eighty-one US dollars 00/100 cy), so that no additional financial expenses would have been generated to those initially foreseen. In this regard, DUNOR maintains that the Commission and its expert have established an additional requirement – to have demonstrated that they have disbursed all financial expenses prior to the Analysis Period – which is not contemplated in either the Agreement or the Contract[28].

102. In this regard, DUNOR points out that the Contract is an "*Engineering, Procurement, and Construction"* type contract (commonly known as "EPC") at the Contractor's risk and peril, in which, among many other items, certain financial expenses are budgeted[29].

103. The Plaintiff then states that, just as DUNOR assumed the risk of higher costs than those envisaged at the tendering stage, it is logical that DUNOR could also benefit from any reductions in the budgeted costs[30]. To the above, they add that the budgeted financial expenses refer exclusively to the entire Contract Price and to its initial duration (916 days). The Agreement, on the other hand, constitutes a

[27] Reply and Answer to the Counterclaim, No. 33.
[28] Reply and Answer to the Counterclaim, para. 39.
[29] Reply and Answer to the Counterclaim, No. 41.
[30] Reply and Answer to the Counterclaim, para. No. 43.

separate legal act that covers an additional Analysis Period to the contractually stipulated 916 days, so it does not have a specific relationship with the financing originally obtained[31]. It stresses that the original financing is distinct from the financial costs referred to in the Agreement. Finally, it notes that the EY Expert concludes that the amount of US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and one US dollars 68/100 cy) claimed by DUNOR is independent of the amount for financial costs included in the initial OE ("Economic Offer") of the Contract and it is defined as a claimable cost by DUNOR to CFE, pursuant to the Agreement[32].

104. In addition, the Plaintiff submits that both the DATG Expert and the EY Expert concluded that the interest rate on loans was convenient for both DUNOR and the Related Parties[33].

105. DUNOR adds that although the DATG Expert Report indicates that DUNOR should demonstrate that it exceeded the amount of debt budgeted in its EO/OE (*quod non*), it accepts that if this condition is met, DUNOR should be reimbursed the total amount of US$ 419,801.00[34] (Four hundred and nineteen thousand eight hundred and one U.S. dollars 00/100 cy). Subsidiarily, the DATG Expert adds that, even if the financial expenses (US$ 22,986,181.00 (Twenty-two million nine hundred and eighty-six thousand one hundred and eighty-one US dollars 00/100 cy)) were not spent/disbursed, it would be appropriate to reimburse the Plaintiff at least US$ 318,334.72 (Three hundred and eighteen thousand three hundred and thirty-four US dollars 72/100 cy).[35]

106. Now, as to the second item requested, i.e., the Structuring Commissions and Agency Fees, the Plaintiff contends that the Commission considers that the amount requested for the Structuring Commission (US$ 1,361,253.50 - One million three hundred and sixty-one thousand two hundred and fifty-three US dollars 50/100 cy) is unreasonable and excessive due to the lack of "*evidence of*

[31] Reply and Answer to the Counterclaim, para. No. 44.
[32] Reply and Answer to the Counterclaim, para. No. 45.
[33] Reply and Answer to the Counterclaim, para. No. 46.
[34] Reply and Answer to the Counterclaim, No. 47 – Doc. – R-38 Expert Opinion on Cost Engineering (De Anda, Torres Gallardo y Cía., Sc.), p. 38.
[35] Reply and Answer to the Counterclaim, No. 47.

*the studies and analyses carried out by the Banking Syndicate that would allow the identification of the substantive restructuring work"*, since, according to CFE, there was only an extension of the credit agreement term. In this sense, CFE and its Expert consider that the amount of the Structuring Commission is excessive because it used similar calculation parameters as those used in the Structuring of the original Contract when there was no similar work[36].

107. However, the Plaintiff adds that the DATG Expert acknowledges that the credit that originated this Commission is entirely related to the financing of the Works, is directly associated with the costs of the Project, and that it is also duly documented. Therefore, DUNOR submits that the Structuring Commission is included in the scope of the Agreement being a reasonable concept and amount[37].

108. Regarding the lack of documentary support, the Plaintiff specifies that it was not possible for DUNOR to present the information, since the documents belong to the Bank. It adds that the Commission is aware of this situation and that sharing such information would fall outside banking practice[38].

109. On the same alleged unreasonableness of the concept, the Plaintiff adds that the DATG Expert considers that the payment of the Structuring Commission would be unreasonable because such concept was integrated in the original costs of the Power Plant. However, as the EY Expert points out, the DATG Expert started from a partial basis, without having considered the days of deferral of the Analysis Period for the Original Structuring Commission, which directly contradicts the position maintained by the DATG Expert in relation to the second renewal, for which they only recognized the days that were within this Analysis Period[39].

[36] Reply and Answer to the Counterclaim, No. 49.
[37] Reply and Answer to the Counterclaim, No. 50.
[38] Reply and Answer to the Counterclaim, No. 51.
[39] Reply and Answer to the Counterclaim, No. 51.

110. Now, regarding the unreasonableness of the amount alleged by CFE, who considers it to be substantially higher than the original structuring, DUNOR argues that CFE ignores both the work of analysis involved in restructuring a debt of US$ 396,997,949.00 (Three hundred ninety-six million nine hundred ninety-seven thousand nine hundred forty-nine US dollars 00/100 cy), and the increased risk of the loan as a result of the extension of its term. For this, DUNOR refers to the Second EY Expert Report to make it clear that: (i) the DATG Expert's report seems to be challenging the service provided by six banking institutions with worldwide recognition; (ii) the reasonableness of a renewal/novation fee cannot be analyzed by comparing it with an initial Structuring Commission; (iii) the DATG Expert's criterion does not take into account banking operations, since banks are sovereign when negotiating commissions, and it is not common banking practice to charge commissions applying proportionality criteria and, (iv) the granting of a renewal/novation fee for US$ 400 million (first for 103 and then for 141 days) generates an evident risk that must be compensated, either through an increase in rates or through the charging of commissions (as is the case here). For these reasons, as the EY Expert has perfectly documented, the Structuring Commission is a reasonable and compensable expense under section 3.1 of the Agreement[40].

111. Finally, regarding the Agency Commission, DUNOR reiterates that, although the Defendant has acknowledged it owes it and does not question its obligation to reimburse the corresponding amount, US$ 430,405.41 (Four hundred and thirty thousand four hundred and five US dollars 41/100 cy), it has defaulted on its payment alleging that this arbitration has been initiated[41]. It adds that the amount to be reimbursed for Structuring and Agency Commissions amounts to US$ 1,807,981.98[42] (One million eight hundred seven thousand nine hundred and eighty-one US dollars 98/100 cy).

[40] Reply and Answer to the Counterclaim, No. 52.
[41] Reply and Answer to the Counterclaim, No. 53.
[42] Reply and Answer to the Counterclaim, No. 55.

#### 12.1.2.2.2 Defendant's position

112. The Defendant agrees with DUNOR in the sense of considering that the controversial issues concern the interest on receivables from Related Parties and the Structuring Commissions. However, it submits that it does not intend to delay payment resulting from the Application of Clause 25.5 but that it is the Plaintiff who has consistently refused to submit the necessary documentation evidencing the expenses incurred, as set out in the Clause[43].

113. In relation to interest on receivables from Related Parties, the Commission maintains that the purpose of Clause 25.5 is to compensate the Contractor for its longer stay in the Project compared to the time originally agreed. Therefore, the Commission undertook to cover the expenses in which DUNOR may incurred and that are directly related to the Works, are reasonable and documented[44].

114. The Commission states that, in order to avoid the double payment, it requested DUNOR to submit all documents proving that the expenses incurred amount to US$ 22,986,181.00 (Twenty-two million nine hundred and eighty-six thousand one hundred and eighty-one US dollars 00/100 cy) referred to by the Plaintiff in its economic proposal[45]. The Commission adds that the Contractor did not submit the verification in compliance with the Tribunal's order in Procedural Order 4 but limited itself to submitting an Excel file in which, in an improvised manner, it adjusted the US$ 22,986,181.00[46] (Twenty-two million nine hundred and eighty-six thousand one hundred and eighty-one U.S. dollars 00/100 cy). For CFE, these documents were fundamental, since, as stated by Moore Expert, they would prove that DUNOR used the amount of USD $22,986,181.00 (Twenty-two million nine hundred and eighty-six thousand one hundred and eighty-one US dollars 00/100 cy) as a COST FOR FINANCING the Contract and that the amount claimed for US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and eighty-eight hundred and one U.S. dollars 68/100 cy) is indeed a consequence of the effects originated by its greater permanence in the Project[47]

[43] Rejoinder Memorial and Reply to Counterclaim, No. 8.
[44] Rejoinder Memorial and Reply to Counterclaim, No. 22.
[45] Rejoinder Memorial and Reply to Counterclaim, No. 23.
[46] Rejoinder Memorial and Reply to Counterclaim, No. 24.
[47] Rejoinder Memorial and Reply to Counterclaim, No. 25.

115. In summary, the Commission concludes that: i) the Plaintiff did not comply with the order of the Arbitral Tribunal in Procedural Order 4, therefore the Defendant was prevented from identifying whether the intended amount of US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and one US dollars 68/100 cy) is in fact an additional cost for financing other than the US$ 22,986,181.00 (Twenty-two million nine hundred eighty-six thousand one hundred and eighty-one US dollars 00/100 cy) that is included in its Economic Offer for the period originally agreed and, ii) in the case not granted, that it is considered to condemn its client for the interests on receivables from Related Parties, the amount according to the principle of reasonableness should consider the rate of the Plaintiff's EO/OE established in the Contract (3.05% per year), which amounts to US$ 318,334.72 (Three hundred and eighteen thousand three hundred and thirty-four US dollars 72/100 cy).[48]

116. CFE points out that, in relation to the Applicable Interest Rate, the Plaintiff misrepresents what was stated by Moore Expert when it says that CFE's expert performs its own Transfer Pricing analysis and concludes, as EY Expert did, that the interest rate of these claims was "*convenient for both DUNOR and the Related Parties*", since the scope that it intends to give to this statement is incorrect. To this end, the Commission clarifies that Moore Expert points out that the rate used by the Plaintiff and the EY Expert is within the established ranges; however, in its opinion, the rate that must be quantified is the one agreed by the Parties in the Contract, because it is the one that is taken as a reference and then finds reasonableness in its application[49].

[48] Rejoinder Memorial and Reply to Counterclaim, No. 33.
[49] Rejoinder Memorial and Reply to Counterclaim, No. 29-30.

117. Now, with respect to the Structuring and Agency Commissions, whose value claimed by the Plaintiff amounts to US$ 1,361,253.50 (One million three hundred and sixty-one thousand two hundred and fifty-three US dollars 50/100 cy), the Defendant argues that the attribute of "*reasonable"* has not been proven, since it lacks the documents or the evaluation elements that account for the risk elements with which DUNOR justifies its amount. In summary, the Commission considers that the amount is not reasonable because from the documentary evidence presented in the conciliation and submitted in this arbitration, no evidence was found of the studies, analyses, and conclusions made by the Banking Syndicate, which would allow identifying the substantive restructuring work of the financing of the project, since only an extension in the term of the Credit Agreement is recognized and not the modification of the risk's cost[50].

118. CFE adds that it is not justifiable that the Renewal/Novation is more than four times per day higher than the original Structuring Commission and, in addition, the Second EY Expert Report still does not provide evidence of certainty on the intended charge[51].

119. Consequently, it concludes that the only amount that CFE must reimburse to DUNOR is the administrative cost associated with the renewal/novation in the amount of US$ 37,785.23 (Thirty-seven thousand seven hundred and eighty-five U.S. dollars 23/100 cy).

120. Regarding the Agency Commission, the Defendant acknowledges that the concept was reconciled for an amount of US$ 30,405.41 (Thirty thousand four hundred and five US dollars 41/100 cy), however, it points out that the corresponding minutes has not been formalized in accordance with the "Agreement 25.5", derived from the fact that the Plaintiff chose to go to arbitration[52].

[50] Counter-Memorial and Counterclaim, No. 291.
[51] Rejoinder Memorial and Reply to Counterclaim, No. 44.
[52] Rejoinder Memorial and Reply to Counterclaim, No. 45.

#### 12.1.2.2.3 Considerations of the Tribunal

121. In relation to this item, the document entitled "*Minutes of Acknowledgement of Reimbursement for Project Financial Expenses, Insurances, and Guarantees"*, in accordance with clause 25.5 of the Contract dated February 12, 2020, is part of the process[53]. The Minutes states that the Commission reviewed the amount requested by the Plaintiff and considered the amount of US$ 9,662,588.15 (Nine million six hundred sixty-two thousand five hundred eighty-eight U.S. dollars 15/100 cy) to be appropriate.

122. The Agreement also states that "*the Parties agree that this amount will be evaluated once the analysis of the 'Indirect Costs of Additional Works' is concluded"*. It was also agreed that the "*Contractor undertakes, as soon as possible, to provide additional elements on the concepts called 'Structuring Commission' and 'Agency Commission'. In this regard, it reserves all its rights in the event that CFE, after reviewing the information, maintains its current position".*

123. It is pertinent to note that the Plaintiff states that the Defendant subsequently recognized as appropriate an additional amount of US$ 30,405.41[54].(Thirty thousand four hundred and five US dollars 41/100 cy)[55], but that "*the Parties have not formalized the corresponding Minutes in accordance with Agreement 25.5, derived from the fact that the Plaintiff chose to resort to this arbitration proceeding[56].*

124. Thus, within the concepts corresponding to this *item*, those corresponding to Related Parties interests and the "*Structuring Commission"* were still pending.

125. With regard to the interests of the Related Parties, it is pertinent to note that the Agreement stated:

[53] Appendix C-031 of the Plaintiff.
[54] Complaint, para. 79.
[55] CFE Answer, para. 295.
[56] CFE Answer, para. 297.

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*"... 3. DESCRIPTION OF THE CONCEPTS TO BE RECOGNIZED DIRECTLY RELATED TO THE WORKS, WHICH ARE REASONABLE AND DOCUMENTED, AS WELL AS THE DESCRIPTION OF THE DOCUMENTATION TO BE SUBMITTED BY THE CONTRACTOR TO ACCREDIT THE FOLLOWING ITEMS; HOWEVER, IF APPLICABLE, THE GUIDELINES SECTION MUST BE COMPLIED WITH.*

*3.1. FINANCIAL, INSURANCES, AND GUARANTEES*

*• Debt Service Costs, as a consequence of the extension of time to comply with the Purpose of the Contract. These costs will be, but not limited to, the following:*

*➢ Structuring Commission;*

*➢ Availability Commission;*

*➢ Agency Commission;*

*➢ Ordinary interests;*

*➢ Default interest;*

*➢ Withholding Tax;*

*➢ Trust contracting;*

*➢ Legal services fees;*

*➢ Commissions for guarantees. Market consideration for negotiation operations and re-negotiation of claims with financial institutions.*

*…"*

126. As can be seen, the Parties agreed to recognize ordinary interests and default interests, for which they had to comply with the requirements set out in clause 25.5 of the Contract.

127. Thus, in order for the interests to be recognized, it is necessary that they are directly related to the Works. However, as stated by the EY Expert in his first report, the Interests with Related Parties claimed *"derive from the interests accrued in accordance with the principal owed and the terms established in the Commercial Loan Agreement granted by Duro Felguera and Elecnor in favor of*

*Dunor Energía on September 29, 2016, where each one of the lenders granted the amount of US$ 6,850,000".* It adds that this contract states that Dunor Energía's interest is to obtain financing for the activities of its corporate purpose[57]. Thus, since Dunor is "*the specific purpose company constituted for the execution of the CC Empalme II Project*"[58], it is clear to the Tribunal that the purpose of the loan contract was to obtain financing for the execution of the EMPALME II Project, for which it is proven that it is directly related to the Project, as Moore Expert points out.[59]

128. Regarding the reasonableness requirement of the expense, the EY Expert refers to the memorandum "*Review of the reasonableness of the compensation agreed between Dunor Energía S.A.P.I de C.V. with Dunor Felguera S.A. and Elecnor S.A*." dated November 6, 2019 and points out that it states that "*Dunor Energía accrued a lower interest rate than those earned by comparable companies in similar operations*"[60].

129. In connection with such memorandum (Appendix EY-17, mistakenly identified by Moore Expert as Appendix 31), Moore Expert indicates that such document states that "... *after performing an analysis of the market behavior, through the issuance of bonds that had similar characteristics to those of the intercompany loan described above, as well as the characteristics contemplated in the LISR mentioned above, which is shown below, it is possible to conclude that the rate agreed in the mentioned financing is reasonable and is consistent with the arm's length principle...".*

130. However, Moore Expert notes that the memorandum "*cannot be taken as a reference, because, as stated therein, this firm selected the so-called 'Evaluation Method' because it identified that DUNOR 'did not enter into any financing with independent third parties (financial institutions) that would compare (or adjust its comparability) to the terms and conditions of the loan in question'... However, as was known to us, it did enter into a financing with a third party (the Credit*

[57] First EY Expert Report, page 15.
[58] First Moore Report, page 36.
[59] First Moore Report, page 36.
[60] First EY Report, page 16.

*Agreement*)"[61].

131. On the other hand, Moore Expert states that the interest rate of the Contract "*includes the SIX MONTH LIBOR Rate + a 2% spread. Which we considered was a convenient rate for both DUNOR and the Related Parties involved*"[62]

132. Likewise, Moore Expert states that he carried out a transfer pricing assessment taking into account the information on the US Federal Reserve site and the country risk index and concludes that[63] "*the market rate built for financing between DUNOR and its Related Parties (LIBOR SIX MONTH RATE + 2%) is located among the ranges established in the monthly averages of the years 2018-2019, in order to comply with Mexican legislation on transfer pricing"*.

133. In the opinion of the Tribunal, the elements pointed out by Moore Expert, i.e., the convenience of the rate, in his opinion, and the fact that it is within the ranges established to comply with transfer pricing legislation, confirm the reasonableness of the agreed interest rate.

134. Now, on the other hand, Moore Expert stated that[64] "in accordance with the applicable regulations in Mexico, we consider that the first evidence of reasonableness of the case should have been that DUNOR demonstrated that, during the original period, it disbursed the amount determined as Project Financing, which amounted to 22,986,181.00 US dollars and was integrated to the Contract's Fixed Price, which is our understanding that it was already covered by CFE for an amount of US$ 396,997,949.52." It adds that this is "*in order to determine that there is an additional cost (in this financial case) to that originally foreseen in the economic proposal (US$ 22,986,181.00) and thus, ensure that any additional disbursement is reasonable for not having sufficient economic resources to pay for the Contract*".

135. For its part, CFE states[65] that the Contractor did not present in its memorial, appendices, and expert evidence an analysis that would allow it to identify

[61] First Moore Report, page 38.
[62] First Moore Report, page 38.
[63] First Moore Report, page 40.
[64] First Moore Report, page 40.
[65] CFE Answer, para. 288.

whether the Financial Cost shown in its EO/OE for US$ 22,986,181.00 (Twenty-two million nine hundred eighty-six thousand one hundred eighty-one US dollars 00/100 cy) was fully exhausted to demonstrate that the deferral, CFE's responsibility, generated additional financial expenses to those foreseen. Therefore, for the time being, the Defendant points out that it is not reasonable for CFE to reimburse this amount until it evaluates the status of this original amount.

136. In connection with the foregoing, the Tribunal considers, first, that pursuant to clause 25.5 in the event of a delay for a period exceeding 60 days, the Parties may reach an agreement to compensate the Contractor for any expenses they may incur for any additional delay of 60 days. In the Agreement entered between the Parties, it was foreseen that the "*Debt Service Costs resulting from the extension to comply with the Purpose of the Contract"* would be included in the costs, and interests were included therein.

137. From this perspective, for the Tribunal there is no doubt that the end of the delay that was recognized by the Agreement implies a financial cost, since within that period, additional interests are generated.

138. However, the Commission and Moore Expert point out that an "additional cost (in this case, financial) to the one originally foreseen in the economic proposal (US$ 22,986,181.00)" should be demonstrated.

139. In this regard, the Tribunal notes that the Contract did not provide that in order to determine the amount for reimbursement to which the Contractor would be entitled, the estimated bid cost should be compared to the actual cost of the work, as suggested by the Defendant.

140. In fact, what clause 25.5 provides for is that what the Parties must agree is the recognition of "*reasonable and documented expenses directly related to the Works which the Contractor may incur ... as a result of any additional delay"*. Therefore, what must be established is not whether the cost is additional to the estimated costs at the time of submitting the bid, but whether the cost is additional to what the contractor would have incurred if the delay had not occurred.

141. This is confirmed if one examines the Agreement, since the different items recognized therein do not take into consideration the value that such item could

have had in DUNOR's proposal.

142. This is logical if one takes into account that the Contract is a fixed price, so the Contractor assumes the risks of higher costs, and also the benefits from the savings it manages to make.

143. From this perspective, the Tribunal considers that it is clear that if the delay recognized in the Agreement had not occurred, interests would not have been generated, so that they must be recognized.

144. It is worth noting that Moore Expert, after expressing[66] that "*not having this information, it is not possible for us to determine by this means if DUNOR really had an additional cost*", in any case indicates that there are two alternatives to determine the amount to be reimbursed:

> *"(1) Pay the amount requested by DUNOR for US$ 419,801.68, being within the range of the transfer pricing study, performed by our firm for this type of transactions, in accordance with the OECD guidelines, once DUNOR has demonstrated that it exceeded the amount presented in its Economic Offer as the Financing Cost; or*
>
> *"(2) Adjust the amount requested by DUNOR to the interest rate of the Economic Offer (3.05%) and with this reach a reimbursement amount of US$ 318,334.72, since DUNOR cannot integrate the original financial cost accrued and paid for the Project in the amount of US$ 22,986,181.00".*

145. As can be seen, finally, Moore Expert considers that interests at the EO interest rate can be recognized as an alternative. In relation to this alternative, the Tribunal notes that it does not result from clause 25.5 or the Agreement. The Agreement provides that reasonable expenses must be recognized and, as we have already seen from the experts' considerations, such cost is reasonable.

146. Regarding the documentation requirement of the clause, the EY Expert indicates that the interests with Related Parties incurred (accrued) during the Analysis Period amounts to US$ 419,801.68[67] (Four hundred and nineteen thousand eight hundred and one US dollars 68/100 cy). The expert adds[68] that

[66] First Moore Report, page 40.
[67] First EY Report, page 16.
[68] First EY Report, page 17.

the interest payment was made on October 14, 2019, through the Caixa Bank account. It also refers to the accounting record in the Dunor Energía system that evidences the interest payment. Finally, it notes the invoices issued by Duro Felguera and Elecnor corresponding to the interest charges accrued during the analysis period.

147. However, regarding those interests, the Defendant maintained in its Answer that it was not reconciled because not all the means of payment of interest were identified. It points out that the EY Expert report did not include any support whatsoever, and therefore the verification requirement would not be complied with[69].

148. In this regard, the Tribunal finds that the Agreement between the Parties provided[70]:

> *"In order to prove the following concept, THE CONTRACTOR shall deliver to THE COMMISSION, subject to compliance with the confidentiality stipulations included in the contracts:*
>
> *"Main financing contract where the agreed financial conditions can be accredited.*
>
> *"Proof of payment of the concepts claimed where the charges made are verified.*
>
> *"Bank document according to the reconciliation of physical advances), and/or certificates issued by the banking or insurance entity.*
>
> *"The accounting transactions related to the claims extracted from the accounting system used (SAP or Similar). If deemed necessary, you can go to the offices of the Contractor for the verification of accounting records.*
>
> *"Any document that, in the absence of the above, irrefutably demonstrates the costs of the previous concepts."*

149. The Tribunal finds that the EY Expert's Opinion refers to the documents on which it was based, such as the Loan Contract[71] and interest payment

[69] CFE Answer, para. 287.
[70] Agreement, page 5.
[71] First EY Report, page 16.

vouchers[72], which also appear as Appendices to the Opinion. Therefore, the existence of the loan and the payment of its interests are accredited. It also notes that Moore Expert verified the existence of the Contract. In this way, the documentation referred to in clause 25.5 is accredited.

150. As far as the Structuring Commission is concerned, the Tribunal considers the following:

151. The Tribunal finds that the commissions charged are directly related to the Project. Indeed, the EY Expert states that[73] "*The Structuring Commission corresponds to an expense directly related to the Project, in accordance with the Contract for the assignment of receivables; where the Assignor company is Dunor Energía, established with the sole purpose of building and operating a single project, in this case, the Power Plant*".

152. On the other hand, as regards its documentation, the Tribunal finds that the Plaintiff submitted a certificate issued by BNP PARIBAS certifying the structuring/renewal fees between May 17, 2016, and September 30, 2020[74].

153. Based on this certificate, the EY Expert's report indicates the value of the structuring commissions as follows[75]:

"Chart 4. Credit assignment contract structuring commissions

Figures expressed in USD

| BNP Paribas Certified Date | Start Date | End Date | Days | BNP Paribas Certified Amount |
|---|---|---|---|---|
| 18-May-16 | 17-May-16 | 15-Nov-18 | 913 | $ 1,587,991.80 |
| 16-Nov-18 | 16-Nov-18 | 26-Feb-19 | 103 | 992,494.87 |
| 16-Nov-18 | 27-Feb-19 | 18-Jul-19 | 142 | |
| | | | | 1,389,492.82 |

[72] First EY Report, page 17.
[73] First EY Report, page 14.
[74] Doc. EY-10.
[75] First EY Report, page 14.

| | | |
|---|---|---|
| 17-May-16 | 18-Jul-19 | 1158 |

Source: Certificate issued by BNP Paribas bank on February 02, 2021".

154. Likewise, the EY Expert calculates the value of the Structuring Commission charged by the BNP Paribas bank corresponding to the Analysis Period, which amounts to US$ 1,357,774.88 according to the following detail[76]:

"Chart 5. Quantification of the Structuring Commission during the Analysis Period Figures expressed in USD

| Start Date | End Date | Days | 19-Jul-18 to 14-Mar-19 |
|---|---|---|---|
| 19-Jul-18 | 15-Nov-18 | 120 | $ 208,717.43 |
| 16-Nov-18 | 26-Feb-19 | 103 | 992,494.87 |
| 27-Feb-19 | 14-Mar-19 | 16 | 156,562.57 |
| | | 239 | 1,357,774.88 |

Source: EY based on Certificate issued by BNP Paribas bank on February 02, 2021".

155. In relation to said amount, the EY Expert states that[77] "*We did not have a record of the accounting books of the payment of the structuring commissions; however, in our opinion, we consider it sufficient to determine that the "Structuring Commission" is directly related to the work and is reasonable for its compensation based on the provisions of the Credit Rights Assignment Agreement and the BNP Paribas Bank Certificate, which demonstrates that the total amount of the commissions accrued under said Contract have been paid*".

156. However, the Defendant points out that the amount was not recognized for lacking the attribute of "*Reasonableness"* because out of the documentary evidence submitted in the conciliation and in this arbitration, no evidence was found of the studies, analyses, and conclusions carried out by the Banking Syndicate, which would allow identifying the substantive work of restructuring the

[76] First EY Report, page 15.
[77] First EY Report, page 15.

financing of the Project, since only an extension in the term of the loan agreement is recognized[78].

157. The Defendant adds that the Plaintiff used calculation parameters similar to those used in the original Contract Structuring, when there was no similar analysis work for the case of the Renewal (Restructuring) Commission. So it is that, since no greater risk was identified, the original interest rate remained as agreed in the Original Contract[79].

158. The Defendant[80] warns that as indicated in the Expert Report, the daily cost that covers the validity of the Renewal (Restructuring) Commissions exceeds by more than 4 times the daily cost of the Original Structuring Commission.

159. For its part, the Plaintiff points out that it cannot submit the studies prepared, as requested by the Defendant, because they belong to the Banks[81]. It also adds that the Defendant ignores the work involved in restructuring a debt as well as the increased risk of its expansion[82]. It also points out that banks are sovereign when negotiating commissions[83].

160. For his part, Moore Expert distinguishes between the Original Structuring Commission and the First Renewal Commission and the Second Renewal Commission. Regarding the Original Structuring Commission, he points out that even if it only intends to charge a portion related to the initial deferral amounting to US$ 208,717.43 (Two hundred and eight thousand seven hundred and seventeen US dollars 43/100 cy), this was already included in DUNOR's initial costs, and therefore this amount is not included in the stipulations of Clause 25.5[84].

161. On the other hand, regarding the remaining commissions, it indicates[85] that "*the amount paid by DUNOR to the Financial Institutions in the TWO*

[78] CFE Answer, para. 291.
[79] CFE Answer, para. 292.
[80] CFE Answer, para. 293.
[81] Dunor's Answer and Reply, para. 51.
[82] Dunor's Answer and Reply, para. 52.
[83] Dunor's Answer and Reply, para. 52.
[84] First Moore Report, page 24.
[85] First Moore Report, page 25.

*Commissions concerned are more than FOUR times higher than the daily amount paid in the Structuring Commission. About this, we evaluated the documentation that was given to us by CFE and we did not identify any exorbitant risk that would make us think of a drastic change in the financial cost"*.

162. Moore Expert adds that "*Novation Commissions, intended for reimbursement, are not in themselves the product of any credit restructuring; meaning, there are no changes of conditions in the Loan Agreement, more other than its term. So, we do not find any additional work done by these Financial Institutions (more than the risk assumed by the deferral and certain administrative costs) that could support a cost that is more than FOUR times (per day) higher than the original*".

163. Moore Expert also states that[86] "*In the event that the costs of these commissions were supported by the additional risks of the Project originated by the various deferrals (known by the Parties and stated in the Amending Agreements to the Contract), we do not identify that these have affected the main financial cost of the Project. Therefore, if these risks were not passed on to the main financial costs of the Loan Agreement (the interest rate), much less should they be passed on to its commissions"*.

164. He warns that the Restructuring Commissions plus the Original Structuring Fee are exactly 1% (one percent) of the Principal Amount to be financed, when there was only ONE structuring and the others were only term extensions.[87]

165. Moore Expert[88] points out that even though the applicable rate of the Renewal/Novation Commissions was reduced (.40% of the Original Contract, .25% of the First and .35% of the Second – 1% in Total), he considers that having not identified Restructurings in the Original Credit and there have only been extensions in the term for repayment of the credit with similar risks to the original ones (e.g., the credit rate remained similar) the amounts that DUNOR claims to CFE are not reasonable as to their amount, because:

A. Novation Commissions represent 50% (fifty percent) more than what was charged in the Original Structuring, where the legal, financial, and technical

[86] First Moore Report, page 25.
[87] First Moore Report, page 25.
[88] First Moore Report, page 25.

effort of the Financial Institutions was really focused, and

B. In an analysis of the credit coverage of these commissions, those of Renewal and/or Restructuring exceed, on a daily average, by more than FOUR times the Original Structuring Commission.[89]

C. Concluding as follows[90]:

*"1. The partial Commission associated with the Original Structuring Commission for an amount of US$ 208,717.43 should not be recognized by CFE, because this amount should not be understood as an additional cost generated by the deferral of the Project, attributable to this State-owned Mexican Company. Since it was integrated within the Original Costs contemplated by DUNOR and, with or without deferral, had been or were disbursed by this contractor and as part of the construction contract paid by CFE, meaning, DUNOR's claim would double the payment for the same concept.*

*"2. The TWO Remaining Commissions amounting to US$ 992,494.87 and a partial amount of US$ 157,672 are identified as directly related to the Project and with the corresponding documentation. However, they cannot be covered by CFE derived from not presenting a reasonable cost. This is because:*

*"a) The daily cost that covers the validity of these commissions is more than four times higher than the daily cost of the Original Structuring Commission.*

*"b) The Novation Commissions claimed are, as a whole, 50% more than the Original Structuring Commission.*

*"c) There is no additional service on the part of the Financial Institutions involved in the Financial Agreement, which allows identifying any restructuring work or substantive modification of the Project financing and only a change in the validity of the Loan Agreement is recognized. About this, we find no evidence of the studies, analyses, and conclusions carried out by the Banking Syndicate, to expand it; and on the contrary, we only locate the charges of the commissions, analyzed in this section, associated with the amount of the principal (the amount of the Contract), which we consider generates an unreasonable amount. This, because they used calculation parameters similar to those used in the Contract Structuring, when there was no similar work in the case of the Novation Commission (Restructuring).*

*"d) It is emphasized that, in the event that the financial institutions had identified an exorbitant or significant risk of the Project, this risk should have been reflected*

[89] First Moore Report, page 25.
[90] First Moore Report, page 30.

*in the interest rate of the Financial Agreement and not only in these ancillary costs.*

*"(e) For all the above, the only amount that could be paid under this concept is all the administrative costs associated with the renewal of the term of the Loan Agreement; such as: Legal Fees and Notary Fees in the amount of US$ 37,785.23, provided that the fulfillment of the requirements of Clause 25.5 of the Contract (direct, reasonable, and verifiable) are met*"

166. For his part, the EY Expert refers to the Moore Expert Report and points out what he considers inconsistencies in the latter. In particular, the EY Expert states that he does not agree with Moore Expert in relation to the EY Expert's statement about the partial commission associated with the Structuring Commission. To this end, it notes[91]:

*"We can partly agree with the C.P. Gallardo that this amount should not be understood as an additional cost generated by the deferral of the Project; that is, we partially agree that this amount would have been disbursed by Dunor Energía as part of the Contract, but C.P. Gallardo starts from a partial hypothesis, it is based on the criterion of not considering for the Original Structuring Commission the Analysis Period that runs from July 19, 2018 to March 14, 2019.*"

167. The EY Expert adds that[92]

*"We observe how of the total of the days of the original structuring (913), to calculate the claim we only consider 120 days (from July 19, 2018, first day of the Analysis Period, until November 15, 2018, the end date of this original loan). That is, it seems that C.P. Gallardo does not consider that the Agreement contemplates these days of deferral to compensate Dunor Energía. So, we ask ourselves this question: If the Original Structuring Commission does not contemplate that they fall within the Analysis Period, then why does it not apply the same criteria for the Second Renewal? Applying the same criterion, instead of considering 16 days of this second renewal for the amount of US$ 156,562.57, the total 142 days would have to be considered, which would result in an amount to claim of US$ 1,389,492.82".*

168. Regarding Moore Expert's assertion that the daily cost of the commissions is more than four times the daily cost of the original commission, he points out[93] that:

*"You cannot analyze the reasonableness of a Novation Commission based on a*

[91] Second EY Report, page 11.
[92] Second EY Report, page 11.
[93] Second EY Report, page 12.

*criterion of proportionality, and much less compare an initial Structuring Commission with future renewal commissions. It seems that Moore Expert does not take into account banking operations when negotiating commissions. Banks are sovereign in agreeing terms, i.e., they do not work with predetermined criteria (like fees) when charging their renewal and/or Structuring Commission. Banks have no obligation to charge commissions proportionately, it is not a banking practice to charge renewal commissions applying proportionality criteria".*

169. He adds that:[94]

*"granting a renewal to a Loan Agreement (approx. US$ 400 M) generates a clear risk to the financing banks, a risk that must be mitigated by charging their customers, either via rate increases, commissions collection (as in the case at hand), or a mixture of both. These risks should not be measured, nor analyzed on a proportional basis to the initial funding, much less comparing them per day. Risks are analyzed by banks by measuring different particularities, such as: (i) the risk or business deterioration; (ii) the consumption of credit capital; (iii) the cost of mobilizing resources within their organization; meaning, they have to carry out a detailed analysis of the type of operation, for which, they must mobilize a multidisciplinary team of experts who analyze and study the different risks and/or legal, operational and commercial aspects before deciding whether or not to grant the novation and, if so, its cost. We cite by way of example: (i) the credit risk team, liquidity risk, operational risks, market risks; (ii) legal team to analyze legal contingencies, and (iii) the commercial team that analyzes risks from a client's perspective, "Compliance team".*

170. On the other hand, the EY Expert refers to Moore Expert's statement that no additional services by the Financial Institutions are found, and states that[95]:

*"It seems that Moore is challenging or doubting the service provided by the banks involved (six banking institutions with worldwide recognition) to charge this commission. We can discuss with the experts whether the percentages charged and/or the amount of the commission falls within the market price or not, whether or not they are high, or whether the negotiation is good or bad done (see seventh inconsistency). But what we cannot doubt, nor discuss, in our opinion is that granting a renewal to a loan agreement for an amount of nearly US$ 400 M generates an obvious risk for the financing banks (see fourth inconsistency); risk that will be mitigated by charging its clients, either via rate increases, or through commission charges, or a mixture of both".*

[94] Second EY Report, page 12.
[95] Second EY Report, page 12.

171. It also notes that[96]

> *"C.P. Gallardo merely concludes on certain topics without showing any evidence. Therefore, we keep asking ourselves: What similar parameters are you referring to? Have you asked, analyzed, or investigated the work done by the six banks to collect these novation commissions? For us, BNP Paribas' certification is sufficient evidence to conclude that these novation commissions charged to Dunor Energía were those negotiated and agreed between the Parties and are due to the amount that the banks understood as reasonable when assuming the obvious risks generated by the loan renewals".*

172. The EY Expert adds that[97]:

> "*C.P. Gallardo concludes that this is an "unreasonable amount". We reiterate that he provides no evidence: What tests, evidence, experience, does C.P. Gallardo have to conclude that Dunor Energía negotiated poorly and/or that the renewal commissions fall outside of what is reasonable in the market, or in other words, how much would C.P. Gallardo consider a reasonable amount? Is it for C.P. Gallardo excessive and out of the market a 0.25% and 0.35% commission for the first and second renewal respectively?"*
>
> *"For us and again referring to the BNP Paribas certificate, we do see the amount of these commissions as reasonable - we cannot think that a company like Dunor Energía and/or its shareholders (Duro Felguera, Elecnor and Elecnor México) want to pay more than necessary. Likewise, and in addition to the previous point, the range, measured in terms of percentiles, would be between 0.60% and 1.14%, and therefore the commissions paid by Dunor Energía would be reasonable".*

173. In this regard, the Tribunal recognizes that clause 25.5 of the Contract establishes that the Contractor must be recognized "*the expenses directly related to the Works, reasonable and documented in which the Contractor may incur*" in the period to which said clause refers.

[96] Second EY Report, page 14.
[97] Second EY Report, page 14.

174. However, as for the Structuring Commission, the Tribunal considers that it is not affected by the fact that the duration of the Contract has been extended, so it is not part of the "*expenses directly related to the Works, which are reasonable and documented in which the Contractor may incur... as a consequence of any further delay*." It is worth noting that the Structuring Commission is clearly distinguished from debt servicing and that it does not change because of the delay.

175. On the other hand, regarding the two additional commissions, it should be noted that clause 25.5 does not provide for exceptions to the general rule which states that expenses must be reasonable to be recognized. Now, according to the definition of the Diccionario de la Lengua Española de la Real Academia, reasonableness is that which is "*adequate, in accordance with reason"*, or that which is "*proportionate or not exaggerated"*. The foregoing indicates that in order to conclude that a commission is reasonable, it is necessary to determine that it is adequate, proportional, or not exaggerated.

176. Based on the above, what must be established is who must prove the reasonableness of the cost. It is clear that it is up to those who claim recognition of a right, who have to prove the assumptions that gave rise to that right. In the present case, it is up to the Contractor to prove that the sums claimed comply with the conditions set forth in the Contract and the Agreement, and therefore it must prove its reasonableness. Then, the argument of the Plaintiff's expert that it is the Defendant's expert who must demonstrate that the cost is unreasonable, is not acceptable.

177. However, in the present case, the Tribunal finds that the reasonableness of the commissions claimed is based, according to the Plaintiff's experts, on the fact that they were fixed by the banks, and that they are sovereign in fixing those commissions, and on the other hand, that the Contractor is the most interested party in making those commissions reasonable.

178. From this perspective, the Tribunal considers that the reasonableness of an expense cannot simply derive from the fact that the third party who collects it fixed it at that amount, since then that requirement would be devoid of content, since in the end it would be sufficient for it to prove that it was determined by the creditor, so that the value could be recovered. If the agreement requires that the

expense be reasonable, it is necessary to establish such nature.

179. For the same reason it is not enough that the debtor has paid, because this only proves that he accepted the obligation but not that the amount of the same is reasonable.

180. Moreover, it is also not proven that reasonableness cannot be established, since it could have been established with other tests. The possible difficulty of proof does not in principle relieve the burden of the same.

181. For this reason, the Tribunal concludes that it is not appropriate to recognize the sum requested by the Plaintiff for the Structuring and Novation Commissions. In any case, it should be noted that in his First Report, Moore Expert states that[98] "*the only amount that could be paid for these concepts are all the administrative costs associated with the renewal of the period of validity of the Loan Agreement; such as: Legal Fees and Notary Fees in the amount of US$ 37,785.23 (Thirty-seven thousand seven hundred and eighty-five US dollars 23/100 cy), provided that compliance with attributes of Clause 25.5 of the Contract are met".* The Tribunal finds that such expenses are recognized by the EY Expert. The Tribunal considers that these expenses are reasonable, proven, and caused by the extension of time and will therefore be recognized.

182. Taking into account all the above, the Tribunal concludes for the concepts referred to in this section, the following sums will be recognized: US$ 419,801.68 (Four hundred and nineteen thousand eight hundred and eighty-one US dollars 68/100 cy) for interest on Related Parties receivables; US$ 30,405.41 (Thirty thousand four hundred and five US dollars 41/100 cy) for the Agency Commission, and US$ 37,785.23 (Thirty-seven thousand seven hundred and eighty-five US dollars 23/100 cy) for legal and notary fees. That is, a total amount of US$ 487,992.32 (Four hundred and eighty-seven thousand nine hundred and ninety-two US dollars 32/100 cy).

[98] First Moore Expert Report, page 30.

#### 12.1.2.3 Personnel Management and Field Administration Expenses

##### 12.1.2.3.1 Plaintiff's position

183. In accordance with section 3.2 of the Agreement, the Defendant undertook to compensate DUNOR for the expenses for Personnel Management and Field Administration incurred for delays attributable to CFE. In the Complaint Memorial, DUNOR maintains that this obligation has not been satisfied and therefore, CFE had to pay a total of US$ 7,836,863.81[99] (Seven million eight hundred and thirty-six thousand eight hundred and sixty-three US dollars 81/100 cy).

184. DUNOR points out that the Commission never suspended the work of the Power Plant while trying to solve the problems that prevented compliance with the Scheduled Provisional Acceptance Date initially agreed, a situation that forced the Plaintiff to maintain personnel, machinery and equipment on the Site, causing it considerable expenses that it has no obligation to bear[100].

185. DUNOR states that it delivered all the documentation expressly provided for in section 3.2 of the Agreement that reliably proves the expenses incurred. This is also confirmed by the EY Expert when stating that "*(i) the expenses presented have been incurred during the Analysis Period, (ii) said expenses are directly related to the Project and correspond to section 3.2 of the Agreement and (iii) are reasonable and have the required supporting documentation".* DUNOR adds that the continuous request for information by CFE exceeds what was agreed in the Agreement and severely slows down the invoice review process, generating unnecessary delays in the recognition of expenses to DUNOR[101].

[99] Complaint Memorial, No. 85.
[100] Complaint Memorial, No. 86.
[101] Complaint Memorial, No. 94.

186. DUNOR adds that the Commission has refused to pay the expenses arguing that: (i) The invoices were presented "*jumbled*", the supporting documentation for the invoices was incomplete, and some expense invoices were not appropriate. (ii) Clause 3.2 of the Agreement only considers the concepts that can be recognized, without specifying that, in case they are appropriate, 100% of their cost must be recognized. Therefore, given that the execution of the Project suffered delays attributable to DUNOR, in CFE's opinion, it is appropriate to apply a "*specific methodology*" for each Party to cover the proportional cost that corresponds to it, in accordance with section 5 of the Agreement[102].

187. DUNOR indicates that the expenses for Personnel Management and Field Administration incurred during the Analysis Period amount to US$ 8,448,761.46 (Eight million four hundred and forty-eight thousand seven hundred and sixty-one U.S. dollars 46/100 cy). Of these expenses after their timely review, by Official Letter RGROS-174/20, dated July 31, 2020, the Defendant recognized as reimbursable a total of US$ 7,130,383.43 (Seven million one hundred and thirty thousand three hundred and eighty-three US dollars 43/100 cy). However, according to the financial analysis carried out by the EY Expert, US$ 7,836,863.81 (Seven million eight hundred and thirty-six thousand eight hundred and sixty-three US dollars 81/100 cy) meet the requirements of section 3.2 of the Agreement and must be reimbursed to DUNOR[103]. Likewise, it warns that the EY Expert proves that an additional amount of US$ 179,846.27 (One hundred and seventy-nine thousand eight hundred and forty-six US dollars 27/100 cy) complies with all the requirements of section 3.2 of the Agreement, leaving only the payment by the Contractor pending. Despite the foregoing, it adds that some of the invoices corresponding to this item continue to be under review, and CFE still does not comply with its obligation to review and reconcile them in due time[104].

188. In this regard, DUNOR considers that the amount recognized by CFE is based solely and exclusively on the annexed documents to Official Letter RGROS-174/20. However, as indicated by the EY Expert, there is no formal agreement

[102] Complaint Memorial, No. 92.
[103] Complaint Memorial, No. 90.
[104] Complaint Memorial, No. 90.

that the amounts determined as appropriate have been accepted by DUNOR. The Plaintiff adds that the Expert Cámara Report presented in these proceedings also did not carry out any analysis of why the expenses not recognized by the Commission did not meet the requirements of the Agreement[105].

189. DUNOR states that, on the contrary, the EY Expert carefully analyzed each of the disputed items among the experts, corroborating and ratifying the conclusions of the First EY Expert Report, in which he identified the existence of: (i) an amount of US$ 4,598,313.38 (Four million five hundred and ninety-eight thousand three hundred thirteen US dollars 38/100 cy) reconciled between the Parties, (ii) an amount of US$ 3,238,550.43 (Three million two hundred and thirty-eight thousand five hundred fifty US dollars 43/100 cy) that meet all the requirements of the Agreement and must be compensated, (iii) an amount of US$ 133,905.48 (One hundred and thirty-three thousand nine hundred and five US dollars 48/100 cy) that meets all the requirements of the Agreement to be compensable, but which has not yet been settled, (iv) an amount of US$ 45,940.79 (Forty-five thousand nine hundred and forty US dollars 79/100 cy) for quality withholdings that meet all the requirements of the Agreement but have not yet been reimbursed to the subcontractors and, (v) US$ 341,114.35 (Three hundred and forty-one thousand one hundred and fourteen US dollars 35/100 cy) that would not be compensable[106].

190. DUNOR clarifies that only 11% of the total claimed is in dispute, since the other 89%, despite its recognition by the Commission, has not yet been paid. DUNOR considers that this is because CFE bases its arguments on an invoice-to-invoice analysis of the expenses to be reimbursed pursuant to section 3.2 of the Agreement, under the assumption also erroneous, that DUNOR claims US$ 8,448,761.46 (Eight million four hundred forty-eight thousand seven hundred and sixty-one US dollars 46/100 cy) and not US$ 8,016, 710.08[107] (Eight million sixteen thousand seven hundred and ten US dollars 08/100 cy).

[105] Reply and Answer to the Counterclaim, No. 57.
[106] Reply and Answer to the Counterclaim, No. 58.
[107] Reply and Answer to the Counterclaim, No. 60.

191. DUNOR refers to the analyses carried out by CFE in its Answer and Counterclaim in which it presented a series of examples of invoices that, in its opinion, would prove that the aforementioned expenses did not meet the requirements of the Agreement to be reimbursable. It adds that the vast majority of CFE's allegations are aimed at challenging the origin of expenses that DUNOR does not claim and that are not part of this dispute[108]. To that end, it points out that the fact that a particular invoice, chosen expressly by CFE, whether refundable or not, does not affect the validity of other invoices, so it is clear that the Commission bases its claim on an extremely deficient methodology[109]. It adds that the "*examples"* do not support CFE's position either, since they correspond, for the most part, to non-controversial expenses. It states that it appears, in fact, that the Counter-Memorial was drafted without taking into account either the EY Expert's Report or what DUNOR actually claimed in this arbitration[110].

192. DUNOR refers to the expenses outside the recognition period and points out that CFE presents a chart of invoices that would not be included in the Analysis Period. The Plaintiff states that these invoices have already been reconciled by the Parties through Official Letter RGROS-174/20 and points out that DUNOR is not claiming any amount from them, and therefore, there is no dispute in this regard[111].

193. In relation to the unsettled invoices, DUNOR brings up the First EY Expert Report, explaining that the amount of US$ 141,175.52 (One hundred and forty-one thousand one hundred and seventy-five US dollars 52/100 cy) pending payment should be split as follows: i) an amount of US$ 133,905.48 (One hundred and thirty-three thousand nine hundred and five US dollars 48/100 cy) which corresponds to expenses that meet all the requirements of the Agreement to be reimbursed and ii) the remaining amount of US$ 7,270.07 (Seven thousand two hundred and seventy US dollars 07/100 cy) corresponds to amounts that the EY Expert determined as not valid and that, consequently, have not been claimed

[108] Dunor Answer and Reply Memorial, No. 60.
[109] Dunor Answer and Reply Memorial, No. 63.
[110] Dunor Answer and Reply Memorial, No. 64.
[111] Dunor Answer and Reply Memorial, No. 65.

by DUNOR in the present arbitration[112].

194. Now, regarding non-recognizable expenses, the Plaintiff points out that the Commission alleges that i) adjustments were made to the amounts of some invoices for including concepts not related to the purpose of the Agreement, such as the supply of consumables or labor for temporary installations. However, DUNOR clarifies that these are items that were included within section 3.5 and not within this section. ii) The Annual Depreciation Rate of the Income Tax Law would consider different and lower depreciation percentages than those indicated by DUNOR, making adjustments necessary. In this regard, DUNOR points out that as revealed in the EY Expert's Report, the Parties agree that the depreciation amounts to a sum of US$ 4,900.90 (Four thousand nine hundred and nine US dollars 90/100 cy), so there is no dispute regarding this amount either. (iii) Invoice No. 000118 for the "*Servicio de Recolección y Limpieza de Grúa Titán for the Removal of Materials*" would not be appropriate because it was part of the cost of the Power Plant. The EY Expert agrees with this conclusion, and therefore it is not an amount claimed by DUNOR in the context of this arbitration. iv) Invoice No. 1910000082 corresponds to services performed to address certain failures and damages presented in the Project, not being applicable expenses since the Contractor was obliged to carry out these repairs at its own expense. Once again, the EY Expert agrees with this criterion and therefore it is not an amount claimed by DUNOR either[113].

195. Regarding the unreasonable expenses, the Plaintiff points out that CFE argues that: i) the amount claimed by DUNOR for electric energy for construction site offices during the Analysis Period for MXN$ 606,374.32 (Six hundred six thousand three hundred seventy-four Mexican pesos 32/100 M.N.) does not correspond to a reasonable monthly consumption of a field office. It adds that CFE uses installed capacity to estimate what it considers to be a "*reasonable expense"* for this concept. However, the EY Expert determined the appropriateness and reasonableness of an amount of US$ 30,672.97 (Thirty thousand six hundred and seventy-two US dollars 97/100 cy) for this concept, supported by calculations based on actual field office figures. ii) The Commission

[112] Dunor Answer and Reply Memorial, No. 66.
[113] Reply and Answer to the Counterclaim, No. 67.

refers to personnel expenses incurred by the company "*Entre el Ángel y la Diana, S.A."* on which the Commission recognizes a total of US$ 756,231.13 (Seven hundred and fifty-six thousand two hundred and thirty-one U.S. dollars 13/100 cy) of the US$ 840,761.44 (Eight hundred and forty thousand seven hundred and sixty-one U.S. dollars 44/100 cy) claimed by DUNOR. The Plaintiff adds that, according to CFE, the remaining amount corresponds to amounts that the Plaintiff "*fraudulently intends the Commission to cover [and that refer to] the total benefits for all the time worked on the site (severance payments, vacations, etc.)*". However, according to the EY Expert's criteria, these benefits fall within the concept of "*Benefits required by the Federal Labor Law"* referenced in the Agreement and that took place within the Analysis Period. In addition, the Plaintiff points out that it should be borne in mind that, although there are some expenses within the Analysis Period that may not have their origin in the time-extension, there are others that were derived from the time-extension but, on the other hand, were left out of the agreed period. Thus, both the EY Expert and DUNOR agree that these are appropriate expenses, since they correspond to an expense agreed for reimbursement and that took place in the Analysis Period. Additionally, it should be noted that, according to the calculations of the EY Expert and the expense certificates, the amount recognized as appropriate by CFE as of July 2020 was US$ 768,941.30 (Seven hundred and sixty-eight thousand nine hundred and forty-one US dollars 30/100 cy) and not US$ 756,231.13.[114] (Seven hundred and fifty-six thousand two hundred and thirty-one US dollars 13/100 cy).

196. DUNOR notes that Defendant alleges that various invoices for "*Professional Services, Claiming Indirect Expenses Incurred by Dunor"* would be unreasonable as they are not a service providing direct value to the Project. In this regard, the Plaintiff points out that the Agreement is intended to compensate, that is, to hold the Contractor harmless for delays exceeding 60 days due to Government Force Majeure or because of the Commission. That said, it is clear that the Contractor would not be compensated if it had to bear the necessary expenses to make the Agreement itself applicable. It points out that, contrary to what is maintained by the Defendant, this is not an expense "*exclusively for the benefit of the Plaintiff*", but expenses arising from and causing in the application of the Agreement which,

[114] Reply and Answer to the Counterclaim, No. 68.

(i) are included in section 3.2 thereof; (ii) correspond to the Analysis Period and, (iii) meet all requirements to be refundable.

197. Finally, the Plaintiff points out that CFE refers to invoice No. C46345, and that the latter claims a higher amount for this item than the amount of the invoice. In this regard, DUNOR points out that the difference between the amount claimed and the amount shown on the invoice was not recognized as appropriate by the EY Expert and, consequently, is not claimed by DUNOR in the present arbitration[115].

198. Regarding the expenses without documentary support, the Plaintiff argues that the Commission refers to two situations in particular: i) the inappropriateness of Invoice No. 256610027818 presented by Clifford Chance for fees, this being an expense not claimed by DUNOR and, ii) the inappropriateness of invoices in the amount of US$ 141,175.52 (One hundred and forty-one thousand one hundred and seventy-five US dollars 52/100 cy) that would not have documentary support. In turn, this amount is composed of two invoices: one from Multiservicios Suzgo, in the amount of US$ 140,000.00 (One hundred and forty thousand US dollars 00/100 cy) and another from García Sotos y Asociados for US$ 1,175.52 (One thousand one hundred and seventy-five US dollars 52/100 cy). In this regard, DUNOR points out that the EY Expert determined that neither of these two amounts was appropriate, so they are not among those claimed in this arbitration.

199. The Plaintiff points out that the Commission has referred to alleged delays in the review of personnel expenses because no information was included on the origin of the salary caps. It highlights that, as stated by CFE itself, it is confidential information, since they refer to contracts for the provision of services between DUNOR and third parties. To that end, it refers to section 3.2 of the Agreement and states that the section does not require such a document. It adds that, in spite of this, DUNOR, in good faith, made significant efforts to reach an agreement with the parties involved and submitted a salary tabulator to the Commission[116].

[115] Reply and Answer to the Counterclaim, No. 68.
[116] Reply and Answer to the Counterclaim, No. 70.

200. Subsequently, the Plaintiff refers to the Reclassification of Information between sections of the Agreement, pointing out that, under that heading, the Commission does not indicate which cases would not comply with the requirements of the Agreement, but only tries to justify the enormous delay it accumulates in the review of invoices in the reclassification of amounts from section 3.2 to section 3.5 of the Agreement. It adds that CFE maintains that the reclassification of insurance amounts from section 3.2 to section 3.1 of the Agreement would have delayed the review of invoices, being, according to the Commission "*a representative example of how DUNOR was deliberately delaying the final resolution of its claim*". For DUNOR, the above simply does not make sense because: i) in the first place, DUNOR, being in a delicate financial situation, was the first interested party in the settlement of the claim, and ii) a complete review of the communications exchanged between the Parties shows that DUNOR, after being requested to reclassify, diligently attended CFE's comments, being the Commission itself the one that decided to reclassify again the mentioned insurances from section 3.1 to section 3.2 of the Agreement, in the meetings held on January 23 and 24, 2020[117].

201. DUNOR indicates that, although it delivered the documents supporting the claimed costs to CFE, in compliance with the Agreement, the Commission has systematically failed to comply with the deadlines established for the review of such invoices. It adds that, after the first submission of documentation to the Commission, it took up to 4 months to reply. This situation is contrary to section 5 of the Agreement, which establishes that CFE will have the same period as DUNOR - that is, one month - to carry out the "*review and conciliation"* of the documentation[118]. This has prevented DUNOR's access to financing, so it has generated difficulty in obtaining resources to cope with the construction requirements[119].

202. The Plaintiff considers that the purpose of the Commission's statements is not to challenge the amounts claimed by DUNOR, but rather that CFE intends to justify its delays in two ways: i) first, by meticulously choosing the examples it

[117] Reply and Answer to the Counterclaim, No. 72-74.
[118] Complaint Memorial, No. 89.
[119] Reply and Answer to the Counterclaim, No. 56.

cites, CFE intends to prove that initially some invoices were included among those claimed by DUNOR that were inappropriate and/or unsupported. What the Commission forgets to mention is that the purpose of the invoice review and conciliation procedure provided for in the Agreement is precisely to filter and distill those invoices submitted within certain deadlines pursuant to the Agreement. It considers that nothing explained by the Commission in any way justifies the flagrant failure to comply with the deadlines set forth in the Agreement, even less so when, as CFE acknowledges, in some cases the contractually established deadlines for the review were exceeded by up to a multiple of 10 (the review was done in 10 months instead of 1). ii) Second, the Commission tries to justify its delays in that the Plaintiff would have made a total of 6 "time-*extensions during the review and conciliation process"*; however, it should not be forgotten that: a) the Agreement establishes a procedure for the delivery and conciliation of invoices month by month, so that the staggered delivery of information is in accordance with the Agreement and, b) the Commission itself abused this fact to add comments to invoices that had already been approved in previous reviews. Therefore, DUNOR concludes that nothing described by CFE in any way excuses the delay that it accumulates in the review of invoices[120].

203. DUNOR argues that the "*CFE's specific methodology"* is inappropriate. The Plaintiff reiterates that the Commission did not order the temporary suspension because "*the Parties were making their best efforts for the completion of the project and the Contractor was continuing to execute Works within the scope of the Contract"*. It adds that, for almost a year, the Project was stopped due to causes attributable only to CFE. During all that time, DUNOR could not demobilize even part of its resources on-site. This prevented DUNOR from using its resources efficiently[121].

204. The Plaintiff adds that in order to take advantage (at least in part) of the resources that the Commission obliged him to keep on-site, DUNOR was carrying out some tasks for the Project. CFE now intends to use this circumstance, created by itself, to argue the applicability of a "*specific methodology"* under section 5 of the Agreement. Specifically, the Commission

[120] Reply and Answer to the Counterclaim, No. 76-79.
[121] Reply and Answer to the Counterclaim, No. 81 and 82.

intends to apply to the invoices submitted by DUNOR a discount percentage - determined unilaterally - in an attempt to compensate for the expenses that DUNOR allegedly imputes to these works, but which nevertheless are not part of the Agreement[122].

205. The Plaintiff points out that CFE's allegation lacks any logic because the unilateral deduction that CFE intends to impose has no basis in the text of the Agreement[123].

206. It emphasizes that DUNOR did not deliver to CFE all its invoices, but only those that were the result of the extension of the Scheduled Provisional Acceptance Date. DUNOR asserts that it does not claim the expenses related to the Works, i.e. included in the Original Price of the Plant, which were incurred during the Analysis Period. It therefore states that if the percentage discount were to be applied as the Commission intends to apply it: (1) there would be a whole set of invoices that would not have been claimed or recognized because they did not originate in the agreed extension of time and, (2) regarding the invoices claimed, a discount percentage would also be applied for work carried out during the Analysis Period. It points out that the work performed by DUNOR during the Analysis Period that falls outside the scope of the Agreement is being used by the Commission as an excuse to unilaterally try to reduce the amounts owed by CFE to DUNOR. It adds that accepting the Commission's approach would mean that, far from compensating DUNOR for "*the reasonable expenses in which it was affected*", it would be causing it very significant economic damage on the basis of the unjustified and capricious application of a recognition percentage, which, given the requirements of the Agreement and the Contract, has no reason to exist[124].

207. The Plaintiff concludes that CFE is only delaying payment of the amounts owed pursuant to section 3.2 of the Agreement and therefore, the Tribunal must order the payment of US$ 8,016,710.08 (Eight million eighteen thousand seven hundred and ten US dollars 08/100 cy).

[122] Reply and Answer to the Counterclaim, No. 83.
[123] Reply and Answer to the Counterclaim, No. 84.
[124] Reply and Answer to the Counterclaim, No. 88.

#### 12.1.2.3.2 Defendant's position

208. The Defendant points out that resulting from the signatures of the Amending Agreements, there was never a suspension of Project activities, since the effects that occurred and extended the Dates of Critical Events did not merit the total stoppage of the work. Even DUNOR continued to execute them in the recognition period (from 19 July 2018 to 14 March 2019) established in the Agreement. It maintains that the Plaintiff was reporting Work that contributed progress and cost to the Project. In this regard, it points out that not all the expenses incurred for the execution of the works during the recognition period must be covered by the Agreement, since these are works that were within the Contract Price and that are not originated by their greater permanence in the Project[125].

209. In addition, it contends that the claims filed by the Plaintiff, under the Agreement, exhibited lack of order, misclassification of sections 3.2 and 3.5, lack of evidence and unreasonableness in many expenses. This prevented the Commission from carrying out an efficient, expeditious, and clear review of the documents. It points out that there are different repetitive irregularities such as the following: i) the claim of the personnel of the company Entre el Ángel y La Diana, S.A. de C.V, lacks support, having to claim only the proportional part of the benefits; ii) refusal to reclassify invoices relating to section 3.2 to 3.5 of the Agreement; iii) proof of payment equivalent to 17% of the amount claimed, which were delivered 16 months after the first release of information; iv) insurance invoices were reclassified from section 3.2 to 3.1 of the Agreement, which was addressed 11 months later; and finally, v) delay in the delivery of evidence of the tabulator and/or salaries of the personnel of the DUNOR's offices.[126]

210. From the aforementioned, the Commission highlights that this type of situations caused by the Plaintiff caused the Commission to take four months to answer the initial complaint, because since February 15, 2019, the non-compliances with the information submitted by the Contractor were notified. It also refers to the minutes of the meeting dated April 4 and 5, 2019, which

[125] Rejoinder Memorial and Reply, No. 48.
[126] Rejoinder Memorial and Reply to Counterclaim, No. 49.

evidences until when it was able to conclude the review[127].

211. With regards to DUNOR's claim that it lacked the resources to meet the construction requirements due to the Commission's non-compliance, the Defendant maintains that this is false since, as shown in the work-progress reports reconciled between the Parties, the Contractor made considerable progress in the work, so it does not follow that these circumstances would have affected it, and its argument lacks evidentiary support[128].

212. It points out that it seems contradictory to CFE that the Plaintiff, on the one hand, states in its Reply Memorial that it is unaware that the Parties have agreed to recognize the amount of US$ 7,130,383.43 (Seven million one hundred and thirty thousand three hundred and eighty-three U.S. dollars 43/100 cy), since it states that "*there is no formal agreement that the amounts determined as due by CFE according to Official Letter RGOS-174/20 have been accepted by DUNOR"*, and on the other hand, in paragraph 59 of the Reply Memorial, it states that CFE "*acknowledges owing it, but still has not paid it"*. At this point, it points out that in order to proceed with the payment, the necessary support is required, such as the agreed Minutes, and adds that it has been the stubbornness and intransigence of the Plaintiff to seek the ALL or NOTHING, which had prevented the Commission from meeting its obligations which it has not ignored[129]. It notes that the Commission sent DUNOR a Letter of Acknowledgement for the concept of local and field offices, and that DUNOR decided not to sign it because it did not meet its expectations, so payment could not be made.

213. It also recalls that the Commission has never disregarded the previously reconciled amount of US$ 7,130,383.43 (Seven million one hundred and thirty thousand three hundred and eighty-three U.S. dollars 43/100 cy), which is even ratified as appropriate by Expert Cámara, both in his First Expert Opinion and in the Complementary Report[130].

214. The Defendant reiterates that DUNOR acts maliciously since, in paragraphs

[127] Rejoinder Memorial and Reply to Counterclaim, No. 50.
[128] Rejoinder Memorial and Reply to Counterclaim, No. 51.
[129] Rejoinder Memorial and Reply to Counterclaim, No. 54.
[130] Rejoinder Memorial and Reply to Counterclaim, No. 57.

59 and 60 of its Reply, it states that: (i) the Commission devoted an excessive number of pages to this dispute. The Commission states that this is surprising since the detailed explanation given of how the Parties have been reconciling each of the claims in respect of which the Contractor was entitled to be paid, so that the Arbitral Tribunal has the necessary elements to determine that the Commission's action is correct and appropriate in accordance with the Agreement and the Contract. (ii) The Commission erroneously indicates a different amount than the one claimed by the Plaintiff. In this regard, the Commission warns that this is false, since the Defendant had to identify what the amount claimed was, because firstly it is clear from the Complaint Memorial that the sum of the Analysis Period amounts to US$ 8,448,761.46 (Eight million four hundred and forty-eight thousand seven hundred and sixty-one US dollars 46/100 cy) and later it is indicated that DUNOR has incurred in expenses for Personnel Management and Field Administration amounting to a total of US$ 8,016,710.08 (Eight million sixteen thousand seven hundred and ten US dollars 08/100 cy). In addition, there is a third amount determined by the EY Expert in his First Expert Opinion for US$ 7,836,863.81 (Seven million eight hundred and thirty-six thousand eight hundred and sixty-three US dollars). CFE adds that what is striking and should not go unnoticed by the Arbitral Tribunal is that the EY Expert in his Complementary Opinion no longer concludes an amount payable to the Plaintiff and limits himself to pointing out that he does not agree with the methodology applied by the Expert Cámara, so that ultimately, the Plaintiff was forced to indicate the second amount as definitive[131].

215. Under the title "*Dunor only claims reimbursable* expenses", CFE points out that the Plaintiff knows how the invoices presented both in the Complaint Memorial and in the EY Expert Opinion were analyzed one by one, and by which the amount claimed was reached and today affirms that they are not part of what is claimed in this arbitration. So, the question is, what is the purpose of your expert attaching them and referring to them in his Opinion?[132].

216. Regarding the expenses outside the recognition period, the Commission specifies that the examples given in the Counter-Memorial are for the Arbitral

[131] Rejoinder Memorial and Reply to Counterclaim, No. 58.
[132] Rejoinder Memorial and Reply to Counterclaim, No.

Tribunal to verify how the reconciliation process of the invoices submitted by the Contractor was carried out and why they were rejected, as stated in RGROS-174/20. However, the Plaintiff resubmitted those invoices as an appendix to its Complaint[133].

217. With respect to the unsettled invoices, the Commission points out that the determined amount of US$ 133,905.48 (One hundred and thirty-three thousand nine hundred and five US dollars 48/100 cy) corresponds to invoices from Elecnor de México S.A. de C.V., considered by the Commission as inappropriate because they have not been paid and consequently, could not be reimbursed. It adds that this was noted by the EY Expert. Therefore, the above amount lacks documentary support that justifies whether it is due, so CFE should therefore be exempted from paying these amounts[134].

218. In relation to expenses not subject to recognition because they fall outside the scope of Agreement, the Defendant points out that during the meeting held on October 02 and 03, 2019, the Parties reconciled the invoices submitted where some expenses were found to be ineligible for recognition for a variety of reasons such as: i) being a supply or transfer of materials; ii) payment for civil works; iii) warehouse that was no longer under construction at the date of the claim; iv) temporary electrical installations that were no longer on site during the period of recognition of the claim; v) permanent electrical installations that correspond to the scope of the Contract and, vi) access control cards of personnel who did not prove that they were on Site during the Claim Period. In addition to the above, CFE indicates that adjustments were made to the amounts of some invoices because they included items that were not directly related to the scope of the Agreement[135].

219. With respect to unreasonable expenses, it refers to electricity expenses and to this end, the Commission maintains that according to the Agreement, section 3.2 "*Expenses for the Management of Personnel and Field Administration"*, section V subsection f), only office consumption costs are applicable. It specifies that the Commission carried out a physical inspection at the Site, observing that

[133] Rejoinder Memorial and Reply to Counterclaim, No. 65-66.
[134] Rejoinder Memorial and Reply to Counterclaim, No. 68-69.
[135] Counter-Memorial and Counterclaim, No. 311 and 312.

the Contractor had only contracted an electric power service with CFE Distribución, with a single light meter and from which the offices and the work were powered; therefore, there was a single bill that recorded the electricity consumption used in the field offices, as well as the consumption in execution of the development of the work and start-up tests. To this end, it highlights that the electricity consumption of the years 2016 and 2017 did not exceed MXN$ 57,902.00 (Fifty-seven thousand nine hundred and two Mexican pesos 00/100 M.N.) per month for consumption (28,248 kWh at an average price of 2.0498 $/kW), and as of May 2017, they increased substantially in the order of MXN$ 279,462.29 (Two hundred and seventy-nine thousand four hundred and sixty-two pesos 29/100 cy) monthly (151,618 kWh at an average price of $1.8432/kW), when DUNOR started testing activities[136].

220. The Commission adds that in order to recognize what is fair and reasonable, it determined the consumption of the offices, dining facilities and infirmary, estimated according to the maximum load of the Plaintiff's equipment and facilities, which were verified on Site, without including the Subcontractor's facilities that were also consuming from the same electricity meter. The above can be evidenced from the electricity bill for the month of December 2017 with the consumption history chart and graph from January 2017 to January 2018[137].

221. In this regard, CFE argues that the EY Expert made a calculation that has no basis whatsoever, for which it states: a) the installed load in offices, dining facilities, infirmary, etc., cannot generate these billed and claimed electricity consumptions, and b) DUNOR declares that there were no activities related to the works in the months that the EY Expert took for its calculation. The Commission warns that both the energy consumption of the construction site and of the offices came from the same energy meter and that the period of time considered in the calculation does include activities developed on the construction site up to the Provisional Acceptance Date of the Project, which was August 14, 2019, since there were works pending to be performed, which consist of 658 Minor Deficiencies and later 95 Warranty Claims, which today have not been fully addressed, so it is false what is stated by the EY Expert, where it

[136] Rejoinder Memorial and Reply to Counterclaim, No. 72.
[137] Rejoinder Memorial and Reply to Counterclaim, No. 73.

indicates that in that period from May 2019 to March 2020 there were no activities related to the Works[138]. Additionally, it adds a comparison chart of the office expenses of the Empalme I and Empalme II Projects.

222. The Commission states that the reasonable amount to be recognized for this concept is US$ 17,981.00 (Seventeen thousand nine hundred and eighty-one US dollars 00/100 cy) maximum, which is consistent with the installed load for the office's consumption and provisional facilities and not the amount of US$ 30,672.97 (Thirty thousand six hundred and seventy-two US dollars 97/100 cy) determined by the EY Expert, which is not based on actual figures for the equipment installed in the field offices and which takes into account on-site power consumption, which would mean paying double since it is part of the Contract Price[139].

223. Regarding the amount claimed from the personnel of Entre el Ángel y La Diana S.A. de C.V., the Commission points out that as of today, DUNOR still does not provide documentary support for its claim, since it was only entitled to claim for the proportional part of the benefits as indicated in section 4, paragraph b) of the Agreement[140].

224. Additionally, the Defendant clarifies that the dispute does not lie in whether or not the benefits are applicable, since the Agreement so provides, but what must be recognized is the proportional part of the salaries and benefits, since DUNOR intends that the Commission absorb all the labor costs that correspond as employer, for benefits that do not belong to the period of recognition, therefore, the Arbitral Tribunal must consider that the methodology used by the Defendant is fair and reasonable since it does not have the information that should have been provided by the Plaintiff[141].

225. Regarding the expenses without documentary support, the Commission states that there are different claims that CFE does not consider appropriate because documentary support was not exhibited. An example of the above is the

[138] Rejoinder Memorial and Reply to Counterclaim, No. 74.
[139] Rejoinder Memorial and Reply to Counterclaim, No. 77.
[140] Rejoinder Memorial and Reply to Counterclaim, No. 78.
[141] Rejoinder Memorial and Reply to Counterclaim, No. 79 and 80.

collection of the invoice of the company "CLIFFORD CHANGE SLP" for "*professional fees for the provision of legal services"*. CFE maintains that no evidence was presented to support that the services provided by this company are related to the concepts described in the Agreement[142].

226. With respect to the delay in the review of personnel expenses, the Commission clarifies that this was due to the fact that the information with which the concept was to be supported was not from a third party, but that it concerned the salaries of the management, technical and administrative personnel of the companies that form the Consortium of the Plaintiff, a fact that it refused to accept, causing a delay in the conciliation of the amounts[143].

227. It refers to the Agreement insofar as it establishes that "*sensitive information (that) does not affect the accreditation and determination of the amount claimed"* may be excluded from the information to be provided in order to obtain the recognition. In this case, the information was necessary to proof the expenses, so that only when the information was available, the corresponding adjustments were made, arriving at a fair and reasonable reconciled amount[144].

228. It also submits, with regard to the reclassification of information between sections of the Agreement, that what the Plaintiff stated in its Reply Memorial is false.[145] It states that the truth of the facts is that due to the poor organization of the documents submitted by the Contractor in relation to the claims indicated in the Agreement, the Commission proposed the reclassification of these expenses from 3.2 to 3.5, since they did not comply with the premises set forth in section 3.2, since only the indirect costs of the work should be included. It points out that it was only after several months that DUNOR understood this fact and that finally in the Minutes of November 20 and 21, 2019 in paragraph 1 the reclassification was agreed without granting its origin in section 3.5[146]. Therefore, the Commission states that it fully complied with the Agreement, reclassifying the invoices from section 3.2 to section 3.5 and that it justifies, not as the Plaintiff

[142] CFE Counter-Memorial, No. 329-338.
[143] Rejoinder Memorial and Reply to Counterclaim, No. 84.
[144] Rejoinder Memorial and Reply to Counterclaim, No. 85.
[145] Reply and Answer to the Counterclaim, No. 71.
[146] Rejoinder Memorial and Reply to Counterclaim, No. 87.

points out, the delay in the review[147].

229. Regarding the reclassification of the concept of Insurances, the Defendant states that since February 8, 2019, it requested the reclassification of insurance invoices and only until November 15th did DUNOR accept said reclassification[148]. It adds that the Plaintiff states that the Commission decided at the Meeting held on January 23 and 24, 2020 to reclassify the insurance referred to in section 3.1 to section 3.2 of the Agreement 25.5. It warns that this is false, as can be corroborated in the appendix to the aforementioned Minutes, which DUNOR did not present. It also adds that the invoices were withdrawn by the Contractor from section 3.2 of the Agreement and were not included again in this claim[149].

230. In light of the foregoing, the Commission states that the delays incurred in the revision of invoices are justified, since they were attributable to the Plaintiff[150].

231. Regarding the inadmissibility of CFE's "*specific methodology*" to which the Plaintiff refers, the Commission states that it proposed this methodology, since it is fair and reasonable that those expenses that in a proportional part contribute to the development of the Project and that are within the scope of the main Contract are costs for which the Contractor is responsible, as they were used to advance contractual obligations. By way of example, it states that the entire amount corresponding to the Construction Supervisor is being claimed, and it should only be the proportional part concerned of what was billed by the personnel during the Recognition Period, which was from July 19, 2018 to March 14, 2019, since this amount is part of the indirect costs of the Work, and the Supervisor participated in the supervision and administration of the resources to execute the actual percentage of progress that the Project had during said period[151]. It also points out that during said period, the Contractor was in arrears with part of the Work, since it was attending pending construction work. The methodology proposed by the Commission seeks to avoid abuse by the Plaintiff

[147] Rejoinder Memorial and Reply to Counterclaim, No. 86 - 88.
[148] Rejoinder Memorial and Reply to Counterclaim, No. 90.
[149] Rejoinder Memorial and Reply to Counterclaim, No. 91.
[150] Rejoinder Memorial and Reply to Counterclaim, No. 97.
[151] Rejoinder Memorial and Reply to Counterclaim, No. 98 and 99.

who seeks to be paid fully for the expenses claimed pursuant to the Agreement and also to be paid within the scope of the Contract, with the consequence that DUNOR obtains a double benefit, since as can be seen in the construction-progress reports, the Contractor continued to carry out Contract Works[152]. It adds that the Commission's proposal would fairly and reasonably allow DUNOR to cover the proportional part of its indirect expenses corresponding to the execution of the Works during the recognition period, so that of the amount of US$ 7,130,383.43 (Seven million one hundred and thirty thousand three hundred and eighty-three U.S. dollars 43/100 cy) conciliated by the Parties, of the expenses corresponding to the Agreement of clause 25.5 in section 3.2 Expenses for Personnel Management and Administration of Local and Field Offices, and once this specific methodology has been applied, only an amount of US$ 6,127,824.10 (Six million one hundred and twenty-seven thousand eight hundred and twenty-four US dollars 10/100 cy) shall be recognized to the Contractor, which is detailed in the chart included in its Rejoinder Memorial based on Appendix R-111[153].

#### 12.1.2.3.3 Considerations of the Tribunal

232. The Plaintiff[154] points out that, pursuant to section 3.2 of the Agreement, the Defendant undertook to compensate DUNOR for the expenses of personnel management and field administration incurred by DUNOR for the delays attributable to CFE. It adds that these expenses amount to US$ 7,836,863.81 (Seven million eight hundred and thirty-six thousand eight hundred and sixty-three US dollars 81/100 cy) and have not been paid.

233. The Plaintiff[155] points out that the Commission never suspended the work on the Power Plant while they were trying to solve the problems that prevented compliance with the Scheduled Provisional Acceptance Date initially agreed, which forced DUNOR to keep personnel, machinery, and equipment mobilized on the Work Site, causing it considerable expenses that it has no obligation to bear.

[152] Rejoinder Memorial and Reply to Counterclaim, No. 101.
[153] Rejoinder Memorial and Reply to Counterclaim, No. 102.
[154] Complaint, para. 85.
[155] Complaint, para. 86.

234. It adds[156] that although DUNOR delivered to CFE the supporting documents for this item, in accordance with what is indicated in the Agreement, the Commission's first answer was not received until May 20, 2019, that is, approximately 4 months after sending DUNOR the required information, which is contrary to section 5 of the Agreement, that establishes that CFE will have the same period as DUNOR (that is, one month) to carry out the "*review and conciliation"* of the documentation.

235. In relation to these expenses, the Tribunal finds the following:

236. The Agreement sets out the expenses that may be recognized for these concepts and for this purpose, it refers to: fees, salaries, and benefits; depreciation, maintenance, and rent; services, freight, and cartage; and office, training and education, and security expenses. In addition, the Agreement specified the documents that should be delivered by the Contractor to the Commission.

237. However, the EY Expert indicated in his opinion that when reviewing he obtained a total sum of Expenses for the Management of Personnel and Field Administration of MXN$ 8,448,761.46 (Eight million four hundred forty-eight thousand seven hundred and sixty-one Mexican pesos 46/100 M.N.)[157].

238. The EY Expert[158] points out that in the Official Letter RGROS-174/20, the Commission recognized a total amount of MXN$ 7,130,383.43 (Seven million one hundred and thirty thousand three hundred and eighty-three Mexican pesos 43/100 cy), as a result of CFE's review.

239. In this way, the EY Expert points out that there is a difference of US$ 1,318,378.03 (One million three hundred eighteen thousand three hundred seventy-eight Mexican pesos 03/100 cy) between what is claimed by DUNOR and what is recognized by CFE. He adds that there are two reasons[159] for this difference:

i. Expenses amounting to MXN$ 549,298.51 (Five hundred and forty-nine

[156] Complaint, para. 89.
[157] First EY Expert Report, p. 21.
[158] First EY Expert Report, p. 21.
[159] First EY Expert Report, pp. 22 and 23.

thousand two hundred and ninety-eight Mexican pesos 51/100 M.N.) that the Commission determined were not appropriate.

ii. Expenses amounting to US$ 3,301,148.88 (Three million three hundred one thousand one hundred and forty-eight US dollars 88/100 cy) of which the Commission only determined that part of the claim was appropriate, that is, the sum of US$ 2,353,070.05 (Two million three hundred and fifty-three thousand seventy US dollars 05/100 cy) so the unrecognized difference amounts to US$ 769,078.83 (Seven hundred and sixty-nine thousand seventy-eight US dollars 83/100 cy).

240. Therefore, the EY Expert points out that there is a total cost of US$ 3,850,447.39 (Three million eight hundred and fifty thousand four hundred forty-seven US dollars 39/100 cy) not settled by the Parties, which are those examined in detail by the Expert[160]. The Tribunal clarifies that this figure includes the sum of MXN$ 2,353,070.05 (Two million three hundred and fifty-three thousand seventy Mexican pesos 05/100 M.N.), which the Commission accepted in paragraph ii.

241. The EY Expert proceeded to carry out the corresponding analysis and verified that[161]

> *"The expenses presented have been incurred (accrued) during the Analysis Period.*
>
> *"The expenses claimed are directly related to the Project and correspond to concepts defined in one of the seven items provided for in section 3.2 of the Agreement.*
>
> *"The expenses are reasonable and have the supporting documentation required in section 3.2 of the Agreement that proves that they were actually incurred by the Contractor, for this purpose, at this point we verify, including but not limited to:*
>
> *"There is evidence of the rendering of services and receipt of goods, such as: time logs, authorized attendance lists, payments of labor benefits to the corresponding government entities, receipts of per diem expenses (invoices, referral notes, tickets, etc.), reports, statements or communications for consulting services, receipt and/or delivery of goods.*

[160] First EY Expert Report, p. 23.
[161] First EY Report, p. 26.

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*"The expenses incurred and invoiced correspond to the hours, services, personnel, rates, etc., established with the subcontractors and suppliers in the contracts entered into by Dunor Energía or in the previously authorized purchase orders.*

*"The invoice corresponds to the evidence of the services and/or goods received.*

*"The proof of payment corresponding to the expense, in cases where the payment incorporated several invoices, we verify the integration of the total payment made.*

*"The accounting record corresponding to the payment of the expense".*

242. Therefore, it stated that[162] "*a total amount of US$ 3,238,550.43 of expenses that meet the requirements set forth in section 3.2 of the Agreement (items i, ii, and iii above) to be granted as expenses directly related to the Works, are reasonable and documented"*.

243. It also stated that[163] "*a total of US$ 90,936.34 complies with the specifications indicated to be granted as expenses directly related to the Works, which were reasonable and documented, and incurred during the Analysis Period. However, due to the type of expense (personnel services that worked directly on the work and that extended and/or incurred in work during the Analysis Period, as well as other expenses associated with the construction works), they correspond to Expenses for Third-Party Claims, for this reason they should be compensated in section 3.5 of the Agreement".* It adds that "*these expenses comply with the documentation and characteristics analyzed in point iii mentioned above"*.

244. The EY Expert adds that he determined[164] "*a total of US$ 133,905.48 that meets the requirements set forth in section 3.2 of the Agreement (points i, ii, and iii above) to be granted as expenses directly related to the Works, which were reasonable and documented. However, as of the date of submission of this Report, they have not been liquidated by the Contractor"*.

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[162] First EY Report, p. 26.
[163] EY First Report, p. 27.
[164] EY First Report, p. 28.

245. It also states that "*a total of US$ 45,940.79 ... corresponds to the amounts retained from the subcontractor "MHO Engineering, SA de CV" for "Quality Retention" which, although they correspond to expenses directly related to the Works, which were reasonable and documented, have not been reimbursed to the Subcontractor. Therefore, as of the date of submission of this Report, it has not been paid by the Contractor"*.

246. Finally, it states[165] that "*we determined a total sum of US$ 341,114.35 USD corresponding to non-compensable expenses"*.

247. Therefore, the EY Expert concludes that the amount that should be compensated for this concept is US$ 7,836,863.81 (Seven million eight hundred and thirty-six thousand eight hundred and sixty-three U.S. dollars 81/100 cy), which is broken down as follows[166]:

> *"Expenses claimed by Dunor and recognized by CFE without difference in the Official Letter RGROS-174/20 $4,598.31.38*
>
> *Expenses for Personnel Management and Field Administration under analysis that complies with the provisions of the Agreement for its compensation $3,238,440.3".*

248. Finally, it points out[167] that as part of the US$ 520,960.62 (Five hundred and twenty thousand nine hundred and sixty US dollars 62/100 cy) not credited, there is a total of US$ 133,905.48 (One hundred and thirty-three thousand nine hundred and five US dollars 48/100 cy) that complies with the requirements of the Agreement; however, said payments have not been settled by the Contractor.

249. It adds[168] that a total of US$ 45,940.79 (Forty-five thousand nine hundred and forty U.S. dollars 79/100 cy) corresponds to the amounts withheld from the subcontractor MHO Engineering for quality retention, noting that these items have not been reimbursed to the contractor, and therefore have not been disbursed by DUNOR.

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[165] EY First Report, p. 28.
[166] EY First Report, p. 30.
[167] EY First Report, p. 31.
[168] EY First Report, p. 31.

250. For its part, the Defendant makes its observations in relation to this *item* under the following headings[169]: (i) expenses outside the recognition period; (ii) unsettled invoices; (iii) expenses not eligible for recognition because they are not within the scope of the Agreement; (iv) unreasonable expenses; and (v) expenses without documentary support.

251. Regarding the expenses outside the recognition period, he noted that they had been discarded as recorded in document RGROS-174/20 despite having been reconciled[170]. In this regard, the Plaintiff in its Reply points out that the Commission analyzed each invoice, despite the fact that those included in this heading have not been claimed[171]. The Defendant for its part points out that the Plaintiff submitted all the invoices as appendices to its Complaint, so the Defendant ruled on them in its Answer. In this connection, the Tribunal finds that the expenses referred to in this objection are not claimed by the Plaintiff and there is therefore no need for further consideration.

252. As for the unsettled invoices, in its Rejoinder[172] the Defendant states that there is an amount of US$ 133,905.48 (One Hundred and Thirty-Three Thousand Nine Hundred and Five US Dollars 48/100 cy) that corresponds to invoices from Elecnor de México considered by the Commission as not appropriate because they have not been paid and consequently could not be reimbursed. This amount matches with that which the EY Expert points out has not been paid by the Contractor[173]. In its Reply, the Plaintiff states that such amount has not been paid because of the financial suffocation to which CFE has subjected Dunor[174]. To this extent, the Tribunal considers that since what must be reimbursed are the expenses incurred, it is only necessary to recognize this amount as long as it has been paid.

[169] CFE Answer, para. 300.
[170] CFE Answer, para. 302.
[171] Dunor Answer and Reply, para. 65.
[172] Rejoinder and Reply to CFE Counterclaim, para. 68.
[173] EY First Report, p. 31.
[174] Dunor Answer and Reply, para. 66.

253. With regard to expenses not eligible for recognition because they are not within the scope of the Agreement, the Defendant in its Rejoinder refers to paragraphs 307 to 312 of its Answer. For its part, the Plaintiff refers to the different cases and indicates that with regard to the invoices related to the supply of consumables or labor for temporary installations, they are not claimed under this heading, but under section 3.5 of the Agreement and adds that the other expenses referred to by the Defendant in that item are not amounts claimed in this arbitration[175], for this reason, the Tribunal considers that no additional considerations apply to the latter expenditures.

254. Regarding the unreasonable expenses, these refer to the amounts claimed for electricity, personnel expenses for the company Entre el Angel y la Diana, S.A. de C.V., and other invoices for professional services that, according to the Plaintiff, had no direct value for the Project. The Tribunal then proceeds to rule on the latter damages.

255. In relation to the amounts for electricity, the Defendant[176] points out that the "*Expenses for the Management of Personnel and Field Administration"*, section V subsection f), are only applicable to expenses for office consumption, and not for any other activity.

256. To this end, the Defendant[177] warns that the Contractor had only contracted an electric power service with CFE with a single light meter from which it was fed to the offices and the work, therefore there was only a single receipt that included the consumption in execution of the development of the works and start-up tests. It warns that this can be verified with the electricity consumption of the years 2016 and 2017, where the consumptions did not exceed MXN$ 57,902.00 (Fifty-seven thousand nine hundred and two Mexican pesos 00/100 M.N.) monthly for office and work consumption (28,248 kWh for average price of $ 2.0498/kW), and which as of May 2017 increased substantially in the order of MXN$ 279,462.29 (Two hundred and seventy and nine thousand four hundred and sixty-two Mexican pesos 29/100 M.N.) monthly (151,618 kWh for average price of $1.8432/kW), when DUNOR initiated testing activities, seeking to be recognized for the total

[175] Dunor Answer and Reply, para. 67.
[176] Rejoinder and Reply to CFE Counterclaim, para. 71.
[177] Rejoinder and Reply to CFE Counterclaim, para. 72.

bill.

257. The Commission points out[178] that with the purpose of recognizing what is fair and reasonable, it determined the expenses for the offices, dining hall, and nursing, estimated according to the maximum load of the Plaintiff's equipment and facilities, verified on the Site. The Commission's calculations refer only and exclusively to the temporary facilities owned by DUNOR (office, dining hall, and infirmary), without including the Subcontractors' facilities that were also consuming from the same light meter.

258. It then adds that the calculation of the EY Expert has no support[179] for the following reasons: a) the load installed in the offices, dining hall, nursing, etc., cannot generate the electricity consumption billed and claimed, b) although DUNOR states that there were no activities related to the work in the months taken by the EY Expert for its calculation, CFE points out that the period of time considered in the calculation does include activities carried out on Site up to the Provisional Acceptance Date of the Project, which was on August 14, 2019, where pending works on the Project were recorded, which consisted of 658 Minor Deficiencies and subsequently 95 Warranty Claims, which today have not been fully addressed, so it is false what was stated by the EY Expert, where he indicates that in that period from May 2019 to March 2020 there were no activities related to the Works. It emphasizes that the expert is implicitly recognizing that there was only one light connection for the offices and the construction Site. It adds that in Second EY Expert Report, the initial amount claimed was reduced by approximately 50%, and even so, the consumption of electricity for field offices is excessive, and the methodology used to determine the expenses is not clear. It points out[180] that the reasonable amount to recognize is US$ 17,981.00 (Seventeen thousand nine hundred and eighty-one US dollars 00/100 cy) as a maximum, which is in accordance with the load installed for office's consumption and provisional installations and not the amount of US$ 30,672.97 (Thirty thousand six hundred and seventy-two US dollars 97/100 cy) determined by the EY Expert, which is not based on real figures of the equipment installed in the

[178] Rejoinder and Reply to CFE Counterclaim, para. 73.
[179] Rejoinder and Reply to CFE Counterclaim, para. 74.
[180] Rejoinder and Reply to CFE Counterclaim, para. 76.

field offices and which considers these on-sit electricity consumptions, which would be paid double since it is part of the Contract Price.

259. For its part, the Plaintiff[181] points out that the amount claimed by DUNOR for electrical energy for construction offices during the Analysis Period for MXN$ 606,374.32 (Six hundred and six thousand three hundred and seventy-four Mexican pesos 32/100 cy) indicated by the Defendant, does not correspond to a reasonable monthly consumption of a field office. It warns that CFE relies on installed capacity to estimate what it considers to be a "*reasonable expense"* for this concept. For its part, for the verification of this expense, EY reviewed a calculation made by DUNOR based on the average spending of the months of May 2019 to March 2020 for the payment of electricity (without VAT), since during these months there were no Work-related activities, so the expense for this period corresponded only to the use of electricity for the field offices. In accordance with this calculation, EY determined the appropriateness and reasonableness of an amount of US$ 30,672.97 (Thirty thousand six hundred and seventy-two US dollars 97/100 cy) for this item[182]. The Expert adds that this amount is supported by calculations based on real figures from field offices and not on mere theoretical estimates that take installed capacity as a reference (as the Commission does in its Counter-Memorial).

260. In relation to energy consumption, the Tribunal finds the difference between the energy consumption of Empalme II versus Empalme I (Appendix R-113).

| | **EMPALME II** | **EMPALME I** | **OBSERVATIO N** | **DIFFERENC E** |
|---|---|---|---|---|
| **CFE Service No.** | **85520 16-07-14** | **525160201601** | | |
| Dec-17 | $269,391.65 | S/M | Attached receipt Attached receipt Attached | ***IT IS NOT POSSIBLE TO HAVE DIFFERENC ES DUE TO*** |

[181] Reply and Answer to the Counterclaim, para. 68.
[182] Reply, para. 68.

| | | | | |
|---|---|---|---|---|
| | | | receipt Attached receipt Attached receipt Attached receipt Attached receipt | ***THE LACK OF AMOUNTS*** |
| Jan-18 | $207,237.13 | S/M | | |
| Feb-18 | S/M | $21,673.11 | | |
| Mar-18 | S/M | $25,555.51 | | |
| Apr-18 | S/M | $26,092.98 | | |
| May-18 | S/M | $32,481.62 | | |
| Jun-18 | S/M | $38,659.94 | | |
| Jul-18 | $271,011.34 | $44,227.94 | | $226,783.40 |
| Aug-18 | $114,360.42 | $45,533.33 | Amount obtained from records for July 2018 | $68,827.09 |
| Sep-18 | $135,276.77 | $43,923.35 | | $91,353.42 |
| Oct-18 | $92,824.17 | $30,777.08 | | $62,047.09 |
| Nov-18 | $67,179.01 | $19,449.88 | | $47,729.13 |
| Dec-18 | $105,253.43 | $12,711.81 | | $92,541.62 |
| Jan-19 | $114,894.72 | $14,690.64 | | $100,204.08 |
| Feb-19 | $105,706.16 | $18,073.04 | | $87,633.12 |
| Mar-19 | $606,376.76 | $17,544.23 | | $588,832.53 |

261. On the other hand, the estimate of consumption made by officials of the Defendant taking into account the equipment installed (Appendix R-048) was also attached.

262. A review of those documents shows, on the one hand, a substantial difference in the electricity consumption of the two Power Plants, which does not appear to be justified from the elements provided by the Plaintiff, unless that corresponds

to the energy used to solve problems of Minor Deficiencies or other activities. It should be noted that the average consumption of EMPALME I, which the Commission also cites, is closer to the consumption estimated by the Defendant, that is, the sum of MXN$ 606,374.32 (Six hundred and six thousand three hundred and seventy-four Mexican pesos 32/100 cy).

263. Taking into account the elements submitted by the Parties that are documentarily valid, as a result of the foregoing the Tribunal considers that an amount of US$ 17,981.00 (Seventeen thousand nine hundred and eighty-one US dollars 00/100 cy) should be recognized.

264. On the other hand, the Commission[183] points out that in relation to the personnel in charge of the company "*ENTRE EL ANGEL Y LA DIANA S.A. DE C.V.*", the supporting documentation was requested, among others, the salary tabulator, with evidence of the costs for each of the workers shown in the different invoices. It points out that the Contractor refused on the grounds that to provide those details would violate the law on the protection of personal data.

265. In this regard, in its Reply, the Plaintiff states that "*the Commission recognizes a total of US$ 756,231.13 of the US$ 840,761.44 claimed by Dunor".*[184] It adds that "*the US$ 84,530.32* difference corresponds, according to CFE, to amounts that the Plaintiff 'fraudulently intends the Commission to cover [and that refer to] the total benefits for all seniority for the time worked on the site (severance payments, vacations, etc.)'"*. The Plaintiff points out that, however, in accordance with the EY Expert's criteria, these benefits fall within the concept of "*Benefits required by the Federal Labor Law"* referenced in the Agreement and that they took place within the Analysis Period. In addition, it should be borne in mind that although there are some expenses within the Analysis Period that may not have their origin in the time-extension, there are others that were derived from the time-extension and that, instead, fell outside the agreed period. Thus, both the EY Expert and DUNOR agree that these are appropriate expenses, since they correspond to an expense agreed for reimbursement and that took place in the Analysis Period. Additionally, it should be noted that, according to the EY Expert's

[183] CFE Answer, para. 317.
[184] Reply and Answer to the Counterclaim, para. 68.

calculation and the expense certificates, the amount recognized as appropriate by CFE as of July 2020 was US$ 768,941.30 (Seven hundred and sixty-eight thousand nine hundred and forty-one US dollars 30/100 cy) and not US$ 756,231.13 (Seven hundred and fifty-six thousand two hundred and thirty-one US dollars 13/100 cy).

266. In this regard, the Defendant[185] points out that the dispute on this point is not whether or not the benefits are applicable, since the Agreement provides for them, but what must be recognized is the proportional part. The Defendant points out that DUNOR wants the Commission to absorb all labor expenses for benefits that do not belong to the recognition period. For this reason, the Commission made the calculation for fees, salaries, and benefits, a methodology that is fair and reasonable in the absence of information that should have been provided by the Plaintiff.

267. In relation to the foregoing, the Tribunal must observe that, in order for the Defendant to recognize an amount for these concepts, the information indicated in section 3.2 of the Agreement must be provided, excluding "*sensitive*" information that does not affect the accreditation and determination of the amount claimed. Therefore, from the point of view of the Agreement concluded by the Parties, if the information requested is necessary to determine the amount claimed, it must be provided. Since it is not established that such information has been submitted, DUNOR's complaint must be rejected in this regard.

268. The Plaintiff[186] notes that the Defendant alleges that various invoices for "*Professional Services, Claiming Indirect Expenses Incurred by Dunor"* would be unreasonable because they were not a service providing direct value to the Project. In this regard, it points out that the Agreement is intended to compensate, this is, to hold the Contractor harmless for delays of more than 60 days due to Government Force Majeure or due to the Commission's fault. It then notes that, it is clear that the Contractor would not be compensated if it had to bear the necessary expenses to make the Agreement itself applicable. It points out that these expenses (i) are included in section 3.2 of the Agreement; (ii) belong to the

[185] Rejoinder and Reply to CFE Counterclaim, para. 79.
[186] Reply, para. 68.

Analysis Period and, (iii) comply with all the requirements to be reimbursable.

269. For its part, the Commission points out that the activities carried out under the concept of the referred invoices, do not comply with the purpose of the Agreement, since the nature of the work claimed is the "*Review, analysis, and claims preparation for financial expenses and increase of guarantees"*, which is not a direct expense related to the Works and does not directly provide value to the Project. It also adds that some of these invoices do not have proof of payment.

270. The Tribunal understands that the Parties refer to the invoices presented by DUNOR that were rejected by CFE and to which the latter refers in paragraph 327 of its Counter-Memorial and Counterclaim. In accordance with that paragraph, "*the Plaintiff submitted invoices that the Commission rejected in Section 'III. Services', subsection a) 'Consultants, Advisors, Services, and Laboratories', as is the case of ELECNOR MEXICO S.A. DE C.V., with the concept 'Review, analysis, and assembly of claim of Financial Expenses and increase of guarantees of equipment of the months August 2018, September 2018, October 2018, and November 2018' and of the company PROYECTOS E INGENIERÍA PYCOR S.A. DE C.V., with the concept "Professional services, realization of claim of indirect expenses incurred by DUNOR, period from August 2018 to November 2018", since they are Not Reasonable because they are a service that does not provide value directly to the Project and are exclusively for the benefit of the Plaintiff to file claims with the Commission, so it is inappropriate and unacceptable for the Defendant to absorb said expenses, which must be in charge of the Contractor and which are also not provided for in Agreement 25.5"*.

271. In relation to this point, the Tribunal notes that clause 25.5 provides for the compensation of expenses "*that are directly related to the works"*, so it is clear that the expenses incurred in the claim's preparation do not have such character and therefore, cannot be recognized. In any event, the Tribunal notes that Appendix DOC.EY-21 to the First EY Expert's Report indicates a series of transactions with Elecnor that have not been settled by the Contractor.

272. Therefore, the amounts indicated by the EY Expert will be recognized, with the exception of the value for electric energy, for which the amount calculated by CFE US$ 17,981.00 (Seventeen thousand nine hundred and eighty-one US

dollars 00/100 cy) will be recognized and not the amount claimed by the Contractor US$ 30,672.97 (Thirty thousand six hundred seventy-two US dollars 97/100 cy), and the value corresponding to the services rendered by MHO ENGINEERING for US$ 84,530.32 (Eighty-four thousand five hundred thirty US dollars 32/100 cy).

273. Accordingly, the value to be recognized and paid by the Defendant is the sum of US$ 7,739,641.51 (Seven million seven hundred and thirty-nine thousand six hundred and forty-one US dollars 52/100 cy).

274. It is pertinent to add that the sums that have not been paid by the Plaintiff, which are part of the items identified by the EY Expert, must be paid by the Defendant when the actual payment by the Plaintiff is proven. Excluding the expenses incurred for the preparation of the claim referred to above.

#### 12.1.2.4 Administration Expenses and Office Structure

##### 12.1.2.4.1 Plaintiff's position

275. In relation to the Administration Expenses and Office Structure, DUNOR states that section 3.3 of the Agreement provides for CFE to appoint an External Consultant to analyze and quantify this expense item. It considers that, although the Commission deliberately delayed this designation (from August 28, 2019 to February 13, 2020), it finally appointed the EY company, who issued its report dated August 3, 2020 (EY Indirect Cost Report), by which it validated US$ 2,663,129.37 (Two million six hundred and sixty-three thousand one hundred twenty-nine US dollars 37/100 cy) for Administration Expenses and Central Office Structure claimed by DUNOR and concluded that the indirect costs indicated by the Defendant, which are in a range of 3-4.5%, are reasonable, and should then be reimbursed by CFE. It is specified that this item includes the expenses incurred by DUNOR at a corporate level in the execution of the Project during the Analysis Period, which have not been duly paid by CFE[187].

[187] Complaint Memorial, No. 103-106.

276. DUNOR states that said report yielded the following conclusions: (i) it is appropriate and reasonable, given the circumstances, to quantify the concept recognized in section 3.3 of the Agreement. (ii) There are three (3) Power Plant structures that provide services to DUNOR and that, therefore, have incurred indirect costs in the execution of the Project. (iii) The total amount of indirect costs incurred by DUNOR's Central Offices, for the indicated period, amounted to US$ 2,663,129.37 (Two million six hundred sixty-three thousand one hundred twenty-nine 37/100 cy)[188].

277. The Commission requested clarifications, which were duly answered by EY. However, on October 30, 2020, CFE again reiterated its request for clarifications ignoring EY's conclusions, despite the fact that the aim of the Agreement was clearly that the conclusions of the External Consultant would be binding on both Parties[189].

278. DUNOR notes that the EY Expert has reviewed and validated his previous report as part of the expert report attached to the Complaint Memorial and maintains that the EY Expert has reached the same conclusions, namely: (i) that indirect costs are reflected in the Balance Sheet and the Profit and Loss Account; (ii) that are included in the General Catalogue of Accounts of the accounting system; (iii) that fit the definition of "*indirect*" cost based on accounting doctrine and article 211 of the RLOPSMR; (iv) that they are directly related to the Project and were incurred during the Analysis Period, and (v) that the allocation percentage is reasonable under the OECD Transfer Pricing Agreement and Guidelines. Derived from the above, EY concludes that the total amount of Administration and Central Office Structure Costs incurred by DUNOR during the Analysis Period amounts to a total of US$ 2,975,708.00 (Two million nine hundred and seventy-five thousand seven hundred and eight US dollars 00/100 cy) (this amount is calculated at the exchange rate on December 31, 2020). This amount "*is within the reasonable range with respect to market practices"* and should be compensated to DUNOR in accordance with section 3.3 of the Agreement[190].

[188] Reply and Answer to the Counterclaim, No. 107.
[189] Complaint Memorial, No. 108.
[190] Complaint Memorial, No. 109 and 110.

279. Additionally, DUNOR adds in its Reply that CFE and its expert do not recognize for this concept any sum to the Plaintiff; however, their arguments are divergent on this point. First, the DATG Expert does not question the methodology that EY followed in the Report, and confirms that the expenses incurred for this concept are directly related to the Project. In the same way, the DATG Expert understands that the percentages of Indirect Administrative Costs calculated by EY are reasonable. DUNOR adds that CFE Expert confirms that the percentages of Indirect Costs identified in studies carried out and/or requested by CFE are substantially higher than those indicated by the EY Expert (in a range of 8-14%), even going so far as to affirm, on CFE's own experience, that: "*It was stated to us that this Directorate, which controls the Coordination of Thermoelectric Projects (which requested this study) incorporates into its sale price of its engineering projects 15% of Indirect Costs related to the Administrative Cost of the Corporation of that Directorate and CFE. And in projects outside Mexico, up to 21.5% has been added to the direct amount in international bidding processes*"[191].

280. It then maintains that a first point of discrepancy is the Indirect Costs of the Central Offices initially contained in the Economic Offer (not those related to the Agreement), which amounted to an amount ranging between US$ 8,981,774.00 (Eight million nine hundred and eighty-one thousand seven hundred and seventy-four US dollars 00/100 cy) and US$ 13,472,661.00 (Thirteen million four hundred and seventy-two thousand six hundred and sixty-one US dollars 00/100 cy).

281. DUNOR notes that regarding these costs, the Commission and its Expert are inventing a requirement not provided for in the Agreement, namely that this amount initially budgeted had to be exhausted in full so that what is now claimed by DUNOR entails an additional cost.

[191] Reply and Answer to the Counterclaim, No. 101.

282. The Plaintiff submits that this logic is deficient because the Agreement's aim to compensate the Contractor for the costs incurred for a period of delay attributable to CFE, even with a 60-Day franchise, this being independent of whether or not the Indirect Costs of the Central Offices corresponding to the contractual period have been exhausted. It adds that the Contract is an EPC Contract at the Contractor's risk, in which certain expenses were budgeted for Indirect Costs of Central Offices. Given the nature of the Contract, if cost overruns were incurred, it would be DUNOR who would absorb them, in the same way it would be DUNOR who would benefit in case of spending lower costs than budgeted[192]. Additionally, remember that the budgeted expenses are calculated based on the entire Contract Price and with respect to the initially agreed duration of the Project (916 days). The Agreement, on the other hand, is a separate legal act, which covers an additional Analysis Period to those 916 days[193].

283. Secondly, the DATG Expert considers that it is not possible to give a decisive opinion on the reasonableness of this concept as long as the Arbitral Tribunal has not ruled on the rest of the concepts in dispute. DUNOR argues that this argumentation, in addition to being incomprehensible, lacks logic, since, as indicated by the EY Expert, it is not understood why the DATG Expert establishes a causal link between (i) the reasonableness of the indirect costs of the parent company calculated on the direct costs of the work, and (ii) the additional costs in dispute. No such relationship exists for either DUNOR or EY. The costs included under section 3.3 are but a few of the costs listed in the Agreement independently, and have nothing to do with each other, nor is there any relationship between their amounts[194].

284. Thirdly, the Plaintiff points out that the DATG Expert understands that the indirect costs of the corporation would not be reasonable for two reasons: (i) there is no document that allows for discerning how the workloads were distributed among the three parent companies, nor have the activities and evidence of the services provided by each of them been identified and, (ii) in any case, the costs imputed to Elecnor México would not be reasonable, since "*it has a 0.01%*

[192] Reply and Answer to the Counterclaim, No. 105.
[193] Reply and Answer to the Counterclaim, No. 105.
[194] Reply and Answer to the Counterclaim, No. 106.

*shareholding and submits an 8.49% of the claim"*[195].

285. In this regard, DUNOR states that it endorses the EY Expert's considerations, who establishes that the Agreement does not require that the reasonableness of the corporate indirect costs be determined with reference to a document establishing the distribution of workloads (the Agreement does not even require the preparation of such a document). Likewise, the EY Expert indicates that the way to quantify the indirect costs of the parent companies is not based on whether or not there are service contracts, but "*based on reasonable allocation criteria of the indirect costs existing in each of the projects"*. It adds that the activities and evidence of the services provided[196] are also not required.

286. DUNOR also states that, as explained by the EY Expert, the quantification of the indirect costs of the parent companies was carried out based on reasonable allocation criteria of the existing indirect costs for each of the projects (including Empalme II), thus complying with the requirements of the Agreement, which was analyzed to the satisfaction of the EY Expert with all the required information[197].

287. On the other hand, regarding the objections made by CFE to Elecnor México's costs due to its low shareholding, DUNOR points out that this is a meaningless argument, since the shareholding of a given corporation has nothing to do with the services rendered by it and, consequently, with the costs incurred. This is also the position of the EY Expert, who also states that trying to link the shareholding proportion and the distribution percentage would mean disregarding the calculation criteria of the Agreement, as explained in the EY Expert's Report. It also clarifies that Elecnor España is the parent company and therefore incorporates Elecnor México into its organization. Elecnor España is the one who decides how to channel its activities in each project and in this case, it decided that most of the supporting corporate activities would be provided by its Mexican subsidiary, which, on the other hand, explains why Elecnor España's costs (25.52% of the total) are comparatively low. In other words, using Elecnor's corporate office in Mexico was more efficient than using its offices in Spain, which logically reduces the amount of DUNOR's claim for the costs for the corporate

[195] Reply and Answer to the Counterclaim, No. 107.
[196] Reply and Answer to the Counterclaim, No. 108.
[197] Reply and Answer to the Counterclaim, No. 108.

office in Spain[198].

288. In addition, DUNOR notes that the Commission does not accept the EY Expert Report dated August 3, 2020, because in its opinion CFE has not expressly agreed to it and because CFE would have lacked the elements to determine the merits of the Report as it had not been able to review the EY Expert's sources to argue that costs in the 34.5% range would be reasonable[199].

289. In addition, the Plaintiff indicates that CFE considers that the EY Expert was not impartial in the issuance of his Report, since he was subsequently hired by DUNOR in the framework of this procedure, and that the Report should be disregarded[200].

290. DUNOR states that CFE affirms that the fact that it was CFE who appointed EY as an External Consultant "*did not imply that the Commission accepted [the Report] in its entirety without prior review"*. DUNOR warns that this interpretation is manifestly contrary to the Agreement, which stipulates that "*[t]o determine the appropriateness and corresponding participation in the project of the administration and Power Plant structure that THE CONTRACTOR has at the corporate level, THE COMMISSION shall appoint an External Consultant... to validate the reasonableness of the appropriateness of the concept and carry out the required documentary review"*[201].

291. DUNOR points out that the Agreement allows the Commission to have access to the review process and grants it the right to be provided with information. However, this does not mean that what is decided by the External Consultant is subject to the "*validation"* of the Defendant[202].

292. The Plaintiff adds that the Commission states that "*EY... did not provide elements that would allow CFE to determine whether the Report was appropriate, arguing that due to confidentiality obligations that EY maintains with the Contractor, it is not possible to provide this information"*[203].

[198] Reply and Answer to the Counterclaim, No. 109 and 110.
[199] Reply and Answer to the Counterclaim, No. 112.
[200] Reply and Answer to the Counterclaim, No. 112.
[201] Reply and Answer to the Counterclaim, No. 114.
[202] Reply and Answer to the Counterclaim, No. 117.
[203] Reply and Answer to the Counterclaim, No. 118.

293. In this regard, DUNOR points out that, as is evident from Document C-085, the confidentiality alleged by CFE only plays a relevant role with respect to two of the seven questions posed by the Commission. The first refers to the source of the EY Expert to affirm that the range of 3 - 4.5% is consistent with other similar projects and, therefore, reasonable. The EY Expert responded that he was contractually prevented from providing this information due to confidentiality reasons with his clients, not with DUNOR. In other words, the EY Expert refers to confidentiality clauses in contracts with third parties, being his experience with them what allows him to affirm the reasonableness of the indirect costs[204].

294. DUNOR adds that the same happens in question 3, in which CFE requests to know EY's "*position on the reasonableness of the Corporate Costs of similar companies"*. The EY expert replies that he cannot provide this information due to the "*confidentiality that the EY firm maintains on information of similar companies"*. DUNOR states that the Commission's expert shared some studies that establish that indirect costs can range from 8 to 14% but that for confidentiality reasons, it was not possible to know the companies, countries, and periods considered[205]. Therefore, DUNOR points out that CFE also relies on confidentiality so as not to disclose its sources even to its Expert and it is completely unreasonable that the Commission now intends that the EY Expert act in a different way, especially when it turns out that the percentage of indirect costs identified by CFE is substantially higher than that proposed by the EY Expert.[206]

295. DUNOR points out that the Defendant has even challenged the impartiality of the EY Expert, justifying its very serious accusation with a falsehood, that "*at the time of its preparation [of the Report], EY was already part of the Plaintiff's defense team, a situation that invariably also affects the impartiality and objectivity of the [EY Expert Report, February 5, 2021*]".[207] In response, DUNOR states that the Report relating to section 3.3 of the Agreement was issued by EY on August 3, 2020 and DUNOR only hired the EY Expert on December 18, 2020,

[204] Reply and Answer to the Counterclaim, No. 119.
[205] Reply and Answer to the Counterclaim, No. 120 and 121.
[206] Reply and Answer to the Counterclaim, No. 122.
[207] Reply and Answer to the Counterclaim, No. 126.

i.e. 137 days later[208].

296. For all the above, DUNOR concludes that the Administration and Structure Expenses of the DUNOR's Central Offices comply with all the requirements of the Agreement, and CFE must reimburse DUNOR a total amount of US$ 2,975,708.00 (Two million nine hundred and seventy-five thousand seven hundred eight US dollars 00/100 cy). [209]

#### 12.1.2.4.2 Defendant's position

297. In response to this dispute, the Commission submits that the Plaintiff only seeks to justify the willful misconduct of the EY Expert when he was acting as an External Consultant. It adds that the Plaintiff seeks an amount of US$ 2,975,708.00 (Two million nine hundred and seventy-five thousand seven hundred and eight US dollars 00/100 cy); however, the Commission maintains that this amount has not been supported by DUNOR or its Expert[210].

298. In addition, CFE points out that the appointment of the External Consultant to carry out the corresponding analysis did not imply that the Commission accepted it in its entirety, without prior review and being able to make the statements that suit its right[211]. This is because the Commission was not part of the Consultant's analysis, and in order to be able to recognize it as valid and reasonable, it requires evaluating the methodology applied, carrying out a general review of the revised information and evaluating the reasonableness of the amounts determined in accordance with the Agreement. Therefore, the Commission, by email dated September 28, 2020, requested clarifications from the Contractor regarding the Opinion prepared by the EY Consultant.[212]

299. The Commission adds that the EY Expert, referring to the observations raised by the Commission, did not provide elements that would allow CFE to determine the merits of the Opinion, since he argued that due to EY's confidentiality obligations, it was not possible to provide this information. He also indicated that,

[208] Reply and Answer to the Counterclaim, No. 127.
[209] Reply and Answer to the Counterclaim, No. 131.
[210] Rejoinder and Reply to CFE Counterclaim, No. 105 and 106.
[211] Counter-Memorial and Counterclaim, No. 376.
[212] Counter-Memorial and Counterclaim, No. 377.

the information cited in the opinion is what the firm's experience has observed in Latin American countries in international companies with similar projects and with transnational operations[213].

300. Likewise, CFE adds that on October 30, 2020, CFE sent an email to the Contractor stating what CFE understood EY's response to be: *"It would be important that the responses were made from your point of view as a Contractor and not from the firm, which I understand has some confidentiality limitations and knowledge limitations of the ways in which the reasonableness of the cost overruns of the project are evaluated"*[214]

301. It adds that by mail dated December 7, 2020, the Contractor stated to CFE the following: "*... In this regard, DUNOR wishes to indicate that we do not plan to deliver more than what has already been submitted to CFE in the expert opinion prepared by the expert appointed in accordance with the Agreement between the Parties in sections 3.3 and 3.4 'Costs of Administration and Central Office Structures' of Clause 25.5 of the Contract"*[215].

302. CFE points out that subsequently DUNOR sent the request for arbitration, which made it materially impossible for the Commission to continue with the review of the Opinion issued by the EY External Consultant and, consequently, to recognize as appropriate and reasonable the Costs of Administration and Structure of Central Offices, so it lacks the elements to express its opinion on the conclusions reached by the Consultant, leaving the Commission in a state of defenselessness[216].

303. In the same vein, CFE points out that the EY External Consultant, who was the one who drafted the Opinion dated August 03, 2020, is now the expert chosen by the Plaintiff and who drafted the Opinion dated February 04, 2021 that is attached to its Complaint Memorial, so that said EY Expert was not impartial in the drafting of the first Opinion, since at the time of its preparation he was already part of the Plaintiff's Defense team, a situation that invariably also affects the

[213] Counter-Memorial and Counterclaim, No. 380.
[214] Counter-Memorial and Counterclaim, No. 381.
[215] Counter-Memorial and Counterclaim, No. 382.
[216] Counter-Memorial and Counterclaim, No. 384.

impartiality and objectivity of his second Opinion[217]. Therefore, it requests the Arbitral Tribunal to dismiss the first opinion because the External Consultant at the time of its preparation was not impartial, and on the contrary, it is not certain that what was developed was to support the Plaintiff's position.

304. On the other hand, CFE points out that the Expert De Anda, Torres, Gallardo y Cia, concludes that "*the cost determined by DUNOR supported by the EY opinion is not strictly an accounting cost and should only be identified as a hypothetical economic cost"*[218]. Additionally, it points out that "*there is no Service Contract between the THREE parent companies of DUNOR and this one; therefore, it is not possible to identify the activities that these companies provided to the Project. In addition, the EY study does not mention having reviewed evidence of services rendered ... to DUNOR in Mexico nor was such evidence provided to CFE as part of the supporting documentation of the claim"*[219].

305. Consequently, and derived from the two previous points, the Commission points out that there is no evidence of invoices, accounting entries, or deliverables associated with the services provided, which would allow identifying the cost incurred that can be passed on to CFE via clause 25.5 of the Contract. Because of all this, it considers that the opinion presented by DUNOR and prepared by EY should not be the only documentation that DUNOR had to present supporting this concept to be claimed and therefore, the concept of Indirect Costs does not comply with the verification attribute and consequently, its claim by the Contractor to CFE is not appropriate.[220]

306. On the other hand, the Commission notes that Procedural Order No. 4, instructed the Defendant to exhibit Appendix 2 of CFE Applications, category 3 corresponding to "*All Contracts concluded between the Plaintiff and those identified as Related Parties"*, which the Plaintiff did not submit, since the documents submitted are the Credit Agreements between DURO FELGUERA AND ELECNOR, on the one hand, and DUNOR ENERGÍA, on the other hand, and those required by the Defendant are the service contracts that accredit these

[217] Counter-Memorial and Counterclaim, No. 385.
[218] Counter-Memorial and Counterclaim, No. 388.
[219] Ibid.
[220] Ibid.

works carried out to the Contractor during the recognition period in accordance with Agreement 25.5[221]. For the foregoing, the Commission wonders whether the EY Expert was in possession of the contracts concluded between DUNOR and those identified as Related Parties, and if so, why did the Plaintiff not submit them at the document discovery stage? Otherwise, then, how did he perform his analysis without having these important contracts?[222].

307. The Commission adds that Moore Expert agrees with its observation, since he points out in his second expert opinion that, the fact that there is no evidence that the costs claimed were part of DUNOR's books does not allow them to be validated so that they are covered by CFE. This, because the spirit of clause 25.5 is a Reimbursement of the real and non-hypothetical economic Costs and/or Expenses that could be disbursed by the Contractor[223].

308. CFE also maintains that the Plaintiff misrepresents the comments made by Moore Expert, since it takes his statements out of context or reproduces them halfway as in paragraph 100 of the Reply Memorial, which states: *"In the same way, the DATG Expert considers the percentages of Indirect Administrative Costs calculated by EY to be reasonable",* omitting that it goes on to say: *"for this to be true, it is required to conclude all the additional concepts in dispute which based on this range presented by DUNOR would amount to US$ 78,529,166.66. (Multiplying this amount by the range in % brings us to the range in USD indicated by the EY opinion: US$ 2,355,875- US$ 3,533,813.87)"*. The Commission states that the methodology on the part of the EY Expert is correct, but it does not contemplate the scenarios in which the Parties are in dispute, a situation that the Plaintiff opportunely fails to point out[224].

309. On the other hand, the Commission points out that the Plaintiff does not have the documents ordered by the Arbitral Tribunal, since the only support for its claim is what was indicated by the EY Expert, in particular "*reasonable criteria for allocating the indirect costs existing in each of the projects"*. He adds that the above is contradictory since later in his Second Expert Report, the EY Expert

[221] Rejoinder and Reply to CFE Counterclaim, No. 107.
[222] Rejoinder and Reply to CFE Counterclaim, No. 108.
[223] Rejoinder and Reply to CFE Counterclaim, No. 109.
[224] Rejoinder and Reply to CFE Counterclaim, No. 113.

points out that he did have access to the accounts of the parent companies. He adds that it is for this reason that the Commission insists that the activities provided by the 3 parent companies in the recognition period in accordance with the Agreement, are not shown[225].

310. In this context, the Commission wonders: how is it that the EY Expert asserts that the activities provided by the parent companies are shown in the indirect costs of their accounts, if the Plaintiff and the latter do not submit the contracts indicated in Procedural Order No. 4, in which the works related to the recognition period could be visualized, a fact that shows that the EY Expert's arguments lack documentary support[226]. The Commission points out that the EY Expert was focused on pointing out costs without the necessary documentary support, as indicated by Moore Expert, "*without bothering"* to verify whether or not such costs were part of the Contractor's accounting books[227].

311. It expresses that the voluminous statements made by the Plaintiff in an attempt to justify the actions of EY when it acted as an External Consultant and as an independent expert of the Parties, show that it was not impartial and that it clearly favored DUNOR[228].

312. The Commission points out that the Opinion presented as Consultant and the Report already submitted as the Plaintiff's Expert, employs the same methodology and concludes in the same way[229]. To the foregoing, it adds that, in any case, the Consultant should have abstained from participating in the present case as an expert of any of the Parties due to the existence of a conflict of interest comparable to those regulated in various *soft law* instruments such as the IBA Rules on the Conflict of Interest[230].

313. Finally, it adds that the Expert's credibility is doubtful because when the Parties were reconciling the amounts related to the Agreement and, in particular, of Administration Expenses and Central Office Structure, the EY Expert had not

[225] Rejoinder and Reply to CFE Counterclaim, No. 115.
[226] Rejoinder and Reply to CFE Counterclaim, No. 116.
[227] Rejoinder and Reply to CFE Counterclaim, No. 117.
[228] Rejoinder and Reply to CFE Counterclaim, No. 119.
[229] Rejoinder and Reply to CFE Counterclaim, No. 119.
[230] Rejoinder and Reply to CFE Counterclaim, No. 120.

finished his work as a consultant when he was already part of DUNOR's defense team in the present Arbitration[231].

#### 12.1.2.4.3 Considerations of the Tribunal

314. In relation to this item, section 3.3. of the Agreement establishes

> *"To determine the origin and corresponding participation in the project of the administration and Power Plant structure that THE CONTRACTOR has at the corporate level, THE COMMISSION will appoint an External Consultant specialized in the field to carry out the review of the reasonableness of the origin of the concept and carry out the documentary review required for the determination of the percentage of participation of the corporate with respect to the administration and execution of the Project. Likewise, there will be the presence, according to what is stipulated between the parties, of an Attesting Official or Notary Public who will attest to the facts of the content of the documentation shown to the external consultant and personnel of THE COMMISSION, according to the activities indicated in the Procedure for the verification of the percentage of indirect participation of corporate offices in the execution of the Project, who will issue the corresponding testimony.*
>
> *Likewise, the Attesting Official or Notary Public will attest to:*
>
> *I. Report showing the Income Statement (Balance Sheet and Profit and Loss Account) with the periodicity shown from the central office of the SAP system or similar from May 2018 to the Provisional Acceptance Date formalized in the last Amending Agreement to the Contract, which accredits the allocation of costs to the 313 CC Empalme II Project. Report showing the General Catalogue of Accounts of the SAP system or similar, detailing among other things the concepts related to the accounts.*
>
> *Any document that, in the absence of the above, irrefutably demonstrates the costs of the previous concepts"* (emphasized).

315. From this perspective, the first thing the Tribunal must determine is the Consultant's role in the quoted clause. This is because the Defendant points out that the "*appointment of the External Consultant to carry out the corresponding analysis, did not imply that the Commission will accept it in its entirety, without prior review and without being able exercise its right to make the statements that it deems appropriate"*.[232]

316. A review of the clause shows that its task is to carry out "*the review of the*

[231] Rejoinder and Reply to CFE Counterclaim, No. 121.
[232] CFE Answer, para. 376.

*reasonableness of the origin of the concept"* and "*the documentary review required for the determination of the percentage of participation of the corporate with respect to the administration and execution of the Project"*. From this perspective, the Tribunal considers that the role of the Consultant is to support the Parties in this matter. The Agreement does not clearly provide for the opinion of the Consultant to define the matter, since his function is to review reasonableness and documentation. If the Consultant's opinion was to be definitive/final, it would be logical that the Parties would have expressly agreed so and foreseen some mechanism for the event that either of them did not agree with the Consultant's opinion.

317. However, since the expert opinion presented by the Plaintiff in this arbitration proceeding was prepared by EY, who was also the one that prepared the report "*Indirect costs incurred by the corporate offices of Dunor Energía S.A.P.I de C.V."*, and in the Expert Report it is stated[233] that "*the analysis and results presented in the section are those corresponding to the work carried out"* in the report previously submitted, the Tribunal must first determine whether there exists in this case a situation that may affect the value to be given to the initial report made pursuant to the Agreement of the Parties or to the report submitted in this arbitration procedure.

318. In its Answer to the Complaint, CFE stated[234]:

> *"... this fact should not go unnoticed by the Arbitral Tribunal, the external consultant E&Y, who was the one who prepared the Opinion dated August 03, 2020 (first opinion), is now the expert chosen by the Plaintiff preparing the opinion dated February 04, 2021 (second expert report) that accompanies its Complaint Memorial, so it can be seen that said the EY Expert was not impartial in the preparation of the first opinion, since at the time of its preparation it was already part of the Plaintiff's defense team, a situation that invariably also affects the impartiality and objectivity of its second opinion"*

319. In that regard, the Plaintiff states that the Report relating to section 3.3 of the Agreement was issued by EY on August 3, 2020 and it was not until December

[233] EY First Report, page 31.
[234] CFE Answer, para. 385.

18, 2020 that DUNOR hired EY as an Expert, that is to say, 137 days later[235].

320. From this perspective, the Tribunal finds no reason to deprive the Indirect Costs Report prepared by EY of its value, insofar as at the time said Report was prepared in accordance with the provisions of the Agreement, and without any elements supporting that the person who prepared it did not act at that time in accordance with their professional judgment.

321. On the other hand, regarding the report submitted by the Party in the arbitration proceedings, the Tribunal considers that there are no elements that allow it to be disqualified from a technical point of view. The fact that he adopts his initial position does not disqualify him from a technical point of view, since it is natural that if an expert gives an opinion of a situation in a certain sense, it is to be expected that, unless new facts are established, he will maintain it later.

322. From this perspective, the fact that an expert opinion has been submitted by EY that reaffirms what it had pointed out in its previous report does not disqualify what was previously said, nor does the opinion presented in this process lose value for that reason.

323. In any case, it is evident that the fact that the same person prepared the initial opinion and the Expert Report determines that when examining the Expert Report, the Tribunal must take into account that the person who prepared it cannot express an independent opinion with respect to what was said in its initial opinion.

324. Regarding the merits of the dispute, the Tribunal finds that regarding the expenses directly related to the works, Moore Expert points out that[236] "*the calculation of the Indirect Costs claimed to CFE refer to the period agreed as imputable to that State-owned Mexican Power Company (from July 19, 2018 to March 14, 2019)", therefore concludes that "that the methodology of the firm EY, on the Indirect Costs originally disbursed by the parent companies of DUNOR, attributable to the CC Empalme II project, are directly associated to this project"*[237]. Therefore, the costs are directly related to the works.

[235] Reply and Answer to the Counterclaim, para. 127.
[236] First Moore Report, p. 50.
[237] Moore Report, p. 50.

325. However, regarding the reasonableness of the expenses, the EY Expert's opinion stated[238]:

> *"... the relationship of reasonableness that should exist between the expenses indicated in Clause 25.5 of the Contract, in the Agreement, and the price agreed in the Contract. That is, to analyze the amount of indirect expenses incurred by Central Offices, we must understand what a "reasonable range" of indirect expenses would be usually incurred in Central Offices with international headquarters. Which, according to existing market practices and projects similar to the case at hand (combined cycle plants) can be measured based on what they represent with respect to the total amount of the Contract (US$ 396,997,949)."*

326. The EY Expert[239] also pointed out:

> *"These prices, based on my experience, in similar energy projects (combined cycle plants) in Latin American countries, carried out by international groups with organizational structures like the case at hand, always include both the contribution margin and the indirect costs of the Central Offices. Likewise, these indirect costs of the Central Offices usually oscillate (depending on the country risk and the degree of decentralization of the project) between 3% and 4.5%, calculated on the total fixed costs of the project (without VAT and without contribution margin).*
>
> *"Therefore, we conclude that within the fixed costs offered by Dunor Energía in the Contract, should be included the indirect costs of the Central Offices that would range between US$ 8,981,774 and US$ 13,472,661 (3% and 4.5%, respectively) during the period of execution stipulated in the Contract (915 days), that is, from the date of commencement of the Works (October 26, 2015) until the Scheduled Provisional Acceptance Date of the Power Plant (April 28, 2018). For the Analysis Period (239 days), proportionally, a reasonable range of administration costs incurred by Central Offices directly related to the Project would range from US$ 2,336,243 to US$ 3,504,364 (3% and 4.5%, respectively)."*

[238] EY First Report, pages 31 and 32.
[239] EY First Report, page 32.

327. However, in its Answer to the Complaint, CFE stated that it had made a series of statements to the EY Expert due to the Report presented and that it requested him "*to identify the source so that EY can flatly state that a similar project maintains indirect costs in a range of 3 – 4.5%. It would be important to know the companies that were consulted for this statement*"[240]. The Defendant adds that in replying, the EY Expert stated that it was not possible to provide this information and noted that "*the information cited in the opinion is what in the experience of the firm has observed in Latin American countries in international companies with projects of these characteristics / similar projects and with transnational operations*". To which CFE on October 30, 2020, told him that *"the responses were made from your perspective as a Contractor and not from the firm, which I understand has some confidentiality limitations or knowledge limitations of the ways in which the reasonableness of cost overruns of the Project are evaluated."* To which the EY Expert stated that he did not plan to provide further information[241].

328. However, in this regard, the Tribunal should point out that Moore's first expert opinion indicates the following about oral information that he received from CFE and that he was authorized to share[242]. First, he referred to engineering projects where CFE participates, as a service provider, through the Corporate Directorate of Engineering and Infrastructure Projects (DCIPI) and expressed:

> *"It was stated to us that this Directorate, which controls the Coordination of Thermoelectric Projects (which requested this study) incorporates into its sale price of its engineering projects 15% of Indirect Costs related to the Administrative Costs of the Corporate of that Directorate and CFE. And that in projects outside Mexico it has been added up to 21.5% of the direct amount, in international bidding processes."*

[240] CFE Answer, para. 379.
[241] CFE Answer, paras. 380-382. The aforementioned emails are listed as Appendix R-072.
[242] First Moore Report, page 52.

329. On the other hand, he also referred to Indirect Cost Studies in other parts of the world and noted[243]

> *"CFE shared with us that in some studies that have been carried out and/or requested it was identified that the Indirect Costs can be in a range of 8 – 14%, on the direct amount of the works, to be identified as reasonable.*
>
> *"As mentioned above, for reasons of confidentiality, it was not possible for us to know the companies, countries, and periods considered.*
>
> *"On these percentages, it seems that the statement made by DUNOR (based on the work done by the EY firm) that the Indirect Costs in question are reasonable is valid. With the information that CFE itself presents. This, because the EY study calculates the additional Indirect Costs of the project in the range of 3.0% and 4.5%. However, for this to be true, it is necessary to conclude all the additional concepts in dispute which based on this range presented by DUNOR would amount to US$ 78,529,166.66. (Multiplying this amount by the range in % brings us to the range in USD indicated by the EY opinion: US$ 2,355,875 - US$ 3,533,813)*
>
> *"Therefore, until all the concepts in dispute have been concluded, it is not possible to issue a decisive opinion on the reasonableness of this concept."*

330. The Tribunal observes that although CFE Expert points out that it would seem that the Indirect Costs are reasonable, he also points out that "*it is necessary to conclude all the additional concepts in dispute which, based on this range presented by DUNOR, would amount to US$ 78,529,166.66"*.

331. However, taking into account the information provided by EY and Moore Experts, the Tribunal finds that the amounts calculated by EY are reasonable and to the extent that such costs are a proportion of the direct costs, they will be calculated taking into account the values finally recognized.

[243] First Moore Report, page 52.

332. On the other hand, Moore Expert Report points out that "*we do not identify any study, contract, invoices, payments, or any supporting information known or delivered to CFE on the disbursement of any amount identified in this range by the concept of Indirect Costs that could prove that said amount has already been exhausted in its entirety and therefore, the cost claimed in this concept is an additional cost attributable to CFE"*[244].

333. For this purpose, the Tribunal considers that in accordance with clause 25.5 of the Contract what is recognized are the expenses incurred for the delay in addition to the 60 days provided for in the clause. Thus, the contractual clause does not provide that the expenses incurred must be compared with those that had been estimated, in order only to pay the excess. What needs to be determined are the additional costs actually incurred. This is because in fixed-price contracts, the Contractor assumes the risk of differences between the estimated cost and the agreed price, and therefore the agreed price cannot be identified with the costs incurred.

334. On the other hand, Moore Expert[245] states that "*... there is no Service Contract between the THREE parent companies of DUNOR and this one; therefore, it is not possible to identify the activities that these companies provided to the Project. In addition, the EY study does not mention having reviewed the evidence of the services provided by its holders to DUNOR in Mexico nor was such evidence provided to CFE as part of the documentation supporting the claim*." It also notes that "*Consequently ... there is no evidence of invoices, accounting entries, or deliverables associated with the services provided, which allow identifying a cost incurred that can be passed on to CFE via Clause 25.5 of the Contract"*.

[244] Moore's First Opinion, page 51.
[245] First Opinion, pp. 54 and 55.

335. However, in its second report, EY[246] states that "*In the Agreement, we do not observe that a service contract must be presented and/or accredited between the three parent companies of Dunor Energía and therefore we do not understand why for C.P. Gallardo if there should be such a contract. The veracity of the claimable amount does not have to be based on the existence of a Contract, but on what is established in the Agreement. It is in the Agreement itself where it is established that the veracity of this concept is, on the one hand, whether or not there are indirect costs of the parent companies and, secondly, whether the criterion of imputation of these costs to the projects (among which is Empalme II), is reasonable or not*." Likewise, it points out that[247] *"We do not understand what C. P. Gallardo means by not having identified the activities and evidence of the services rendered by the parent companies. If this were a requirement to quantify the amount of the claim, this would have been reflected in sections 3.3 and 3.4 of the Agreement, and it was not so. On the contrary, the Agreement is clear and unequivocally defines all the information necessary to quantify the claimed Indirect Administrative Costs of the Parent Company".*

336. It adds that[248] "*the services rendered by the parent companies are reflected in the indirect costs of their respective accounts, which are allocated and/or imputed to the projects (e.g., Empalme II) with a reasonable allocation criterion. In other words, the way to quantify these indirect costs of the parent companies is not whether or not there are service contracts; it is based on reasonable allocation criteria of the existing indirect costs to each of the projects (among which are Empalme II); and we did so - see Section 5 and Appendices V, VI, VII, VIII, IX, X, XI, XII, XIII, of our EY Expert Report".*

337. In this regard, the Tribunal observes that in the Agreement between the Parties on the application of clause 25.5 to comply with the Purpose of Contract PIF-039/2015 of September 17, 2018, the following was agreed in section 3.4:

[246] Second EY Opinion, p. 24.
[247] Second EY Report, p. 22.
[248] Second EY Report, p. 24.

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*"3.4 METHODOLOGY FOR THE THIRD PARTY TO BE CONTRACTED TO BE IN A POSITION TO ACCREDIT THE INDIRECT EXPENSES OF CENTRAL OFFICES ACCORDING TO CLAUSE 25.5 OF THE CONTRACT PIF- 039/2015 OF 313 CC EMPALME II, PROJECT WITH THE OBJECTIVE OF ADDING IT TO THE OTHER ITEMS OF THE AGREEMENT.*

- *Report showing the Income Statement (Balance Sheet and Profit and Loss Account) with the periodicity shown from the central office of the system or similar from May 2018 to the Provisional Acceptance Date formalized in the last Amending Agreement to the Contract, evidencing the allocation of costs to the 313 CC Empalme II Project.*

- *Report showing the General Catalogue of Accounts of the SAP system or similar, detailing among other things the concepts related to the accounts.*

- *Statement under oath by THE CONTRACTOR stating the number and relation of Contracts that are administered by the Central Office. (Monthly)*

- *Analysis and calculation of the percentage of participation of Central Office for the administration of the Project based on the amounts corresponding to the contracts of the projects that are administered by Central Office.*

- *Detailed table(s) containing the information indicated in the previous points to obtain the amount of participation of Central Office to the total cost that it represents in the 313 CC Empalme II Project.*

*Any document that, in the absence of the above, irrefutably demonstrates the costs of the previous concepts.*

*Procedure:*

*1.- Based on the Monthly Income Statement of Central Office and using the General Catalogue of Accounts, the concepts that are not directly related to the 313 CC Empalme II Project must be discriminated in order to obtain the total amount of the concepts applicable and attributable to the Project.*

*2.- Perform the analysis and calculation of the monthly participation percentage of Central Office for the administration of the project, taking into account the weighting of the amounts of the contracts, number of contracts, and their duration (start and end date).*

*3.- Apply the calculated percentage indicated in point 2 to the resulting amount indicated in point 1, in order to obtain the amount charged to the 313 CC Empalme II Project."*

338. As can be seen, the Parties established a specific methodology for calculating indirect costs. A review of this methodology does not indicate that it has contemplated the need for contracts between the Parties in order to establish the costs. In fact, in the items taken into account, there is no reference to such contracts. To that extent, the Tribunal considers that such a requirement is not appropriate.

339. Finally, Moore Expert[249] in his Report states that not having found "*a service contract that regulates the participation of the THREE holding companies with DUNOR and thus being able to identify the workloads of these companies in relation to the project, we evaluated the behavior of the claim based on each company and the shareholding that each one has in DUNOR. From this analysis, we identified the following (and it is ratified by the EY firm in the work done for this concept)*

| **Shareholder** | **% Participation** |
|---|---|
| Duro Felguera | 50.00% |
| Elecnor España | 49.99% |
| Elecnor México | .01% |

340. The Expert adds that the claim for Indirect Costs amounts to US$ 2,663,130.00 (Two million six hundred sixty-three thousand one hundred thirty U.S. dollars 00/100 cy) broken down as follows[250]:

[249] Moore Report, pp. 52 and 53.
[250] First Moore Report, page 53.

| **Shareholder** | **Participation in Claim (USD)** | **Participation in Claim (%)** |
|---|---|---|
| Duro Felguera | 1,757,137 | 65.98% |
| Elecnor España | 679,632 | 25.52% |
| Elecnor México | 226,361 | 8.49% |
| **Total** | **2,663,130.00** | **100%** |

341. Moore Expert then points out[251] that the methodology used by the EY Expert does not present a reasonable amount. Even more so when there is no document that allows us to discern how the workloads of the holding companies were distributed in the CC Project Empalme II, therefore, the result of the application of the factors seems more a possible fact associated with the lack of project than an administrative effort. Elecnor México has a .01% shareholding and 8.49% of the claim.

342. It adds that "*the costs associated with Elecnor México, which would present exorbitant revenues for this concept (.01% of participation vs. 8.49% of the Contract). Unless there is a DUNOR - Elecnor México contract that justifies the work performed by this Corporation".*

343. On this aspect, the EY Expert, in his Second Report, expressed his disagreement regarding the fact that there should be a link between the shareholding and the percentage of distribution. It adds[252] that trying "*to link and establish a proportionality criteria between the two is not reasonable for the case at hand - it would mean disregarding the calculation criteria of the Agreement, which is based on two basic variables: (i) on the one hand, the indirect costs of the parent companies (Duro Felguera, Elecnor, and Elecnor México) and, (ii) on the other hand, the distribution criterion for project (Empalme II). Criteria explained in our EY Expert Report which C.P. Gallardo does not seem to challenge or contradict."*

[251] First Moore Report, p 53.
[252] Second Report, p. 23.

344. In this regard, the Tribunal finds that, on the one hand, the Agreement did not establish any distribution rule among the companies according to their participation as shareholders in DUNOR. On the other hand, the fact that Elecnor México's shareholding is lower does not mean that it has not provided significant support to the Project. Additionally, Elecnor México is a subsidiary company of Elecnor, and therefore it is hardly reasonable that it is through the subsidiary that the support required by DUNOR has been provided. In addition, it is worth noting that Elecnor México and Elecnor hold 50% of DUNOR's capital, and between them they hold less than 50% of the claim. Finally, EY Expert Report explains[253] how the distribution cost was arrived at, without having demonstrated that the criteria followed by EY for this purpose was not correct.

345. Therefore, the Tribunal concludes that the calculated value of US$ 2,975,708.00 (Two million nine hundred and seventy-five thousand seven hundred and eight US dollars 00/100 cy) is appropriate pursuant to the Agreement and therefore, this Tribunal recognizes it as appropriate/due.

#### 12.1.2.5 Third-Party Claims Expenses

##### 12.1.2.5.1 Plaintiff's position

346. The Plaintiff points out that section 3.5 of the Agreement establishes that CFE must compensate DUNOR for expenses arising from Third-Party Claims including "*all claims from suppliers and subcontractors received by the Contractor"* as a consequence of delays suffered in the execution of the Project. Therefore, DUNOR submitted the required information regarding expenses totaling US$ 6,285,204.81 (Six million two hundred eighty-five thousand two hundred four US dollars 81/100 cy). This amount is composed of (i) expenses whose origin is the claim of a third party and (ii) expenses originally included in section 3.2 of the Agreement that were reclassified to this category by CFE[254].

347. DUNOR adds that by Official Letter dated October 28, 2019, the Commission sent Dunor its comments in relation to the invoices submitted for Third-Party Claims (corresponding to the Analysis Period), indicating that invoices justifying

[253] Doc C-039.
[254] Complaint Memorial, No. 111.

the claim were missing. The Plaintiff states that, in response to the comments indicated, it re-submitted to CFE the study corresponding to the aforementioned period.[255]

348. It adds that the Agreement in no way subjects the performance of the Commission's obligations to the manner in which the Plaintiff submits its invoices. The Agreement only states that "*the Contractor shall deliver the documentary supports of the claims per calendar month no later than the last working day of the following month*". DUNOR submits that it has diligently complied with that obligation. This has not been done by the Commission, who had the same deadline to carry out the review and conciliation[256].

349. Regarding the financial analysis performed, DUNOR points out that of the total amount presented by DUNOR (US$ 6,285,204.81) (Six million two hundred and eighty-five thousand two hundred and four US dollars 81/100 cy), the EY Expert distinguishes between: (i) expenses arising from Third-Party Claims, which amount to US$ 2,160,299.20 (Two million one hundred and sixty thousand two hundred and ninety-nine US dollars 20/00 cy), of which, the EY Expert confirms that a total amount of US$ 1,072,457.09 (One million seventy-two thousand four hundred and fifty-seven US dollars 09/100 cy) complies with the requirements indicated in section 3.5 of the Agreement and must be reimbursed to DUNOR. Moreover, an additional amount of US$ 971,935.48 (Nine hundred and seventy one thousand nine hundred and thirty five US dollars 48/100 cy) "*were incurred during the Analysis Period, are directly related to the Project and correspond to concepts defined under section 3.5*", but these are amounts that, despite not having been paid yet, are appropriate and should be compensated. (ii) Expenses reclassified by CFE to section 3.5 of the Agreement, amounting to US$ 4,124,905.61 (Four million one hundred and twenty-four thousand nine hundred and five US dollars 61/100 cy). Of these, the EY Expert considers a total of US$ 3,624,304.66 (Three million six hundred and twenty-four thousand three hundred and four U.S. dollars 66/100 cy) to be compensable and points out that an additional amount of US$ 168,354.76 (One hundred and sixty-eight thousand three hundred and fifty-four US dollars 76/100 cy) meets the requirements of the

[255] Complaint Memorial, No. 112.
[256] Complaint Memorial, No. 113.

Agreement, and although this amount has not yet been paid, it is appropriate and should be paid. (iii) A sum of US$ 90,936.34 (Ninety thousand nine hundred and thirty-six US dollars 34/100 cy) included in section 3.2 of the Agreement has been reclassified by the Expert EY to this category[257].

350. DUNOR states in its Reply that it provided the Commission with the information required for the analysis of those concepts in accordance with sections 3.5 and 5 of the Agreement. In this regard, the following were presented: (i) the invoices claimed, (ii) their respective accounting entries, (iii) proof of payment (if these did not exist, CFE was informed), (iv) contracts, (v) supplier claims, and (vi) the official letters shared with suppliers showing the commercial efforts made to minimize the impact of third-party claims[258].

351. DUNOR specifies that the documentation was complete, which is derived from the fact that the EY Expert had the same information to prepare his Report. It adds that despite this, CFE made comments on the documentation submitted by Official Letter RGROS-283/2019, of October 28, 2019, that is, more than 3 months after the invoices were submitted. Specifically, CFE requested that it be specifically stated where in the contracts and their appendices their scope and provision of services was set out. The above proves that for 3 months the Commission had not even read the contracts, which demonstrates its lack of diligence during the invoice review process[259].

352. DUNOR also states that such a request for information manifestly exceeds the provisions of the Agreement. Additionally, in the same communication, CFE requested the delivery of the payment vouchers made to Siemens and Doosan Skoda[260]. DUNOR states that in good faith it complied with both CFE requests by sending it the new information. It adds that on November 6, 2019, CFE again requested the same information, thus breaching the terms of the Agreement, and also reported that 4 invoices were missing. Again, the Plaintiff, as a sign of its good faith and diligence, complied with this request on November 15, 2019[261].

[257] Complaint Memorial, No. 114.
[258] Reply and Answer to the Counterclaim, No. 134.
[259] Reply and Answer to the Counterclaim, No. 136.
[260] Ibid.
[261] Reply and Answer to the Counterclaim, No. 137 and 138.

353. The Plaintiff notes that, in November 2019, the Commission requested the reclassification of a series of invoices from section 3.2 to 3.5 of the Agreement, which DUNOR did not object to, on the understanding that such a reclassification would not imply any waiver of the amounts, but just an adjustment that was administratively convenient for the Commission. After making the reclassification requested by the Commission in November 2019, of the initial amount claimed by section 3.5 of the Agreement (US$ 6,285,204. 81) (Six million two hundred eighty-five thousand two hundred four US dollars 81/100 cy) only the sum of US$ 5,913,324.53 (Five million nine hundred thirteen thousand three hundred twenty-four US dollars 53/100 cy) is being claimed in the arbitration proceedings. [262]

354. The Plaintiff adds that despite the release of the new documentation, CFE continuously requested new information that exceeded the provisions of section 3.5 of the Agreement, further delaying the review procedure. This action of the Defendant was completely abusive, and its sole purpose is to delay the payments it has been obliged to make[263].

355. DUNOR points out that, in CFE's opinion, there are invoices presented by DUNOR that are inadmissible, so it estimates that only US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy) would be refundable. Specifically, the Commission maintains that they would not be appropriate because (i) they were left outside the Analysis Period; (ii) they have been previously considered under section 3.2 of the Agreement; (iii) have not been paid by DUNOR, and (iv) for DUNOR's intention to collect double withholdings.

356. In view of the above, DUNOR points out the following: first, the amount of US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy) recognized by CFE turns out to be wrong, because as analyzed by the EY Expert: (i) there is no recognition agreed between the Parties regarding this amount, and (ii) in any case, this amount is miscalculated and should be US$ 1,072,457.09 (One million seventy-two thousand four hundred and fifty-seven US dollars 09/100 cy). The foregoing because invoice ICI258

[262] Reply and Answer to the Counterclaim, No. 141.
[263] Reply and Answer to the Counterclaim, No. 143.

must be adjusted, being appropriate from it US$ 64,392.57 (Sixty-four thousand three hundred and ninety-two US dollars 57/100 cy) and not the US$ 48,801.30 (Forty-eight thousand eight hundred one US dollars 30/100 cy) indicated by the Defendant's expert[264].

357. Secondly, it argues that the Commission's position regarding the disputed amounts is wrong. DUNOR highlights the following conclusions of the EY Expert: i) an amount of US$ 1,422,603.55 (One million four hundred and twenty-two thousand six hundred and three US dollars 55/100 cy) has been agreed by the Parties, there is no dispute in this regard; ii) an amount of US$ 2,791,594.29 (Two million seven hundred ninety-one thousand five hundred ninety-four US dollars 29/100 cy) (for expenses reclassified from section 3.2 to 3.5) complies with the requirements of the Agreement, i.e., "*pertain to works related to the extension of the Provisional Acceptance Date, which belong to the Analysis Period and which have been actually accrued or paid by the Contractor"*. Therefore, there is consensus between this Party and CFE's Expert that this amount should be reimbursed to DUNOR; and iii) an amount of US$ 979,670.48 (Nine hundred and seventy-nine thousand six hundred and seventy US dollars 48/100 cy) that would not have been paid to the subcontractors and therefore, would not be reimbursable according to CFE's Expert[265].

[264] Reply and Answer to the Counterclaim, No. 146 and 148.
[265] Reply and Answer to the Counterclaim, No. 149.

358. Furthermore, in accordance with points i) and ii), CFE's Expert acknowledges that a total amount of US$ 4,214,197.84 (Four million two hundred and fourteen thousand one hundred and ninety-seven US dollars 84/100 cy) would be reimbursable. This makes clear the Defendant's lack of merits, who, in disagreement with its own expert, considers only reimbursable an amount of US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy)[266].

359. On the other hand, DUNOR points out that the difference between US$ 1,422,603.55 (One million four hundred and twenty-two thousand six hundred and three U.S. dollars 55/100 cy) recognized by the Expert Cámara and US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy) recognized by CFE, is due to an amount of US$ 365,726.90 (Three hundred and sixty-five thousand seven hundred and twenty-six US dollars 90/100 cy) that, in the Expert's opinion, should be paid to DUNOR by virtue of the agreement formalized in Minutes No. 7. DUNOR points out that, notwithstanding the fact that this is an amount that must be paid, as indicated by the EY Expert in his Second Expert Report, the Parties have not entered into a formal agreement regarding the expenses of section 3.5 of the Agreement that would put an end to the claims for this category. It points out that there are subsequent agreements such as that of May 2020 whose recognition of amounts should have been taken into account by Expert Cámara[267].

360. DUNOR points out with respect to the reclassified expenses, that the reference to the US$ 2,791,594.29 (Two million seven hundred and ninety-one thousand five hundred and ninety-four US dollars 29/100 cy) is not correct either. It maintains that beyond arithmetic errors, the EY Expert thoroughly checked all the calculations carried out by Expert Cámara for this concept and found many errors and inconsistencies[268].

361. Regarding the amount of US$ 971,935.48 (nine hundred and seventy-one thousand nine hundred and thirty-five US dollars 48/100 cy), the EY Expert concludes that "*according to the documentation analyzed, we determine that the*

[266] Reply and Answer to the Counterclaim, No. 150.
[267] Reply and Answer to the Counterclaim, No. 152.
[268] Reply and Answer to the Counterclaim, No. 153.

*transactions were incurred during the Analysis Period, are directly related to the Project and correspond to concepts defined within section 3.5 of the Agreement*".[269]

362. Dunor adds that the main component of the difference between what Dunor claimed and what is recognized by CFE's Expert is due to: (i) amounts that meet all the requirements of the Agreement but have not been settled (US$ 971,935.48 (Nine hundred and seventy-one thousand nine hundred and thirty-five US dollars 48/100 cy) and US$ 168,354.76 (One hundred and sixty-eight thousand three hundred and fifty-four US dollars 76/100 cy)), and (ii) differences with respect to the amounts reclassified from section 3.2 to 3.5 of the Agreement[270].

363. In relation to the amounts reclassified from section 3.2 to 3.5 of the Agreement, it points out that the difference between the US$ 3,624,304.66 (Three million six hundred and twenty-four thousand three hundred and four US dollars 66/100 cy) recognized by EY and the US$ 2,791,594.29 (Two million seven hundred and ninety-one thousand five hundred and ninety-four US dollars 29/100 cy) considered by CFE's Expert, is due to a large number of errors and inconsistencies in the report presented by the Expert Cámara. In this regard, DUNOR maintains that these errors are as follows: i) there is an amount of US$ 365,726.90 (Three hundred and sixty-five thousand seven hundred and twenty-six US dollars 90/100 cy) for amounts reclassified for the month of July. This amount is not updated as it does not take into account letters and official letters exchanged between the Parties subsequent to the Minutes. ii) An amount of US$ 7,735.00 (Seven thousand seven hundred and thirty-five US dollars 00/100 cy) for "*amounts reclassified from the months of August 2018 to March 2019"* considered by the Expert Cámara as not settled but which, in fact, it is and meets all the requirements of the Agreement to be compensable. iii) The EY Expert concluded that the Expert Cámara took into account in this section the invoices of "*MHO Engineering"* which the Expert considers to be attributable to section 3.2 of the Agreement, insofar as they are personnel benefits and not a third-party claim *per se*. DUNOR notes that there is also an agreement, in accordance with Official Letter RGROS-174/20, for the reclassification of this amount to section

[269] Reply and Answer to the Counterclaim, No. 154.
[270] Reply and Answer to the Counterclaim, No. 155.

3.2 of the Agreement. It adds that the amount of this invoice was calculated incorrectly, and that the amount of the quality withholdings was not deducted; iv) Cámara's Expert Report has not analyzed six different expenses that DUNOR claimed and for which the EY Expert recognized US$ 2,187.78 as being due. (Two thousand one hundred and eighty-seven US dollars 78/100 cy)[271]. v) There are expenses determined as not applicable by the EY Expert but that Expert Cámara does consider applicable in the amount of US$ 85,037.19 (Eighty five thousand thirty-seven US dollars 19/100 cy) (for supplies of the Power Plant); vi) There are errors in determining the service proportion that occurred within the Analysis Period; vii) There are errors in the basis of the invoices considered by Expert Cámara. Occasionally, non-returned quality withholdings are not deducted; viii) Expert Cámara omits evidence of which works are part of the Analysis Period or are derived from it; and, finally, there are discrepancies with Expert Cámara on the concepts to be compensable pursuant to the Agreement[272].

364. Based on the foregoing, DUNOR points out that the EY Expert, after having carried out his analysis of the differences among the experts, only identifies four items in which the amount determined by Expert Cámara is correct, therefore a correction of the amount claimed for US $ 14,663.80 (Fourteen thousand six hundred and sixty-three US dollars 80/100 cy) is appropriate.[273]

365. Therefore, DUNOR concludes that as indicated by the EY Expert, CFE must, on the one hand, reimburse DUNOR for US$ 4,682,097.96 (Four million six hundred and eighty-two thousand ninety-seven US dollars 96/00 cy) and US$ 90,936.34 (Ninety thousand nine hundred and thirty-six 34/100 cy), on the other hand, US$ 971,935.48 (Nine hundred and seventy-one thousand nine hundred and thirty-five U.S. dollars 48/100 cy) (for amounts incurred but not settled) and US$ 168,354.76 (One hundred and sixty-eight thousand three hundred and fifty-four U.S. dollars 76/100 cy) (for quality withholdings)[274].

366. Now, in relation to the mechanism used by the EY Expert to determine which

[271] Reply and Answer to the Counterclaim, No. 157.
[272] Reply and Answer to the Counterclaim, No. 157.
[273] Reply and Answer to the Counterclaim, No. 158.
[274] Reply and Answer to the Counterclaim, No. 159.

amounts are appropriate, it states that DUNOR provided the EY Expert with the supporting documentation for each of the transactions and reviewed, including but not limited to: (i) the existence of evidence of the rendering of the service including work estimates, logs, and attendance lists, (ii) that the expenses incurred and invoiced correspond to DUNOR's subcontractors and suppliers, (iii) that the invoices correspond to amounts and evidence of the services received, (iv) that the payment vouchers correspond to the expense, and (v) the accounting record of the payment of the expense[275].

367. Regarding the *dies a quo* for the computation of the term in which CFE should review the information submitted, DUNOR points out that the Commission maintains that the term should begin "*when the complete information is submitted*". In this regard, DUNOR points out first, that such condition is not a requirement of the Agreement, since section 5 refers only to the fact that "*the Commission shall have the same period [1 month] for the review and reconciliation*" of invoices. Additionally, the decision on when the information delivery should be understood to be completed, to the extent that it implies the initiation of a contractual term, cannot remain, as CFE intends, at its sole discretion. It adds that if this were the case, we would not be in the presence of an obligation subject to a deadline, but to the condition that CFE gave for good and sufficient the documentation submitted. It is obvious and clear that this is not what was agreed in the Agreement. If it were (*quod non*), in accordance with article 1944 of the Federal Civil Code, the condition would be null and void because its fulfillment would depend on the sole will of the Defendant[276].

368. DUNOR adds that CFE had, from the very beginning, full information for its review. The contractual logic of section 5 of the Agreement leads one to consider as *dies a quo* for the computation of the term for the review of invoices by CFE, their delivery by DUNOR. It points out that only insufficient information would affect the deadline, although never by suspending or restarting it, but by extending it. However, this extension could not be left to the discretion of CFE who, in any case, would have to identify the missing documentary elements[277].

[275] Reply and Answer to the Counterclaim, No. 162.
[276] Reply and Answer to the Counterclaim, No. 164.
[277] Reply and Answer to the Counterclaim, No. 165.

In this regard, DUNOR points out that the Commission does not identify or specify the missing documentary elements and, when it does, it requests documents that simply do not exist, thus delaying their review and, consequently, the payment of the amounts due[278].

369. Along the same lines, DUNOR maintains that CFE affirms that the calculation of the payment term of the invoices pursuant to the Agreement would be since they are "*effectively recognized*" through the issuance of minutes. However, the Plaintiff contends that this argument means leaving the payment of invoices pursuant to the Agreement to the sole discretion of one Party, an interpretation that contradicts article 1707 of the CCF[279].

370. For all the above, DUNOR concludes that CFE has the obligation to reimburse DUNOR for the expenses incurred in relation to section 3.5 of the Agreement.

#### 12.1.2.5.2 Defendant's position

371. The Defendant expresses that it agreed to reimburse the expenses derived from the Third-Party Claims, arising from the extension of the provisional acceptance date, which runs from July 19, 2018 to March 14, 2019[280].

372. CFE states that the Plaintiff was partially providing the information through letters DUNOR-CFE-572, DUNOR-CFE-573, DUNOR-CFE-574, DUNOR-CFE-621, DUNOR-CFE-623, DUNOR-CFE-624, DUNOR-CFE-625, DUNOR-CFE-626, and DUNOR-CFE-628[281].

[278] Reply and Answer to the Counterclaim, No. 166.
[279] Reply and Answer to the Counterclaim, No. 167.
[280] Counter-Memorial and Counterclaim, No. 392.
[281] Counter-Memorial and Counterclaim, No. 393: Includes reference tables.

373. In this regard, CFE specifies that it carried out the review of all the documentation submitted by the Contractor and in minutes of the meeting dated October 02 to 03, 2019 and with Official Letter No. RGROS-238/2019 dated October 28, 2019, issued comments regarding all communications, in which it indicated to the Contractor that all invoices lacked the necessary information and required for analysis[282].

374. The Commission notes that, as of the date of the Answer to the Complaint, the Contractor had not complied with the obligation to deliver to the Commission all the necessary documents evidencing and supporting the expenses that were accrued or incurred[283]. It also adds that up to that date, the Contractor had only submitted claims for an amount of US$ 2,321,912.10 (Two million three hundred and twenty-one thousand nine hundred and twelve US dollars 10/100 cy), so that the amount claimed in paragraph 111 of the Complaint Memorial (US$ 6,285,204.81) (Six million two hundred and eighty-five thousand two hundred and four US dollars 81/100 cy) is completely false.

375. The Commission contends that the Plaintiff astutely tries to make it appear that it has complied with the delivery of the information since the beginning of its request dated June 25, 2019, but, as can be seen in the various documents issued by the Contractor, it has delivered the information in "*piecemeal*" fashion, which has affected the time for review by the Commission[284].

376. It adds that as recorded in Minutes No. 3 of October 2 and 3, 2019, the Parties met in order to reconcile the amounts of the invoices for the month of July, without reaching an agreement on the amount to be recognized[285].

377. However, from the review made by the Commission to the files of invoices submitted by DUNOR for section 3.2 "*Expenses for Personnel Management and Field Administration*", it was observed that some did not correspond to this section, according to the guidelines established in the Agreement, so that in Meeting Minutes No. 04 dated November 20-21, 2019, it was indicated that a

[282] Counter-Memorial and Counterclaim, No. 395.
[283] Counter-Memorial and Counterclaim, No. 397.
[284] Counter-Memorial and Counterclaim, No. 399.
[285] Counter-Memorial and Counterclaim, No. 400.

proposal was made to reclassify some claimed invoices "*since it is considered that they correspond to sections 3.1, 3.3, and 3.5, which are shown in the Chart attached to these Minutes*". It is also stated that DUNOR agreed[286].

378. Regarding the previous reclassification, the Commission points out that the new reclassification never implied a commitment of acceptance for payment, but was part of the analysis and conciliation process, since according to the stipulations of the Agreement and Official Letter RGROS-101-2020, these fall under section 3.5 of the Agreement[287].

379. Regarding the documentation submitted by DUNOR, the Commission states that with Official Letter No. RGROS-101-2020 dated April 24, 2020, informed DUNOR that the requests were not supported by the claims of suppliers and subcontractors that have been received by DUNOR and that are the result of the time-extension. It also requested that efforts to minimize the impact of third-party claims were to be shown[288].

380. It also points out that the Commission prepared a list of all the invoices for which DUNOR did not provide the documentary support, which also do not contain the reports, activities and/or works performed by the personnel claimed, nor does it justify that these resulted from the impact period established in the Agreement. CFE argues that DUNOR acknowledges the merits of the observations issued by the Commission in its Official Letter No. RGROS-238/2019, a situation demonstrated by DUNOR's delivery of the required supporting documentation through Communication No. DUNOR-CFE- 812[289].

381. The Commission states that it subsequently issued comments on this response in the Minutes of the meeting dated November 20, 2019 and in the meeting dated December 02 and 03, 2019, in which the Plaintiff acknowledged its omission, so DUNOR was again asked to exhibit the necessary supporting documentation.[290]

[286] Counter-Memorial and Counterclaim, No. 401.
[287] Counter-Memorial and Counterclaim, No. 402.
[288] Counter-Memorial and Counterclaim, No. 403.
[289] Counter-Memorial and Counterclaim, No. 404.
[290] Counter-Memorial and Counterclaim, No. 405.

382. CFE maintains that DUNOR has not submitted the documentation required in accordance with the Agreement, since the information supporting third-party claims and the work reports of the third-party personnel, demonstrating what work they carried out, has not been delivered. In addition, it remains to be proved that it made the payment of various invoices to its subcontractors[291]. Likewise, the Commission points out that it identified two invoices that the Plaintiff, taking advantage of the opportunity, fraudulently included and that fall outside the recognized period.[292].

383. In addition, the Commission notes that the payment records for each of the invoices show an amount for withholdings. It indicates that as of the date of the Counter-Memorial there is no evidence that these withholdings have been returned to the subcontractors, and shows that the withholding amount identified by the Commission is US$ 216,759.20 (Two hundred sixteen thousand seven hundred fifty-nine US dollars 20/100 cy), an amount that DUNOR intends to charge to the Defendant, taking advantage of the opportunity and with every intention of deceit, by charging this amount twice, once to the third party most probably as a penalty and then, the same amount to the Commission[293].

384. The Commission highlights that all the companies to which these claims refer have formalized contracts and/or addendums for the purpose of hiring Administrative Personnel, clarifying that some of these initially did have a specific purpose of works to be carried out in the scope of the Contract; however, these were modified through addendums, so that during the recognition period of the Agreement they would remain with the object of administrative personnel, meaning, they do not have a specific purpose that allows defining whether the works or activities carried out were allocated or required due to the time-extension of the Scheduled Provisional Acceptance Date or it was for the execution of specific work which is part of the scope of the Contract and which was not compromised[294].

385. The Commission adds that, at the document production request stage in this

[291] Counter-Memorial and Counterclaim, No. 407.
[292] Counter-Memorial and Counterclaim, No. 408.
[293] Counter-Memorial and Counterclaim, No. 409.
[294] Rejoinder and Reply to CFE Counterclaim, No. 129.

process, CFE requested the description of the works hired by DUNOR during the time-extension referred to in the Agreement, however, DUNOR did not submitt additional documentation, limiting itself to stating that what is requested is found in Doc. EY-22 and Doc. EY-36. This, despite the fact that the Tribunal had ordered that, if the purpose of the contracted works could not be specified with said document, DUNOR should display such contracts[295].

386. The Commission warns that the Plaintiff's failure to comply with what is indicated in Procedural Order No. 4 with respect to the documents that had to be produced, would not go unnoticed, since there is a risk of paying surpluses, i) for works included in the scope of the original Contract, and/or ii) for the recovery of arrears by the Contractor, which are outside the aforementioned Agreement.[296].

387. Likewise, the Commission observes that within the contracts there is Work Order No. 157 AD 06102 of the SEPIEC company, formalized in October 2018, for cabling and administrative personnel (official and electrical assistant) who have the category of someone who is going to carry out the work, for an amount of MXN$ 1,516,577.44 (One million five hundred and sixteen thousand five hundred and seventy-seven Mexican pesos 44/100 MN). Hence, CFE warns that the cost of these administrative personnel, for the simple fact of having carried out these activities within the recognition period, when they are works within the scope of the Contract and the cabling activity was not affected in any way by the time-extensions, so DUNOR does not demonstrate evidence of the works carried out by the personnel that it wishes to be recognized[297].

388. The Commission makes a list of companies[298], with respect to which there are only hourly reports without having a log of the work carried out or any report that allows verification of the activities carried out by these personnel[299]. It indicates that this information was initially requested by the Commission by email dated February 15, 2019, and finally during the document production phase. In this phase, the report of the activities carried out by the personnel of each of the

[295] Rejoinder and Reply to CFE Counterclaim, No. 130.
[296] Rejoinder and Reply to CFE Counterclaim, No. 131.
[297] Rejoinder and Reply to CFE Counterclaim, No. 132.
[298] Rejoinder and Reply to CFE Counterclaim, No. 128.
[299] Rejoinder and Reply to CFE Counterclaim, No. 133.

subcontractor companies with respect to which costs are claimed was requested, but the Plaintiff expressed various objections, among them that the report of the activities carried out by the subcontractors has been shared with the Commission through: (i) Work Logs, (ii) Reports and Programs, and (iii) coordination meetings between the Parties, documentation that does not support or specify the activities carried out by the personnel claimed.

389. It also specifies that DUNOR only presented two documents consisting of activity reports from the companies (i) SEPIEC SA DE CV and (ii) PORRAS ARMENDÁRIZ CONSTRUCTORES, which were submitted incomplete and from personnel that did not correspond to those claimed. It then points out that: a) From the company SEPIEC SA DE CV, reports are presented for only a fraction of the claimed period and not the entire time, as well as a minimum fraction of the personnel working on the claims, and the simple reading of these includes activities within the scope of the Contract, including repairs of works poorly executed by the Contractor. b) With regard to the company PORRAS ARMENDÁRIZ CONSTRUCTORES, DUNOR displays an activity report of personnel other than those claimed[300].

390. The Commission points out that in the hourly reports that form part of the Appendices to the invoices claimed in July from the companies mentioned in the table[301], the categories of personnel are indicated as follows: assistants, instrumentalists, mechanics, instrumentation officer, primary test specialist technician, electrical officer, operators, pipe worker, welder, storekeeper, welder electrician officer, operation manager, mechanical officer, crane operator, welder, cable operator, pipe worker, boiler maker, and control personnel for loop testing. These are persons who carry out work activities on Site that form part of the direct costs of the Power Plant[302].

391. CFE points out that, in accordance with section 3.5 of the Agreement, the Plaintiff has not proven that it has claims from the companies indicated in the table, despite having been requested by the Commission through the Official Letter RGROS-101/2020 of April 24, 2020. It adds that the Commission made a

[300] Rejoinder and Reply to CFE Counterclaim, No. 135.
[301] It refers to the chart found in No. 128 of the Rejoinder and Reply to CFE Counterclaim.
[302] Rejoinder and Reply to CFE Counterclaim, No. 137.

final document request in this Arbitration proceedings, which was objected by the Plaintiff stating that there are no claims from the identified suppliers and subcontractors, that they are specialized technical and supervisory personnel who did not operate under a contract for a specific time, but on an hourly basis (management contracts)[303].

392. Due to all of the foregoing, the Commission considers that it is unable to know who and what amounts were claimed by third parties to the Contractor and which resulted from the application of the Agreement. It maintains that the Plaintiff's refusal to provide the documentary elements necessary to prove the existence of said claims and their alleged amounts, creates a reasonable doubt that they do not exist.[304].

393. CFE points out that the EY Expert states that they carried out a review and analysis of the information provided by DUNOR regarding the claim derived from section 3.5 of the Agreement, but their opinions do not reveal an analysis of any document, nor is any evidence attached to the documents analyzed, to determine whether the expenses recognized by it resulted from the time-extension of the Scheduled Provisional Acceptance Date[305].

394. The Commission adds that the EY Expert did not take into account the following: i. The contracts of the companies described above are of administrative personnel, meaning, the activities carried out derived from the recognition period established in the Agreement, are not identified. ii. Of the claimed personnel, no reports and/or evidence of the activities carried out are presented, this is only done with respect to the SEPIEC company, where work is observed within the scope of the contract including repairs of works poorly executed by DUNOR. iii. Of the claimed personnel, only the personnel's names, the hours worked, and their category are available, with which it can be inferred that they executed work that corresponds to direct costs within the scope of the Contract. iv. DUNOR states that it has no claims from suppliers and subcontractors. v. During the recognition period of expenses, DUNOR executed works within the scope of the Contract, which advanced the Project. vi. DUNOR did not submit the execution

[303] Rejoinder and Reply to CFE Counterclaim, No. 138.
[304] Rejoinder and Reply to CFE Counterclaim, No. 139.
[305] Rejoinder and Reply to CFE Counterclaim, No. 143 and 144.

programs for each of the subcontractors that carried out work related to the time-extension referred to in the Agreement of clause 25.5[306].

395. The Commission points out that DUNOR did initially consider the correct criteria applicable to the invoices claimed in section 3.5 of the Agreement, that is, it knew what was necessary to present the suppliers or subcontractor's claims, and precisely, with respect to those invoices, once the comments had been addressed, it delivered the documents in accordance with the Agreement but only for three companies, and not for the rest of the alleged third-party claims, which to date it has not submitted, and also refused to deliver them pursuant to Procedural Order No. 4[307].

396. The Commission states that with respect to the invoices initially submitted in accordance with section 3.5 of the Agreement, the amount due of US$1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy) meets all the requirements of the Agreement. It refers to Invoice ICI258 to explain that this is the amount resulting from the difference between the calculation made by the Commission (US$1,056,876.65) (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy) and that of DUNOR (US$ 1,072,457.09) (One million seventy-two thousand four hundred fifty-seven US dollars 09/100 cy). It maintains that this calculation is due to the fact that initially an amount of US$ 68,336.98 (Sixty-eight thousand three hundred and thirty-six US dollars 98/100 cy) was considered for 7 days of the period from July 17 to 23, 2018, Therefore, when the impact period was corrected, it was considered from July 19 to 23, 2018, that is, 5 days. Therefore, the correct amount is US$ 48,812.13 (Forty-eight thousand eight hundred and twelve US dollars 13/100 cy), which was obtained by applying the methodology determined by the Commission and DUNOR as can be seen in Minutes No. 7[308].

397. On the other hand, in relation to the claim for electricity for energizing and testing equipment in the commissioning test of the *CC Empalme II* Project, the Commission considers that the Plaintiff and the Expert are requesting a direct cost of the work, this being an obligation of the Contractor. It also points out that

[306] Rejoinder and Reply to CFE Counterclaim, No. 145.
[307] Rejoinder and Reply to CFE Counterclaim, No. 151.
[308] Rejoinder and Reply to CFE Counterclaim, No. 154-159.

the extension of the Testing dates did not affect PEM consumption, as it did not have to repeat the tests or carry out additional PEM work that could increase the energy consumption of the tests. In this way, the consumption of electricity of the works and tests carried out during the recognition period of the Agreement, was an expense that was already considered under the Contract that allowed DUNOR to achieve progress according to the monthly work progress schedules agreed between the Parties[309].

398. The Commission clarifies that the amounts of US$ 971,935.48 (Nine hundred and seventy-one thousand nine hundred and thirty-five United States dollars 48/100 cy) (which according to DUNOR is the main component of the difference between what was claimed by DUNOR and what was recognized by CFE's Expert[310]) and US$ 168,354.76 (one hundred sixty-eight thousand three hundred and fifty-four US dollars 76/100 cy) have not been paid, since they do not comply with the Agreement, as confirmed by the Plaintiff when it states that "*they comply with all the requirements of the Agreement, but have not been settled*"[311].

399. The Commission reiterates that the Plaintiff and the EY Expert insist that an amount of US$ 3,624,304.66 (Three million six hundred twenty-four thousand three hundred and four US dollars 66/100 cy) is appropriate, derived from the reclassification of section 3.2 of the Agreement to section 3.5, but the Commission states that the submission of the necessary documents has not been complied with, despite the requests made[312]. Due to the foregoing, CFE states that it confirms that the amount of US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy) is that supported by documentation in accordance with section 3.5 of the Agreement [313].

400. To this end, the Commission refers to the Plaintiff's assertion[314] and EY Expert in the sense that the invoice claimed from the company ABB México SA de CV No. 71047322918146, complies with the provisions of the Agreement. CFE points out that the evidence presented (Service and Technical Reports)

[309] Rejoinder and Reply to CFE Counterclaim, No. 164 and 165.
[310] Reply, no. 155.
[311] Rejoinder and Reply to CFE Counterclaim, No. 166.
[312] Rejoinder and Reply to CFE Counterclaim, No. 168.
[313] Rejoinder and Reply to CFE Counterclaim, No. 170.
[314] Reply, no. 157.

clearly indicates that they are works related to the original Contract, such as the replacement of a 24-volt source, tests on CEMS equipment, and calibrations of analyzers, works that were programmed in the testing and commissioning stage for the functional tests of the CEMS, which is observed in work log note No. 65149 for the period from January 21 to 27, 2019, where the details of the activities carried out are shown. The Commission points out that the Expert did not consider that the amount of US$ 7,735.00 (Seven thousand seven hundred thirty-five US dollars 00/100 cy) constitutes expenses that are considered in the scope of the Contract [315].

401. In relation to the MHO company, the Commission argues that there is procedural bad faith on the part of the Plaintiff, since it maliciously tries to confuse with its arguments what is related to this company. Therefore, the Commission clarifies the following: the Commission, in official letter RGROS-174/2020 of July 31, 2020, recognized the Contractor for Personnel Management and Field Administration Expenses in accordance with section 3.2 of the Agreement, by three people from the company MHO Engineering SA de CV, specifying the reasons for recognition and making the comment that "*this invoice incorporates from the claim from 3.5 to 3.2 only the administrative technical personnel that are part of the organization chart of the Inés Cantero Project, Document Manager, Jesús Martínez Cerón, Electrical Area Manager and Fidel Sánchez Padilla, MV/LV Electrical Supervisor*"[316].

402. The Commission considers that the Plaintiff intends, in the case of the company MHO Engineering SA, to include all the personnel, without these being those who fall under section 3.3 of the Agreement because they are not DUNOR's Management, Technical, or Administrative Personnel, much less found in the Project organization chart. In this regard, the Commission mentions as an example the claim for the first invoice M-149 for the month of July 2018, where a claim can be seen for all twenty-five workers, only three of whom appear in the Plaintiff's organizational chart as Administrative Technical Personnel. Regarding the remaining twenty-two, from the description of the supporting Appendix "*hours report*" it can be deduced that the activities carried out by these

[315] Rejoinder and Reply to CFE Counterclaim, No. 171 and 172.
[316] Rejoinder and Reply to CFE Counterclaim, No. 173.

twenty-two workers are part of direct costs.[317]

403. For all of the above, it indicates that in relation to section 3.5 of the Agreement, the appropriate amount is US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy).[318]

404. Also, the Commission points out that Expert Cámara, in its Complementary report, determines that the payment made by DUNOR to its suppliers for the amount of US$ 4,020,065.96 (Four million twenty thousand sixty-five US dollars 96/100 cy) is appropriate, ratifying what is indicated in its Expert Opinion, but Expert Cámara advises the Arbitral Tribunal "*that said amounts are not duly supported by documentation because there are no contracts that define what (sic) was the object of the work hired by DUNOR during the extension of the Provisional Acceptance, nor reports of activities carried out, in addition to the fact that said information, despite being required by the Arbitral Tribunal, was not submitted by DUNOR, generating serious (sic) doubts for this Expert. It remains pending to present the documentation indicated in the previous paragraph, in order to determine its origin.*[319] In this way, although the expert and the Commission do not conclude on the same appropriate amount, they agree that the Plaintiff does not provide documentary support for the contracts and activities carried out in the recognition period pursuant to section 3.5 of the Agreement, even though they were requested to do so in the conciliation stage and ordered by the Tribunal.

405. The Commission also refers to the amount of US$ 90,936.34 (Ninety thousand nine hundred and thirty-six US dollars 34/100 cy) that the EY Expert indicates corresponds to personnel who, in their understanding, were employed directly on the Work and carried out works during the period of analysis, as well as other expenses associated with the construction work, which in its opinion, correspond to expenses for Third-Party Claims and which should be compensated in accordance with section 3.5 of the Agreement. In this regard, the Commission points out that the EY Expert makes such an assertion without presenting evidence or documentation. It adds that they are direct costs of the

[317] Rejoinder and Reply to CFE Counterclaim, No. 173.
[318] Rejoinder and Reply to CFE Counterclaim, No. 174.
[319] Rejoinder and Reply to CFE Counterclaim, No. 176.

Work, therefore, it is logical that these works are within the scope of the Contract.[320]

406. The Commission notes that the reclassification carried out by the EY Expert includes invoices that had already been analyzed by the Parties during the conciliation process. Some of these invoices were not recognized by both Parties for including expenses and works under the scope of the Contract, since they have nothing to do with the recognition period of the Agreement. To cite a few, the Commission refers to rows 242 and 284, to Invoices 1910000067 and 1910000082, and to the column indicated with the letter "W" of the Expense Schedule for Personnel Management and Field Administration, where the comment on the justification for the rejection of each one of these is that "*THESE VISITS WERE CARRIED OUT TO ATTEND AND CORRECT THE HIGH VIBRATION PRESENTED BY THE FREQUENCY VARIATORS OF THE HIGH PRESSURE WATER SUPPLY PUMPS, THEREFORE ITS RECOGNITION IS NOT APPROPRIATE SINCE IT IS AN OBLIGATION OF THE CONTRACTOR TO REPAIR ALL FAILURES AND DAMAGES THAT OCCUR DURING THE PROJECT AT ITS SOLE EXPENSE"*. It points out that the deficient and biased work carried out by the EY Expert is clear, considering these expenses as appropriate without even presenting the documents that prove that these costs are within the scope of the Agreement[321].

407. For its part, in relation to the amounts of US$ 971,935.48 (Nine hundred and seventy-one thousand nine hundred thirty-five US dollars 48/100 cy) and US$ 168,354.76 (One hundred sixty-eight thousand three hundred and fifty-four US dollars 76/100 cy), the Commission reiterates that the requirements of section 3.5 of the Agreement have not been complied with, therefore they cannot be declared as appropriate.

408. In conclusion, the Defendant affirms that several of the invoices that both DUNOR and its EY Expert have considered as appropriate, lack the documentary support that proves said expenses, thus generating a breach of the Agreement. Therefore, it reiterates that the appropriate amount due for this category is US$

[320] Rejoinder and Reply to CFE Counterclaim, No. 178.
[321] Rejoinder and Reply to CFE Counterclaim, No. 179 and 180.

1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65/100 cy).

#### 12.1.2.5.3 Considerations of the Tribunal

409. Paragraph 3.5 of the Agreement establishes the following.

> *"3.5 THIRD-PARTY CLAIMS.*
>
> *"This category includes all claims from Suppliers and Subcontractors received by THE CONTRACTOR due to the extension of the Scheduled Provisional Acceptance Date and/or the reason that gave rise to this impact as described in this Agreement and in adherence to Clause25.5 of the Contract. At this point, THE CONTRACTOR will make all possible commercial efforts to minimize the impact of claims received by third parties."*
>
> *"In this category, THE CONTRACTOR must present all contractual and accounting information and all that which is required for the analysis and appropriateness of the concepts and amounts claimed by third parties."*
>
> *"Any document that, in the absence of the previous ones, irrefutably proves the expense of the previous concepts."*

410. In relation to Third-Party Claims, it should be noted that said category is made up of two concepts: the first corresponding to a series of invoices that were presented from the beginning as Third-Party Claims and the second to another series of invoices that had initially been presented as expenses pursuant to section 3.2 of the Agreement and which were subsequently requested by the Commission to be reclassified to section 3.5.

411. Taking into account that the disputes arising from one and the other are different, the Tribunal considers it pertinent to address them separately, for this reason it will first address the Third-Party Claims initially submitted, to later examine the claims that were submitted under section 3.2 and that were moved to section 3.5.

##### 12.1.2.5.3.1 Expenses for Third-Party Claims initially submitted

412. The Commission indicates that the amount to be recognized for the Third-Party Claims initially submitted is US$ 1,056,876.65 (One million fifty-six

thousand eight hundred and seventy-six US dollars 65/100 cy)[322]. For its part, DUNOR considers that the amount that should be recognized is US$ 1,072,457.09 (One million seventy-two thousand four hundred and fifty-seven US dollars 09/100 cy)[323]. These figures correspond to those indicated by the respective Experts[324].

413. Now, the EY Expert indicates[325] that the difference between the values that CFE considers should be recognized and those estimated by DUNOR and its expert come from the Invoice ICI258, to which CFE agrees[326].

414. In this regard, CFE points out[327] that in Meeting Minutes No. 7, of January 23 and 24, 2020, after DUNOR demonstrated an impact of costs for the period from July 10 to 23, 2018 (14 days of expenses), an amount due of US$ 68,336.98 (Sixty-eight thousand three hundred thirty-six US dollars 98/100 cy) for 7 days applicable according to the recognition period, that is, the expenses were recognized from July 17 to 23, 2018. To explain how this amount was reached, it points out that at said meeting, each of the concepts claimed and their origin were analyzed, the corresponding calculations being made by both Parties, where they agreed that some concepts were not appropriate in accordance with the Agreement, because they were expenses within the scope of the Contract that were not affected, to name a few examples, freight of materials, transfer of personnel to their place of origin, etc., so that of the total of US$ 180,299.20 (One hundred eighty thousand two hundred and ninety-nine US dollars 20/100 cy), which corresponds to the settlement of the Contract EMP0231, covering the period from July 10 to 23, 2018, it was determined, by mutual agreement between the Commission and DUNOR, that the base amount to calculate the compensation during the period from July 17 to 23, 2018, would be US$ 136,673.90 (one hundred thirty-six thousand six hundred and seventy-three US dollars 90/100 cy), for which 7 of 14 days were recognized, this being 50%, resulting in an agreed amount of US$ 68,336.98 (Sixty-eight thousand three

[322] CFE's Rejoinder, paragraph 154.
[323] Dunor's Answer and Reply, para. 148.
[324] Expert Cámara Report, Chart 9.
[325] First EY Expert Report, Chart 30. Second EY Expert Report, Chart 6.
[326] Rejoinder and Reply to CFE Counterclaim, paragraph 154.
[327] Rejoinder and Reply to CFE Counterclaim, paragraph 155.

hundred thirty-six US dollars 98/100 cy)[328].

415. CFE points out[329] that it subsequently requested DUNOR to correct the impact period, accepting the recognition period of the Agreement from July 19, 2018 to March 14, 2019 and rectifying its claim. Therefore, when making the adjustment, an amount of US$ 48,812.13 (Forty-eight thousand eight hundred and twelve US dollars 13/100 cy) is claimed for Invoice ICI 258, "*being the most fair, transparent and reasonable"*, applying the stated methodology but only considering the impact for 5 days, instead of the 7 days initially considered.

416. CFE refers to the EY Expert's analysis and points out that what it indicated is not correct, since it considered the total amount of the termination of the contract between DUNOR and a third party, without carrying out any analysis of the concepts contained in the contract and whether all of these were within the scope of the Agreement. CFE specifies that, having carried out the correct analysis, the EY Expert should have determined an amount of US$ 136,673.90 (One hundred thirty-six thousand six hundred and seventy-three US dollars 90/100 cy), and not the unilateral amount of US$ 180,299.20 (One hundred eighty thousand two hundred and ninety-nine US dollars 20/100 cy).

417. In relation to the above, the EY Expert indicates that the difference of US$ 15,580.44 (Fifteen thousand five hundred and eighty US dollars 44/100 cy) is due to the ICI258 invoice of the subcontractor "*Ingeniería Control e Instrumentación S.A. de C.V."* where "*we quantified an appropriate amount of US$ 64,392.57, while the Expert Cámara determined an amount of US$ 48,801.30*"[330]. In fact, the First EY Expert Report, indicates an amount of US$ 64,392.57 (Sixty-four thousand three hundred and ninety-two US dollars 57/100 cy),[331] and the Expert Cámara Report indicates an amount of US$ 48,801.30 (Forty-eight thousand eight hundred one US dollars 30/100 cy) [332].

418. Now, the Expert Cámara is based on the communication of CFE RGROS

[328] Rejoinder and Reply to CFE Counterclaim, paragraph 156.
[329] Rejoinder and Reply to CFE Counterclaim, paragraph 157, Appendix R-118 Official Letter RGROS-101/2020.
[330] Second EY Expert Report, page 37.
[331] First EY Expert Report, chart 28, page 46.
[332] First Expert Cámara Report, Chart 5, page 63.

101/2020[333] in which CFE requested DUNOR to make an adjustment of the amounts claimed for the month of July, based on the fact that the expenses can only be recognized as of July 19, 2018, and not July 17th of the same month, as had been done initially. Likewise, the Expert Cámara invokes DUNOR's response dated May 21st [334], in which it says that it supports the review No. July 3, 2018, reconsidering the claimed period from July 19 to 31, 2018. It is pertinent to point out that DUNOR's response incorporated by Expert Cámara has no appendices. Expert Cámara indicates that said figure is "*the amounts agreed by both Parties*"[335].

419. On the contrary, the EY Expert indicates[336] that DUNOR informed him that there is no recognition agreed by the Parties. Likewise, as has already been said, the Commission indicated that it is true that the Parties have not reached a formal agreement regarding the expenses of section 3.5 of the Agreement, as stated by the Plaintiff, since communications must be taken into account subsequent to the conclusion of Minutes 07, such as the case of the official letter RGROS-101/2020 of April 24, 2020, where the Contractor was informed that the claimed invoices were not supported by the suppliers and subcontractor's claims that, if applicable, have been received and are motivated by the time-extension. To this end, the EY Expert warns that an amount was agreed in Minutes 7, but subsequent revisions were made as observed in Official Letter EGROS-095/2020. On the other hand, in his Second Report, the EY Expert states that the relevant invoice contained a total amount of US$ 180,299.20 (One hundred eighty thousand two hundred and ninety-nine US dollars 20/100 cy) for the period from July 10, 2018 to July 23, 2018, but for purposes of expense compensation, only the corresponding proportional part from July 19 to 23 would apply for the July 2018 reimbursement; that is, 5 of the 14 days of service received, for this reason he divided five by fourteen, which yielded a percentage of 35.71%, that percentage being multiplied by the total amount of the invoice (US$ 180,299.20) (One hundred and eighty thousand two hundred and ninety-nine US dollars 20/100 cy) from which he obtained a result of US$ 64,392.57 (Sixty-four thousand three hundred and

[333] Appendix 114 of the First Report of Expert Cámara.
[334] Appendix 115 of the First Report of Expert Cámara.
[335] First Report, page 63.
[336] First EY Report, page 44.

ninety-two US dollars 57/100 cy), which is the amount that must be taken into account.

420. At this point, the Tribunal considers that in the communication DUNOR states: "*we attach Revision No. July 3, 2018 for an amount of USD 500,089.32, reconsidering the claimed period from July 19 to 31, 2018, the electronic files concerning the aforementioned modifications are attached hereto, requesting that it be scheduled for review as soon as possible*".

421. Now, when reviewing the Meeting Minutes 7[337], which is signed by both Parties, it can be seen that they indicate "*From section 3.5 of the Agreement corresponding to the invoices for the month of July 2018, the appropriate amount agreed is US$ 560,470.12*". In the "*Invoice control chart for the month of July 2018, reconciled for section 3.5 and the amount applicable to date"*, Invoice ICI 258 appears for a value of US$ 68,336.98 (Sixty-eight thousand three hundred and thirty-six US dollars 98/100 cy) and the following is stated:

| COMMENTS FROM MEETING ON DECEMBER 2 AND 3, 2019 | COMMENTS FROM MEETING ON JANUARY 23 AND 24, 2020 | STATUS |
|---|---|---|
| DUNOR INDICATES THAT IT HAS DELIVERED ALL THE EXISTING INFORMATION DURING THE NEGOTIATION PROCESS WITH THE SUBCONTRACTOR, IN COMPLIANCE WITH THE PROVISIONS OF SECTION 3.5 OF THE AGREEMENT<br><br>CFE REITERATES THAT ONCE THE INFORMATION IS DELIVERED AND REVIEWED, CFE WILL BE ABLE TO RECOGNIZE THE PROPORTIONAL PART OF THE AMOUNT FROM JULY 17 TO 23 EXCLUDING THE FOLLOWING ITEMS | AFTER ANALYSIS OF THE DELIVERED INFORMATION, THE ORIGIN OF THE FOLLOWING AMOUNT OF: $ 68,336.98 WAS AGREED | RECONCILED |
| TRANSFERS TO ITS PLACE OF ORIGIN - INCORPORATION FREIGHTS - FINANCIAL EXPENSES - ELECTRIC ENERGY | | |

[337] Appendix 60 of the First Expert Cámara Report.

422. As can be seen, the Minutes show that the amount of US $ 68,336.98 (Sixty-eight thousand three hundred and thirty-six US dollars 98/100 cy) was settled, which implies that there was an agreement between the Parties on the matter.

423. However, the Commission requested to adjust the days to be recognized. In making said adjustment, an amount of US$ 48,801.30 (Forty-eight thousand eight hundred and one US dollars 30/100 cy) is obtained, which is the one indicated by the Expert Cámara. Although it is clear that the Parties acknowledge that they did not reach final agreements, in this case, there was a first reconciliation that was requested to be adjusted by the number of days without DUNOR's objection. Due to the foregoing, the Tribunal considers that the amount to be considered is the one indicated by Expert Cámara.

424. On the other hand, it is worth noting that, in his First Report the EY Expert additionally includes a "*total of US$ 971,935.48 of expenses where, according to the documentation analyzed, we determined that the transactions were incurred during the Analysis Period, are directly related to the Project and correspond to concepts defined in section 3.5 of the Agreement. However, as of the date of presentation of this Report, these have not been paid by the Contractor*"[338]. For its part, DUNOR has specified that it claims this amount despite not having been paid. To this end, it states that "*Since this non-payment is directly attributable to CFE, DUNOR does claim this amount in arbitration"*[339]. For their part, Expert Cámara indicates that "*US$ 979,670.48 do not meet the criteria established in the Agreement, that is, they have not been paid by the Contractor to its subcontractors."*[340] Therefore, he considers that such amount is not appropriate.

425. Thus, what the Tribunal must determine is whether, in the event that the Contractor pays said amounts, it would have the right to recover this amount from CFE. The Tribunal considers that to the extent that the EY Expert affirms that the requirements to be recognized are met, except for the payment, and the Expert Cámara does not make any other objections regarding this item except the payment, said amount should be paid by CFE. In any case, as the Agreement requires that the amounts to be reimbursed by CFE have been paid, such

[338] First EY Expert Report, page 47.
[339] Dunor Closing Submission, paragraph 118.
[340] First Expert Cámara Report, paragraph 319.

reimbursement shall be made when DUNOR proves to CFE the effective payment of the amounts referred in this case.

#### 12.1.2.5.3.2 Expenses for claims transferred from section 3.2 to 3.5

426. In its Complaint, DUNOR indicates that in November 2019, the Commission requested the reclassification of some invoices from section 3.2 to 3.5 of the Agreement, to which DUNOR proceeded.

427. In its Rejoinder, the Commission stated that it "*proposed the reclassification of these expenses from 3.2 to 3.5 since they did not comply with the assumptions set forth in section 3.2, since this should only include the indirect costs of the work...*"[341] and adds that "*after several months when DUNOR understood this fact that finally in the minutes of November 20 and 21, 2019 in its paragraph 1 its reclassification was agreed without granting its appropriateness in Section 3.5*"[342].

428. In relation to the foregoing, the Tribunal finds that in Minutes of Meeting No. 04 of November 20 and 21, 2019 held between the Parties, it is stated[343]:

| |
|---|
| CFE, once the corresponding area has been consulted, makes the proposal to reclassify some invoices claimed for expenses since they are considered to correspond to Sections 3.1, 3.3 and 3.5, which are shown in the Chart attached to the Minutes.<br>DUNOR agrees and will proceed to this reclassification during the months recognized by CFE that cover from July 17, 2018 to March 14, 2019. |
| The criteria for this reclassification of the sections are:<br>To Section 3.1 Financial, Insurance, and Guarantees - Invoices associated with tax advisory and management services (GPC consultants).<br>To Section 3.3 Central Offices - All the costs of the Project that correspond to Spain - such as project personnel, travel, and rents<br>To Section 3.5 Third-Party Claims - Direct costs will be included, such as: electric power for tests, direct personnel, consumables, etc. |

429. Thus, according to these Minutes, the reclassification was due to the fact that the Commission considered that only indirect costs should be included in section 3.2 of the Agreement and that direct costs should be reclassified in section 3.5.

[341] Rejoinder and Reply to CFE Counterclaim, paragraph 86.
[342] Rejoinder and Reply to CFE Counterclaim, paragraph 87.
[343] Appendix R-114.

Aspect on which DUNOR expressed its agreement.

430. In its Complaint, DUNOR states that it submitted the documentation required for the expenses derived from the Third-Party Claims; adding that the Commission made observations, in response to which it resubmitted the corresponding study[344]. It adds[345] that CFE required the provision of new information that exceeded section 3.5 of the Agreement, for which it indicates that the Agreement does not subject the compliance of the Commission's obligations to the manner in which the Plaintiff presents its invoices, since "*it only indicates that 'The Contractor will deliver the documentary supports of the claims per calendar month no later than the last business day of the following month'*"[346].

431. DUNOR states[347]that, in June and July 2019, DUNOR delivered to CFE the information required for the analysis of these concepts in accordance with sections 3.5 and 5 of the Agreement. In this sense, the following were presented: "*(i) the claimed invoices, (ii) their respective accounting entries, (iii) proof of payment (if this did not exist, CFE was informed), (iv) contracts, (v) claims of suppliers and (vi) the official letters shared with suppliers where the commercial efforts made to minimize the impact of third-party claims are evidenced*."

432. For its part, the Commission states that the Parties have not reached a formal agreement regarding the expenses of section 3.5 of the Agreement. For this purpose, Official Letter RGROS-101/2020 of April 24, 2020 was sent, where the Contractor was informed that the invoices claimed are not based on claims from suppliers and subcontractors that have been received and that are motivated by the extension. In the same Official Letter, evidence was requested of commercial efforts to minimize the impact of the claims received by Third Parties, this being essential for the analysis and origin of the concepts and amounts claimed. CFE adds that the documents produced by DUNOR and ordered by this panel should not go unnoticed by the Arbitral Tribunal, delivered deficiently in Categories 7, 8, 9, 10, 11, 12, 13, and 141, since these correspond to personnel administration and not to the specific scope of the tasks entrusted. It adds that the requested

[344] Complaint, paragraphs 110-112.
[345] Reply and Answer to the Counterclaim, paragraph 141.
[346] Dunor Reply and Answer to the Counterclaim, paragraph 144.
[347] Dunor Reply and Answer to the Counterclaim, paragraph 134.

Execution Programs must correspond to activities that are a consequence of those allocated in the Recognition Period. It also advises that no minutes of completion of the work carried out by the subcontractors or any document releasing any existing outstanding debts of the subcontractors were submitted.

433. CFE states that "*DUNOR did initially consider the correct criteria for the invoices claimed in section 3.5, that is, it knew what was necessary to present the claims of Suppliers or Subcontractors, clarifying that precisely with respect to those invoices mentioned, once the comments had been addressed, it presented the documents in accordance with the Agreement, but only for three companies, and not for the rest of the alleged claims of third parties, which to date it has not presented, and that it also failed to deliver them in Procedural Order No. 4*"[348].

434. In its Closing Submission, CFE stated[349]that "*during the course of the hearing, it became clear that there were no Third-Party Claims, that is, that the Plaintiff's Expert only limited himself to pointing out that the invoices that the latter submitted to him for this concept and that supposedly had been paid for were within the period*". It adds that the EY Expert "*did not verify that these invoices included claims for the work related to the allocated period*"[350], "*his analysis focused on corroborating that the invoice was presented during the period and had been paid without analyzing and corroborating the veracity or its appropriateness and thus with his expertise and his methodology to determine that the invoices are derived from third-party claims for the work affected by the extensions during the agreed period and that comply with the attributes that are directly related to the Works, reasonable and documente*d"[351]. It adds that Expert Cámara pointed out: "*we have not been able to observe, where effectively allowed and shown that there was a claim, not just an expense, not only to quantify the expense that is being argued, there is no reliable evidence that the activities carried out in reality have been due to cause and effect of these deferrals on the dates of Provisional Acceptance*"[352].

[348] Rejoinder, paragraph 151.
[349] Closing Submission, paragraph 60.
[350] Closing Submission, paragraph 61.
[351] Closing Submission, paragraph 61.
[352] Closing Submission, paragraph 62.

435. Given the positions of the Parties, there are several aspects that the Tribunal must determine: first, what is the meaning of third-party claims in the present case, to determine whether or not there are claims; secondly, if the requirements demanded by the Agreement are accredited and, in particular, if the expenses that are claimed derive from the extension of the date of provisional acceptance; and, finally, the principles that should govern the proof of efforts to minimize the impact of the claims received.

436. In relation to the foregoing, the Tribunal finds it necessary to refer to the Agreement entered into by the Parties, which provides:

> *"3.5. THIRD-PARTY CLAIMS.*
>
> *"This item includes all claims from suppliers and subcontractors received by THE CONTRACTOR due to the extension of the Scheduled Provisional Acceptance Date and/or the reason that gave rise to this impact as described in this Agreement and in adherence to Clause 25.5 of the Contract. At this point THE CONTRACTOR will make all commercial efforts possible to minimize the impact of claims received by third parties.*
>
> *"In this item, THE CONTRACTOR must present all the contractual and accounting information and all that is required for the analysis and origin of the concepts and amounts claimed by third parties.*
>
> *"Any document that, in the absence of the above, reliably demonstrates the costs of the above concepts"* (emphasis added).

437. To the extent that paragraph 3.5 of the Agreement refers to the claims received, it is necessary to specify the scope that must be given to said expression, and if it refers to the existence of a formal document called a claim. In this regard, it is noted that in accordance with the Definition of the Dictionary of the Royal Spanish Academy of Language, to claim is "*To request or demand something with the right or authority*". In other words, the notion of claim does not derive from the fact that such name is given to a request, but rather from the fact that something is demanded, in this case a payment, which, in accordance with the clause, causes the extension of the Scheduled Provisional Acceptance Date and/or the reason that gave rise to this impact.

438. The foregoing is also in line with Clause 25.5 of the Contract, which

establishes that in the event of delay of the Scheduled Date for Provisional Acceptance, the Contract "*will be terminated, unless the Parties agree in writing on terms and conditions that will reasonably compensate the Contractor for any reasonable and documented costs directly related to the Works that the Contractor may incur … as a consequence of any further delay*". In other words, from a contractual point of view, what is essential is that the expense for which payment is required is caused by the delay.

439. This is also consistent with what the Experts stated. In fact, Expert Cámara stated during the Hearing that what is important is to establish that the expense must be caused or derived from the extension. To this end he stated:

> *"For example, in section 3.5 which I present, I have a project under development and I have a series of documents received from my suppliers for the services that they are performing for me, but that may not necessarily originate from a claim, but rather in the service that I have been developing normally in my project and that coincides with the period in which I can make a claim. What we reasonably try to establish is that there is documentation proving that they are indeed being claimed by someone and I say claim because only those that are caused or derived from the extensions in the program can be included. I found, for example, an invoice that was included in the file, which corresponds to a car accident and they pay insurance, well, yes, it is in the period, but what does a car accident have to do with the deferral in time of this project, it is not a consequence of this deferral in the project, I don't know what its origin is, but it does not fit in that sense. There are invoices that are for administration personnel and what reasonably has to be verified is what that personnel is doing, if it is personnel that is directly involved in the Works and that is making progress, why is this a claim? In other words, what we therefore reflect in our report is, are they likely to be recognized? Yes, but it remains to be established what actually corresponds to a claim made by a supplier, a claim that is derived directly from or is a consequence of a deferral in the Performance Tests. That is the criterion we follow, if we cannot establish that traceability, as in the case of 3.5, we are not saying that they are not claimable, no, at the moment there are not enough elements that allow us to consider them that way, but there are other elements, such as the existence of the invoice and that it has been paid, for example.*
>
> *Roberto Hernandez: What you did was, let's say, analyze the cause of the invoice.*
>
> *Lorenzo Camara Anzures: That's right. The cause, correct"* (emphasis added).

440. Likewise, the EY Expert stated that it was verified that the expenses were derived from the extension. In this regard, he stated the following during the

hearing:

> *"In addition to what section 3 says, the undersigned, EY, analyzed one by one all the expenses subject to analysis, I repeat, the 6 million 285 thousand. One by one. And what did we do? Proving that they were, first, incurred by the Contractor. What did we check? First, that the expenses correspond to services provided by their Suppliers or Subcontractors derived from the extension. Second, that the documents demonstrate the commercial efforts that the Contractor made to minimize the impact of the claims. Third, that there is evidence of the provision of the service, such as: work estimates, logs. Four, that the expenses incurred and invoiced correspond to the hours and services. Fifth, that the invoice corresponds to the amounts and evidence. Sixth, of course, the proof of payment, which corresponds to the expense. And finally, the accounting record"* (emphasis added).

441. Therefore, the Tribunal considers that what is crucial is not that the request for payment is called a claim, but that there is an invoice that corresponds to expenses derived from the extension of the scheduled date for Provisional Acceptance.

442. However, with regard to the reference to the accreditation that the expenses are a consequence of the extension of the provisional acceptance, it is pertinent to point out that CFE states[353] that to determine the appropriateness of the expenses in section 3.5, the EY Expert claims to have reviewed and analyzed the information, without explaining the methodology that led him to conclude the amounts in section 3.5. For this purpose, CFE makes a list of companies for which it states that CFE does not have information:

| **SUBCONTRACTORS** | **COMMENTS** |
|---|---|
| INTEGRAL COMMISSIONING SERVICE SAS | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR. |
| | - - The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| EDILBERTO MARTINEZ HERRERA | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |

[353] Rejoinder and Reply to CFE Counterclaim, paragraph 127.

| | |
|---|---|
| ICIPEM INSTRUMENTACIÓN CONTROL Y PUESTA EN MARCHA SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| MHO ENGINEERING SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| INGENIERÍA CONTROL E INSTRUMENTACIÓN SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| SEPIEC SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel, only of two people, and direct cost work is observed within the scope of the Contract without any allocation by the Commission.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| TAMOIN SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| PORRAS ARMENDÁRIZ CONSTRUCTORES | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| TURBOMEX REFACCIONES | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |
| MANTENIMIENTO Y SEGURIDAD INDUSTRIAL SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. |

443. CFE adds[354] that with all the companies described in the chart above, the Plaintiff has deliberately entered into contracts and/or addenda for the purpose of contracting Administrative Personnel, clarifying that some of these initially did have a specific work purpose to be carried out within the scope of the Contract, however, these were modified through addenda, so that during the recognition period of the Agreement they remained with the purpose of administrative personnel, i.e., they do not have a specific purpose that allows one to define whether the activity or work carried out was affected or required due to the extension of the Scheduled Provisional Acceptance Date or was for the execution of a specific work task that forms part of the scope of the Contract and that was not affected.

444. CFE emphasizes that, during the document disclosure phase of this proceeding, the Commission requested, in Category 7 of the documents, the description of the works contracted by DUNOR during the extension referred to in the Agreement. CFE specifies that the Plaintiff did not add additional documentation, and only stated that "*what was requested can be found in Doc. EY-22, Doc. EY-36*", despite the fact that the Arbitral Tribunal ordered that if the object of the contracted works could not be specified with said document, DUNOR should produce such contracts. It then indicates that Order 4 was breached, and that there is a risk of overpayments for work included in the original Contract or for recovering delays that are outside the Agreement.

445. CFE states[355] that among these contracts is Work Order No. 157 AD 06102 of the company SEPIEC, formalized in October 2018, for cabling concepts. In this regard, it advises that it is a scope of the contract and Administrative Personnel (official and electrical assistant) that has the category of someone who is going to carry out the work, for an amount of MXN$ 1,516,577.44 (One million five hundred sixteen thousand five hundred and seventy seven pesos 44/100 cy). Therefore, it advises that it is claiming the cost of these administrative personnel, for the simple fact of having executed these activities within the period of recognition, and that they are works in the scope of the Contract where the cabling activity was not affected in any way by the extensions, therefore DUNOR

[354] Rejoinder and Reply to CFE Counterclaim, paragraph 129.
[355] Rejoinder and Reply to CFE Counterclaim, paragraph 132.

does not provide evidence of the work carried out by the personnel that it intends to be recognized.

446. CFE notes with respect to the personnel claimed from the companies listed in the chart in its Rejoinder[356], that in addition to the aforementioned management contracts, there are only reports of hours and there is no logbook of work performed or any report that allows the verification of the activities carried out by these personnel, since they only present the hours worked, including overtime, without further information that can determine if this work was affected by the recognition period established in the Agreement[357].

447. CFE adds[358] that the Plaintiff did not present evidence of the activities carried out by the personnel claimed by the aforementioned companies. This information was initially requested by email dated February 15, 2019 and the last one during the document production phase. In the last one, the report of the activities carried out by the personnel of each of the subcontractor companies that claimed costs as Third-Party Claims was requested, but in an act of procedural bad faith, the Plaintiff began to express various objections, among them that the report of the activities carried out by the subcontractors has been shared with the Commission through: (i) Work Logs,(ii) Reports and Schedules and (iii) coordination meetings between the Parties, documentation that does not does not support or specify the activities performed by the claimed personnel, since specific information is required on the work carried out by the personnel related to the impact of the recognition period and not on work logs of the Contract or reports and schedules with general activities of said Contract, and that the only thing that emerges is a mixture of works from Clause 25.5 of the Contract and those within the scope of the 313 CC Empalme II Project.

448. CFE notes[359] that Procedural Order No. 4 stated that "*However, if there are other documents with the requested information, they must be produced*." As a consequence of the foregoing, the Plaintiff, in addition to what was referred to in

[356] Rejoinder and Reply to CFE Counterclaim, Chart that works in paragraph 128.
[357] Rejoinder and Reply to CFE Counterclaim, paragraph 133.
[358] Rejoinder and Reply to CFE Counterclaim, paragraph 134.
[359] Rejoinder and Reply to CFE Counterclaim, paragraph 135.

the previous paragraph, only presented two documentaries consisting of reports on the activities of the companies (i) SEPIEC SA DE CV and (ii) PORRAS ARMENDÁRIZ CONSTRUCTORES, which were presented incomplete and concerned personnel that does not correspond to that claimed, for which reason it makes the following observations: i) regarding the company SEPIEC SA DE CV, it states that it presents reports only for a fraction of the period claimed and not for the entire time, as well as a minimum fraction of the personnel that worked in the claims, and from the simple reading of these reports, activities within the scope of the Contract can be deduced, including repairs of works poorly executed by the Contractor, which is recorded in the information provided in Category 12 of the Procedural Order. CFE points out that the Plaintiff recklessly states that there were no works within the scope of the Contract, but as can be seen from the documents, the activities of the claimed personnel are not apparent. ii) With regard to the company PORRAS ARMENDÁRIZ CONSTRUCTORES, CFE points out that it presents a report on the activities of personnel other than the claimed personnel, which appears in the information provided by DUNOR regarding point 12 of Procedural Order 4. CFE observes that, in an attempt to confuse, the Plaintiff produces documents that do not correspond to the claimed personnel and offers reports that are not within the recognition period, and that is why the Commission asks the following question: why do you have activity reports for specific personnel that are not the personnel claimed, while no activity reports were generated for the personnel claimed within the invoices in accordance with the Agreement? In its Opinion, the response is simple: DUNOR does not have the report of personnel activities during the recognition period of the Agreement. It adds that DUNOR must "*Prove in Documentary Form"* its appropriateness and not transmit this burden to the Defendant.

449. In relation to all of the above, the Tribunal finds that the First EY Expert Report indicates that the supporting documentation was requested and it was verified that "*ii. The claimed expenses are directly related to the Project and correspond to services provided (sic) by suppliers or subcontractors derived from the extension of the Scheduled Provisional Acceptance Date*"[360] (emphasis added).

450. Likewise, in the Second EY Expert Report, when carrying out the

[360] First Report, page 44.

corresponding analysis, it is indicated that the expenses *"correspond to services provided by suppliers or subcontractors derived from the extension of the Scheduled Provisional Acceptance Date*"[361] (emphasis added).

451. Additionally, the Tribunal finds that Documents DOC.EY.22 and DOC.EY.36 are included in the file, as an appendix to the First EY Expert Report, in which the corresponding invoice is incorporated with respect to each company whose payment is claimed, and inside a folder called evidence, various information, such as the hours employed and, in some cases, other documents. In addition, Appendix DOC.EY.35 was attached, which contains a chart indicating the following elements to be verified for each expense:

| Ref. in PT | Description | Revised element |
|---|---|---|
| 1 | Expense related to the Work | The type and nature of the expense is directly related to the Work (Combined Cycle Power Plant 313 CC Empalme II) and is reasonable according to the concept of expense described in Section 3.5 of the Agreement |
| 2 | Incurred (accrued) Analysis Period | The expense took place and was accrued in the Analysis Period agreed between the Parties (July 18, 19 to March 14, 19) |
| 3 | Contract/Order | The expenses incurred correspond to the hours, services, personnel, rates, etc., established with the subcontractors and suppliers in the contracts entered into by Dunor Energía. |
| 4 | Evidence of expense | There is evidence of the provision of the service and/or receipt of the goods, such as: authorized work estimates, logs of hours worked, attendance lists, etc. |
| 5 | Invoice | The invoice corresponds to the amounts and evidence of the services received and the amounts agreed in the Contract and/or Order. |

[361] Second Expert Report, page 34.

| | | |
|---|---|---|
| 6 | Payment | The proof of payment corresponds to the expense (invoice). In cases where the payment incorporated several invoices, we verify the integration of the total payment made. |
| 7 | Payment accounting record | We note the policy of the accounting record corresponding to the payment. |

452. In this way, according to this chart, what the expert verified was that the expense was related to the work; incurred in the analysis period agreed by the Parties; corresponds to hours established in the Contracts; there is evidence of the provision of the service; the invoice corresponds to the services received or the agreed amounts, and that it has been paid. However, the question raised by the Commission is whether in these cases the service provided corresponded to the normal execution of the Contract, in which case the service would be paid with the remuneration of the Contract. As already seen, in his two reports the EY Expert affirmed that the services provided were "*derived from the extension"*.

453. On the other hand, the Tribunal finds that in its First Report[362], Expert Cámara found that the sum of US$ 2,791,594.29 (Two million seven hundred and ninety-one thousand five hundred and ninety-four US dollars 29/100 cy) "*complies with the guidelines of the Agreement, that is, pertains to work related to the extension of the Provisional Acceptance*".

454. Additionally, in several cases, the two Experts, EY and Cámara, considered that third-party claims were admissible, even when for different values, as can be seen below, based on the information in Document EY-41 that accompanies the Second Report from the EY Expert:

| **SUBCONTRACTORS** | **COMMENTS OF THE COMMISSION** | **WHAT DOCUMENT EY-41 INDICATES** |
|---|---|---|
| INTEGRAL COMMISSIONING SERVICE SAS | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR. | According to Document EY-41, Expert Cámara proposes recognizing $1,686.85, while the EY Expert indicates that $3,897.49 should be recognized |

[362] First Expert Cámara Report, paragraph 318.

| | | |
|---|---|---|
| | - The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | |
| EDILBERTO MARTINEZ HERRERA | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | According to Document EY-41, Expert Cámara proposes recognizing $47,306.05, while the EY Expert indicates that $41,178.41 should be recognized |
| ICIPEM INSTRUMENTACIÓN CONTROL Y PUESTA EN MARCHA SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | This company appears in two concepts in Document EY-41. In the first, Expert Cámara proposes recognizing $8,048.81, while the EY Expert indicates that $3,222.00 should be recognized<br>In the second, both Expert Cámara and the EY Expert indicate $8,179.74 as the value to be recognized |
| MHO ENGINEERING SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | According to Document EY-41, Expert Cámara proposes recognizing $67,416.79, while the EY Expert does not indicate any figure to be recognized, since he considers that it is part of another section. |
| INGENIERÍA CONTROL E INSTRUMENTACIÓN SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the | According to Document EY-41, Expert Cámara proposes recognizing $10,591.21, while the EY Expert indicates that $127,185.20 should be recognized. |

| | | |
|---|---|---|
| | impact of claims received by third parties. | |
| SEPIEC SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel, only of two people, and direct cost work is observed within the scope of the Contract without any allocation by the Commission.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | This company appears in two items in Document EY-41. In the first, Expert Cámara proposes recognizing $7,341.99, while the EY Expert indicates that $7,911.82 should be recognized<br>In the second, Expert Cámara indicates a value to be recognized of $2,824.91 while the EY Expert indicates as a value to be recognized $3,199.98 |
| TAMOIN SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | According to Document EY-41, Expert Cámara proposes recognizing $13,717.96, while the EY Expert indicates that $15,677.66 should be recognized |
| PORRAS ARMENDÁRIZ CONSTRUCTORES | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | According to Document EY-41, Expert Cámara proposes recognizing $4,369.93, while the EY Expert indicates that $4,540.12 should be recognized |

| | | |
|---|---|---|
| TURBOMEX REFACCIONES | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | According to Document EY-41, Expert Cámara does not propose to recognize anything to this contractor, while the EY Expert indicates that $8,369.42 should be recognized<br>In another item of Document EY-41, Expert Cámara does not propose to recognize anything to this contractor, while the EY Expert indicates that $7,899.63 should be recognized |
| MANTENIMIENTO Y SEGURIDAD INDUSTRIAL SA DE CV | - The Commission does not have evidence of the activities carried out by these personnel.<br>- The Commission does not have a third-party claim against DUNOR.<br>- The Commission does not have evidence of possible commercial efforts to minimize the impact of claims received by third parties. | In relation to this company, it can be seen that, as it appears in the expert opinions, its name is TURBO-MEX REFACCIONES Y MANTENIMIENTO INDUSTRIAL SA DE CV, for which reason it is included in the previous section. |

455. In addition to the above, Document EY-35 refers to each of the indicated Contractors and it is noted in the checklist as an expense related to the Work.

456. From the foregoing it can be deduced that, except in one case, the two experts considered that recognition was appropriate, although for different values.

457. However, in his Second Report, Expert Cámara added the following:

> *"149. It is necessary to indicate that, among the documents that were put before us, we detected that in the Redfern Schedule, CFE requested additional evidence, related to the contracts that specified the activities that the Suppliers or subcontractors carried out during the analysis period, a requirement which in our opinion is necessary to validate the appropriateness of the recognition by CFE, which was not provided to CFE and therefore generates a reasonable doubt regarding their validity and Recognition.*
>
> *150. Due to this, this Expert informs the Arbitral Tribunal that these claims lack documentary elements that accredit and validate that these works were carried out as a result of the extension of the Provisional Acceptance".*

458. It is pertinent to point out that in his presentation at the hearing, Expert

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Cámara said (transcription of the third day):

> *"However, contrary to what the EY Expert stated, we did not have or did not find all the documentation that, in our opinion, meets or enforces all the elements that are needed to be able to be compensated under this section. For example, as I mentioned, in the part where these third party claims were agreed, they are invoices in particular referring to Siemens, to the suppliers Siemens and Skoda, where the claim made by them is fully documented, there is all the reliable documentation and for that reason they reach a conciliation. In this case, the Commission has requested information that up to now we have not been able to see, which effectively allows us and demonstrates to us that there was a claim, not just an expense, not only quantifying the expense that is being argued, there is no irrefutable evidence that the activities carried out in reality have been due to the cause and effect of these deferrals on the Provisional Acceptance dates. Nor do we see that in logbooks these personnel have been indicated in a timely manner. And I emphasize this because there are many or there are several administration contracts in general that are being included in this section, which, although it is true that they could effectively belong to this section to be recognized, in our opinion, they have not been duly accredited. In fact, even, if I remember correctly, in the request for additional information by the Commission in the Redfern, information was requested regarding this. And in the responses that Dunor gave to the Commission, it seems to me, if I remember correctly, that they indicated that they did not have them. What is a fact is that they did not provide information that would allow us to assume that they actually correspond to effects generated by the deferral of the Provisional Acceptance dates. This is what is related to Topics 3.2 and 3.5."*

459. Thus, in his Second Report and during the hearing, Expert Cámara considered that the activities carried out by the personnel had not been proven, and that, additionally, the existence of a claim had not been proven, which the Tribunal finds is not consistent with his first Report, in which he had stated that the sum of US$ 2,791,594.29 (Two million seven hundred and ninety-one thousand five hundred and ninety-four US dollars 29/100 cy) "*complies with the guidelines of the Agreement*".

460. However, the EY Expert maintains in his opinion that he verified that the expenses that he considers should be recognized were made necessary by the extension of the Provisional Acceptance date. In addition, in his first report, Expert Cámara considered viable various claims indicating that they were derived from the extension, only for amounts different from those estimated by the EY Expert, i.e., that in that first opinion, Expert Cámara considered that said

expenses met the requirement to which reference has been made. It was in his second opinion that he stated that these sums should not be recognized.

461. On the other hand, the Tribunal must observe that in various cases the EY Expert considered that certain expenses should not be recognized because they did not meet the said requirement. Likewise, in other cases, in its opinion and its appendixes, it indicates the reasons why it considers that an expense should be recognized. The Tribunal concludes that the EY Expert assessed the claimed expenses and their relationship to the extension of the provisional acceptance date, which is required by the Agreement.

462. On the other hand, the Agreement establishes that "*THE CONTRACTOR shall make all possible commercial efforts to minimize the impact of claims received by third parties*." However, as can be seen, in this case what the Agreement imposed on the Contractor is an obligation to act, the content and scope of which will depend on each specific case. That is why it is in each case that it must be evaluated whether or not there was room to minimize the impact of the third party's claim and, if so, require proof of the action undertaken. At this point, the Tribunal recalls that in matters of civil liability there may be a duty to mitigate the damage on the part of the victim and, in such a case, it is the person who is called on to compensate the damage who must demonstrate that in the circumstances the victim could have mitigated the damage. In this context, in each specific case, it is up to CFE to invoke that the damage could have been mitigated, and that therefore it should not responsible for the corresponding amount.

463. Based on the foregoing, the Tribunal proceeds to examine the different amounts claimed and their quantification by the experts.

464. The Plaintiff requests that the Commission be ordered to pay US$ 5,913,324.53 (Five million nine hundred and thirteen thousand three hundred and twenty-four US dollars 53/100 cy) by reason of the provisions of paragraph 3.5 of the Agreement.[363]. The Commission considers as appropriate an amount of US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six

[363] Dunor Answer and Reply, paragraph 168 and Dunor Closing Submission, paragraph 116.

US dollars 65/100 cy)[364].

465. For his part, the EY Expert determined a total of US$ 4,773,034.30 (Four million seven hundred and seventy three thousand thirty four dollars 30/100 cy) for Third-Party Claims incurred by DUNOR during the analysis period[365], which in his opinion have the supporting documentation indicated in the Agreement and that, according to the nature of the transactions, are directly related to the Project.

466. Expert Cámara said in his report "*that the Parties have agreed on the amount of US$ 1,422,603.55*". He added that, additionally, the sum of US$ 2,791,594.29 (Two million seven hundred and ninety-one thousand five hundred and ninety-four US dollars 29/100 cy) was identified, which "*complies with the guidelines of the agreement, that is, they pertain to works related to the extension of the Provisional Acceptance, which belong to the affected period and which have actually been accrued or paid for by the Contractor*" (emphasis added). Finally, it indicated that "*US$ 979,670.48 does not meet the criteria established in the Agreement, that is, they have not been paid by the Contractor to its Subcontractors, for which reason I consider that they are inappropriate"*.

467. Since in his opinion, the EY Expert indicates that he took the amounts indicated by DUNOR to reach the indicated conclusions, the Tribunal considers it appropriate to start from the calculations made by said expert to compare them with the opinion of Expert Cámara and the observations made by the Defendant.

468. The EY Expert indicates that he verified that the following requirements had been met:

> *"The expenses presented have been incurred (accrued) during the Analysis Period."*
>
> *"The claimed expenses are directly related to the Project and correspond to services provided by suppliers or subcontractors derived from the extension of the Scheduled Provisional Acceptance Date."*
>
> *"The expenses are reasonable and have the supporting documentation required in section 3.5 of the Agreement, which proves that they were actually incurred by the*

[364] Rejoinder and Reply to CFE Counterclaim, paragraph 154 and CFE Closing Submission, paragraph 63.
[365] Second EY Report, page 37.

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*Contractor, for this purpose, in this point we verify, including but not limited to:"*

*"There is evidence of the provision of the service, such as: authorized work estimates, logs of hours worked, attendance lists, etc."*

*"The invoice corresponds to the amounts and evidence of the services received."*

*"The proof of payment corresponding to the expense. In cases where the payment incorporated several invoices, we verify the integration of the total payment made."*

*"The accounting record corresponding to the payment of the expense."*

469. Based on the foregoing, the EY Expert refers to the reclassified expenses from section 3.2 of the Agreement to section 3.5, for an amount of US$ 4,124,905.61 (Four million one hundred twenty-four thousand nine hundred and five US dollars 61/100 cy) and states:

*"1. A total of US$ 3,624,304.66 meets the specifications indicated to be credited as expenses directly related to the Works in accordance with section 3.5 of the Agreement (points i, ii and iii above)*

*"2. A total of US$ 277,722.30 corresponds to expenses for the purchase of supplies for the Power Plant, therefore they do not correspond to the concept of Expenses for Third-Party Claims and cannot be assigned to any of the items of the concept of Expenses for Personnel Management and Field Administration. Therefore, although they correspond to expenses incurred by Dunor Energía, they cannot be compensated under the provisions of the Agreement.*

*"3. A total of US$ 54,523.89 corresponding to expenses for "Testing services and commissioning of transformer protection boards and 400 Kv line for GT1, GT2, and TV" where the Parties agreed to discard the amount to be claimed.*

*"4. A total of US$ 168,354.76 where the expenses claimed by Dunor Energía correspond to the amounts withheld from Subcontractors for "Quality Retention" where, although they correspond to expenses directly related to the Works, reasonable and documented, said amounts have not been reimbursed to the subcontractor, therefore, as of the date of presentation of the report, this expense has not been incurred by the Contractor. This amount also considers adjustments made to the amount claimed for the Analysis Period.*

*"Finally, as we mentioned in section 4.3 of the report, we determined a total of US$*

*90,936.34 of integrated expenses in the concept of Expenses for Personnel Management and Field Administration that, according to their concept and nature, correspond to Expenses for Third-Party Claims, for which they must be compensated in section 3.5 of the Agreement".*

470. In this way, the EY Expert indicates a value of US$ 3,624,304.66 (Three million six hundred twenty-four thousand three hundred and four US dollars 66/100 cy) which, in his opinion, meets the conditions to be accredited as expenses directly related to the Works in accordance with the section 3.5 of the Agreement[366]. He also adds that there is a total of US$168,354.76 (One hundred sixty-eight thousand three hundred and fifty-four US dollars 76/100 cy) that corresponds to the amounts withheld from subcontractors for "*Quality retention"* where "*although they correspond to Expenses directly related to the Works, reasonable and documented, these amounts have not been reimbursed to the subcontractor, therefore, as of the date of presentation of the report, this expense has not been incurred by the Contractor. This amount also considers adjustments made to the amount claimed for the Analysis Period*"[367].

471. For his part in his expert report, Expert Cámara indicates a reclassified amount for the month of July, which according to what he indicates was agreed upon by the Parties, of US$ 365,726.90 (Three hundred and sixty-five thousand seven hundred and twenty-six US dollars 90/100 cy)[368], and reclassified amounts from the months of August 2018 to March 2019, amounting to US$ 2,791,594.29 (Two million seven hundred and ninety-one thousand five hundred and ninety-four US dollars 29/100 cy)[369], for a total of US$ 3,157,321.19 (Three million one hundred and fifty-seven thousand three hundred and twenty-one US dollars 19/100 cy)[370].

472. The EY Expert indicates that he analyzed the differences with the Opinion of Expert Cámara and presented his considerations in the document called "Analysis of the variations of the amounts determined for compensation by EY and Expert Cámara Third-Party Claims" (Doc. EY-41). He adds that "*for some*

[366] First EY Expert Report, page 46.
[367] First EY Expert Report, page 49.
[368] Expert Cámara Report, Chart 7, pages 65 and 66.
[369] Expert Cámara Report, Chart 8, page 71.
[370] Expert Cámara Report, Chart 9, page 74.

*items, the difference in the amounts is due to more than one cause and therefore, we do not agree with the methodology used by Expert Cámara, nor with the amount that determines that the Commission should compensate the Contractor for USD$ 3,157,321.19 (Three million one hundred and fifty-seven thousand three hundred and twenty-one pesos 19/100 cy) for this concept of 'Expenses reclassified from section 3.2 to section 3.5 at the request of CFE'"*.

473. The Tribunal then proceeds to examine the differences between the two expert opinions that the EY Expert indicates in his opinion in the Excel sheet called "*Analysis of variations EY Cámara"*[371].

474. In the first place, there are some cases in which Expert Cámara indicates that there was an agreement between the Parties on the claim. On the contrary, the EY Expert indicates that, according to what DUNOR informed him, there was no formal agreement.

475. For this purpose, the EY Expert refers to the expenses for US$ 365,726.90 (Three hundred and sixty-five thousand seven hundred and twenty-six US dollars 90/100 cy) indicated in Chart 9, page 72 of Expert Cámara's Opinion as "*reclassified amounts of the month of July*". The EY Expert notes that Expert Cámara indicates that these are expenses reconciled and recognized by the Parties, but the EY Expert considers that there were letters and official letters exchanged between the Parties after Minutes No. 7 on the review of expenses of July 2018; the last being the letter DunorCFE-910 of May 21, 2020, so there would be no agreement on them.

476. In relation to this point, the Tribunal considers it appropriate to examine Minutes No. 7[372]. In said document it is noted that it refers to a meeting held on January 23 and 24, 2020 whose objective was the "*Review of the list of expenses referring to points 3.5 of the Agreement for the month of JULY/2018 and the documentation support of these*." In the section called Development it is indicated:

[371] Doc. EY-41.
[372] Doc. EY-37 Minutes No. 7 dated January 23 and 24, 2020 (Agreement).

| | |
|---|---|
| 1 | From Section 3.5 of the Agreement corresponding to the invoices for the month of July 2018, the reconciled proceeding amount remains at US$ 560,470.13. |
| 2 | For the month of July 2018, DUNOR has pending credit for the amount of US$ 22,399.48 as a return of guarantees to Subcontractors so that the Commission can proceed with its recognition. |
| 5 | It is proposed to hold the next meeting in the week of February 10, 2020, prior confirmation. |

477. Under the heading Commitments and Agreements it says "*Continue with the revision of section 3.5 for the month of August*". Likewise, a control chart of Invoices for the month of July 2018 is attached, reconciled for section 3.5 of the Agreement and the amount from the date. However, it is also demonstrated in the process that the Commission requested adjustments to the revised reconciliation and DUNOR made them. This is the case of CFE communication RGRPS-101/2020[373] and DUNOR's response of May 21, 2020[374]. It is important to point out that in this last official letter it was stated that the electronic files were attached, and it was requested "*that it be scheduled for review as soon as possible*". In light of the foregoing, the Tribunal finds that, as stated in the Minutes, the Parties reconciled the values corresponding to the month of July 2018. This implies that in principle this was the agreed value. However, the Commission subsequently requested adjustments, which DUNOR made and requested a review as soon as possible. It is pertinent to note that DUNOR did not indicate that it did not agree with the request, since what it required was a review as soon as possible, with the apparent purpose of expediting the process. It follows from the foregoing that although the Parties reconciled the values, at the same time they allowed adjustments to be made. However, if the Parties had reconciled the values, the adjustments that one Party proposed should be accepted by the other, in order to be binding on them. Due to the foregoing, the Tribunal considers that except for the adjustments requested by CFE and made by DUNOR, the reconciled value for the month of July 2018 should be accepted.

478. On the other hand, the Tribunal refers to the observation of the EY Expert "*regarding the 'amount unpaid by DUNOR' for an amount of USD $7,735 (Seven thousand seven hundred thirty-five US dollars 00/100 cy) indicated in the Chart*

[373] Appendix 114 of the First Expert Cámara Report.
[374] Appendix 115 of the First Expert Cámara Report.

*9, page 72 of the opinion of Expert Cámara as part of the 'amounts reclassified from the months of August 2018 to March 2019' that it determines as not subject to claim*". The EY Expert indicates that this item "*is settled by the Contractor since April 30, 2020 and also meets the requirements established in the Agreement to compensate the Contractor*." For this purpose, the Expert attached the proof of payment to ABB Mexico dated April 30, 2020[375]. Taking into account the document that has just been mentioned, the Tribunal considers that said amount must be recognized, since the non-inclusion of said item by Expert Cámara was due to the fact that it had not been paid, as can be seen in Chart 9 of the First Expert Cámara Report.

479. The EY Expert also points out[376] that the "*Expert Cámara incorporated into the claim a part of the amount of the expenses incurred with the Subcontractor 'MHO Engineering'*". The EY Expert says, referring to the First Report of Expert Cámara that "S*ection (sic) 3.2 considers an amount to be compensated of US$ 173,270.95 and for this section 3.5, determines an amount to be compensated of $435,594.56; while in the EY Expert Report, we analyze all the expenses as part of the claimed Expenses for Personnel Management and Field Administration*". The EY Expert indicates that he considers that said item is part of the claim for expenses in section 3.2, since "*they are related to the provision of personnel for electrical services, I&C and Electrical Supervision of the Start-up (PEM) of the Project and not to a Third-Party Claim per se*". He adds that "*according to the documents attached to Official Letter RGROS-174/20, there is an agreement between the Parties in the reclassification of these expenses from section 3.5 to section 3.2 of the Agreement*." Additionally, the EY Expert indicates that "*Expert Cámara does not deduct from the amount of the expenses the amounts corresponding to the quality withholdings applied that Dunor Energía has not reimbursed to the Subcontractor*." From this perspective, the Tribunal considers that if DUNOR retains values from the Subcontractor, they cannot be claimed from CFE except to the extent that they are paid to the Subcontractor.

480. On the other hand, the EY Expert stated that "*expenses were identified that are part of the expenses claimed by the Contractor and that Expert Cámara does*

[375] Doc. EY-42.
[376] Second EY Report, page 35.

*not detail in his Cost Schedules and therefore were not the object of his analysis, whereas for these items in the EY Expert Report, out of the amount claimed by the Contractor for US$ 18,873.82, we determined that US$ 2,187.78 were due."* Now, in Document EY-41 of the EY Expert, two cases related to the supplier SEPIEC SA de CV are identified, which were not included in the analysis of Expert Cámara, and which, as indicated in the Chart, were included in the claims of May 9 and 16, 2019 attached to official letters Dunor-CFE 546 and 550, which amount to US$ 2,187.78 (Two thousand one hundred eighty-seven US dollars 78/100 cy) (the concept indicated in the chart is Crane Rental), and correspond to the periods of September and October 2018. In this context, since the reason for their non-inclusion has not been proven by Expert Cámara, and the EY Expert includes them and explains the reason, the Tribunal considers that said items should be included.

481. On the other hand, the Expert EY notes that "*expenses were identified that in the EY Expert Report we determined were not eligible for reimbursement because they correspond to the purchase of supplies for the Power Plant, so they do not correspond to Third-Party Claims per se and cannot be classified under any of the headings of the concept of Expenses for Personnel Management and Field Administration. Therefore, although they correspond to expenses incurred by Dunor Energía, they cannot be compensated under the provisions of the Agreement; however, for these expenses Expert Cámara determined an amount of US$ 85,037.19 as appropriate for compensation*". In this regard, the Tribunal finds that the EY Expert's Chart indicates a series of claims that the EY Expert considers inadmissible because they do not meet the established criteria. The Tribunal considers that such values should not be recognized. It goes without saying that the Plaintiff has expressed its agreement with the values determined by the EY Expert, so it must be concluded that it acknowledges that it is not entitled to the other values recognized by the Expert Cámara.

482. On the other hand, the EY Expert also points out what he considers to be "*Errors by Expert Cámara in the quantification of the proportion that must be recognized of the expenses (fraction of recognition), either in the date on which the service took place or the Analysis Period to which the expense corresponds*". Said cases are identified in the Chart attached to the Second EY Expert

Report[377]. The Tribunal considers that the values indicated by the EY Expert should be taken into account to the extent that his observations are reasonable and have not been distorted.

483. Likewise, in said chart, a series of cases are indicated in which it is indicated that Expert Cámara "*does not discount the amounts withheld for quality from Subcontractors and that they have not been reimbursed"*. In this regard, it is clear that when there are withholdings by the Contracting Party, said sum has not been paid and therefore does not have to be recognized by CFE. Therefore, the figure indicated by the EY Expert will be taken into account. Only to the extent that they are paid is recognition due.

484. Likewise, in other cases, the Second EY Expert Report indicates that "*Expert Cámara omits the evidence that indicates that the Works are part of the allocation or that they derive from it".* These cases are individualized in the Chart [378]. In this regard, the Tribunal notes that in the column of observations to the study carried out by Expert Cámara, it is indicated in some cases "*These expenses were incurred due to the fact that the personnel's stay had to be extended, which caused the extension of the original contract."* or that *"This personnel and equipment had to be mobilized and demobilized on multiple occasions due to the uncertainty and constant change in conditions*" or that it was an additional service. Based on the foregoing, the Tribunal considers that the costs indicated by the EY Expert should be included.

485. The EY Expert also refers to discrepancies with Expert Cámara on the concepts that he determines are appropriate for compensation as established in the Agreement, and for this purpose he cites as an example the adjustment that Expert Cámara makes "*to the amount due from the expense incurred by electricity consumption at 85% arguing that it is not specified what proportion is for PEM; however, the concept of the invoice is: 'Electrical energy for energizing and testing equipment in the commissioning of the CC Empalme II Project'; that is, the bill clearly mentions that the energy was for PEM operations (energization and equipment testing). Likewise, according to the comments provided by Dunor*

[377] Doc. EY-41.
[378] Doc. EY-41.

*Energía personnel, we understand that PEM activities were being carried out during the Analysis Period, therefore energy consumption was for PEM operations and for the operation of auxiliary services of the plant during the period in which the generation of the plant was not authorized by CENACE*". It adds that due to the foregoing, "*the 15% that Expert Cámara does not recognize lacks meaning and foundation*." In relation to the foregoing, the Tribunal considers that to the extent that the bill clearly indicates the purpose of the electric power and it corresponds to energization and tests, it must be based on what the bill indicates. Therefore, 100% must be recognized as indicated by the EY Expert.

486. Now, the EY Expert states in his second opinion that he identified "*four items where, in effect, the amount determined by Expert Cámara is correct, since the expenses claimed by Dunor Energía according to the evidence took place outside the Analysis Period for which a correction would be applied to the amount quantified by EY of US$ 14,663.80 (Fourteen thousand six hundred sixty-three US dollars 80/100 cy), the breakdown is as follows*:

| Claim Period | Supplier | Damages | Amount claimed by Dunor Energía | Amount due EY | Amount determined as due Expert Cámara | Difference |
|---|---|---|---|---|---|---|
| Mar-19 | Ambulancias Azteca, S.C. | Diver rental for water collection | $4,359.80 | $4,359.80 | $0.00 | $(4,359.80) |
| Mar-19 | Ingersoll Rand S.A. de C.V. | Compressor maintenance | $5,719.00 | $5,719.00 | 0.00 | $(5,719.00) |
| Mar-19 | Ares Control S.A. de C.V. | Verification, maintenance, and calibration of analyzers | $4,585.00 | $4,585.00 | 0.00 | $(4,585.00) |
| | | | $14,663.80 | $14,663.80 | $0.00 | $14,663.80 |

…"

487. Taking the above into account, the EY Expert calculates the following values in his second report: "*For the claim by Third Parties, of the amount claimed by Dunor Energía for a total of US$ 6,285,204.80, we credit an amount of US$ 4,682,097.96, to which must be added an amount of US$ 90,936.34, from which we obtain a total amount of US$ 4,773,034.30 for reimbursement for expenses due to Third-Party Claims*".

488. Now, the Expert EY says[379] that "*as part of the US$ 1,603,106.842 not accredited, there is a total of US$ 971,935.48 of expenses where, according to the documentation analyzed, we determined that the transactions were incurred during the Analysis Period, are directly related to the Project and correspond to concepts defined in section 3.5 of the Agreement. However, as of the date of presentation of this Report, these have not been paid by the Contractor*". He also indicates[380] "*a total of US$ 168,354.76 where the expenses claimed by Dunor Energía correspond to the amounts withheld from subcontractors for the concept of "Quality Retention" where, although they correspond to expenses directly related to the Works, reasonable and documented, said amounts have not been reimbursed to the Subcontractor, therefore, as of the date of presentation of the report, this expense has not been paid by the Contractor*".

489. In any case, it should be noted that in its Reply Brief, the Plaintiff indicated that there are a series of amounts that meet all the requirements of the Agreement, but that have not been paid[381]. In this regard, DUNOR states that "*...it should be noted that these are expenses actually incurred by DUNOR, and the Tribunal must take into account that the enormous debt that the Commission has with DUNOR has caused it to be in a delicate financial situation, to the point of not being able to face any of the costs it was obliged to pay…. Such is the case of the Third-Party Claims (US$ 1,140,290.25) that could not be paid precisely because of the financial suffocation that CFE is causing to the* Plaintiff *by not paying even the amounts that it recognizes as due*".[382]

490. Now, in its Closing Submission, the Plaintiff says[383] "*That as part of the amount of US$ 1,603,106.84 (One million six hundred three thousand one hundred six US dollars 84/100) not recognized by the EY Expert, a total of US$ 971,935.48 (Nine hundred seventy-one thousand nine hundred thirty-five US dollars 48/100) corresponds to expenses incurred by Dunor in which all the attributes of section 3.5 of the Agreement concur except payment. Since this non-payment is directly attributable to CFE, Dunor does claim this amount in the*

[379] Second Report, page 38.
[380] Ibid.
[381] Dunor Answer and Reply, paragraph 155.
[382] Dunor Answer and Reply, paragraph 156.
[383] Dunor Closing Submission, paragraph 118.

*arbitration*".

491. From this perspective, the Tribunal considers that although DUNOR does not entitled to be reimbursed by CFE for sums that DUNOR has not effectively paid, in the event that CFE does pay them, it must pay the corresponding value. Consequently, the aforementioned reimbursement must be made when DUNOR accredits to CFE the effective payment of the amounts at issue in this case.

492. Taking into account all of the foregoing, the Tribunal concludes that with regard to the claim for the sums presented under the Agreement, the sum of US$ 1,056,876.65 (One million fifty-six thousand eight hundred and seventy-six US dollars 65 /100 cy) should be recognized.[384]

493. However, regarding the claims that were reclassified to paragraph 3.5 of the Agreement, the value to be recognized is US$ 3,624,304.66 (Three million six hundred and twenty-four thousand three hundred and four US dollars 66/100 cy) as indicated by the EY Expert Report[385].

494. Finally, an amount of US$ 971,935.48 (nine hundred and seventy-one thousand nine hundred and thirty-five US dollars 48/100 cy) is accredited, which meets all the conditions required in the Agreement, unless payment has been made[386]. Additionally, an amount of US$ 168,354.76 (one hundred sixty-eight thousand three hundred and fifty-four US dollars 76/100 cy) has been proven, which corresponds to Quality Retention held by DUNOR and for this reason has not been paid to the Contractors[387]. Therefore, DUNOR will have the right to have said amount reimbursed once it has been effectively paid.

### 12.1.3 DUNOR's Obligation to Deliver Spare Parts, Tools, and Special Equipment

#### 12.1.3.1 Plaintiff's Position

495. DUNOR points out that in the declarative list of Works to be carried out by the

[384] First Expert Cámara Report, Chart 5.
[385] First EY Expert Report, page 47.
[386] First EY Expert Report, page 45. First Expert Cámara Report, Chart 6 and paragraph 287.
[387] First EY Expert Report, page 50.

Contractor contained in Clause 4.1 of the Contract, section (p) "*deliver the Spare Parts and Tools and Special Equipment in accordance with Clause 21.5 of the Contract"* is included[388], which should be done no later than the Scheduled Provisional Acceptance Date of the Power Plant[389].

496. It adds that Clause 18.1 of the Contract establishes as a condition prior to the Provisional Acceptance of the Power Plant "*the supply of all the Spare Parts"* by the Contractor.

497. DUNOR indicates that it had the obligation to deliver the Spare Parts, Tools, and Special Equipment expressly indicated in its Technical Proposal, which in turn is based on the Technical Specifications contained in Section 7 of the Tender.

498. DUNOR points out that there were two contracts (the OPF Contract and the SPG Contract). It specifies that the SPG Contract refers to Gas Turbogenerators, and in its first clause it specifies that "*the availability of spare parts, their control, repair, and/or reconditioning, transport... shall be the responsibility of the Service Provider [SPG]*", i.e., the spare parts would be supplied under the SPG Contract[390].

499. Additionally, DUNOR points out that given the risk that certain parts would be delivered in duplicate (under the Contract and under the SPG Contract), during the clarification phase, one of the interested participants asked CFE if the Spare Parts and Special Tools for the Gas Turbogenerator were included in the SPG Contract. The Commission, through the mechanism of the Questions and Answers Matrix contractually enabled for this purpose, initially responded that the SPG Contract only included the spare parts and tools inherent to the Mechanical Area, and that the spare parts and tools of the other areas (electrical, instrumentation and control, etc.) had to be included in the Contract[391].

500. DUNOR adds that since the possibility persisted that the Spare Parts, Tools, and Special Equipment could be supplied in duplicate through both contracts, the

[388] Complaint Memorial, No. 141.
[389] Complaint Memorial, No. 143.
[390] Complaint Memorial, No 150.
[391] Complaint Memorial, No. 151.

same interested party once again asked the Commission to clarify whether "*the spare parts, tools, and special equipment recommended for the package of the [gas] turbogenerator were only included in the SPG Contract… while the Special Tools for the assembly of Gas Turbogenerators were to be included within the OPF Contract*". The Commission replied in the affirmative, clearly stating that only the special tools for the assembly of the Gas Turbogenerators would be included in the OPF Contract.[392].

501. DUNOR states that, since there are two Contracts, and in accordance with the last response given by the Commission, the Consortium prepared its Technical Proposal as stated in its TO-10 and TO-11. Therefore, DUNOR undertook to deliver to the Commission: (i) the Main Equipment indicated in its TO-9, referring to both gas and steam turbogenerators and, (ii) Spare Parts, Tools, and Special Equipment listed in its TO-10 and TO-11, respectively.

502. DUNOR points out that the Consortium that formed DUNOR resulted as the Winning Bidder, which means that its Technical Proposal met all the requirements established in the Tender[393].

503. Notwithstanding the foregoing, since February 7, 2018, the Defendant accused DUNOR of not having delivered all the Spare Parts to which, in CFE's opinion, DUNOR was obliged under the OPF Contract.[394].

504. DUNOR reiterates that Clause 18.1 of the Contract establishes as a condition precedent to the issuance of the Provisional Acceptance Certificate "*the supply of all the Spare Parts (in accordance with Clause 21.5)"*. Therefore, by issuing the Provisional Acceptance Certificate, the Commission accepted that the Contractor had supplied all the Spare Parts to which it was bound.

505. It specifies that from the outset, DUNOR rejected that it was obliged to deliver the Spare Parts, Tools, and Special Equipment requested by CFE.[395].

506. It also adds that Section 1 of the Tender (Instructions for Bidders) provided that each Bidder must include in its Proposal an offer for the Service Performance

[392] Complaint Memorial, No.152.
[393] Complaint Memorial, No. 155.
[394] Complaint Memorial, No. 156.
[395] Complaint Memorial, No. 157.

Guarantee (SPG) for the Gas Turbogenerators, taking into account that this service could only be provided by the technologists or manufacturers of the turbines, "*who happen to be the holders or have the exclusive licenses of the corresponding patents and the only ones capable of including the original spare parts that may be required"*[396]. It points out that said section also expressly established that "*the refurbishing would be the responsibility of the Service Provider*" ("SPG Provider").

507. In the same sense, and in accordance with the terms of the Call, DUNOR states that the SPG Contract signed between CFE and Siemens (manufacturer of the GTs) established that "*the availability of spare parts, their control, repair, and/or reconditioning, transport... will be the responsibility of the Service Provider [SPG]*". With this it is clear that the SPG Contract does contain the express obligation to deliver the spare parts of the GTs[397].

508. It mentions that on April 29, 2019, CFE once again required from DUNOR "*the delivery of the Requested Spare Parts of the Electrical and Instrumentation and Control area for the Gas Turbogenerators confirmed in the TO-9"*, despite the fact that said TO-9 does not refer to Spare Parts, but to Main Equipment. Therefore, DUNOR maintains that the Commission improperly applied Clauses 21.5 and 21.6 of the Contract, unilaterally charging a conventional penalty as a discount of 100% of the market value of the Spare Parts because more than 10 weeks had elapsed since the Scheduled Provisional Acceptance Date. In total, the Commission deducted from the Contract Price the amount of US$ 1,667,781.48 (one million six hundred sixty-seven thousand seven hundred eighty-one US dollars 48/100 cy)[398].

509. Likewise, DUNOR points out that the Commission alleges that the non-delivery of the Requested Spare Parts implies a breach of the Contract Specifications and, therefore, an incomplete execution of the Works. According to the Commission, for this "*non-compliance"* a discount of US$ 1,393,106.70 (One million three hundred and ninety-three thousand one hundred and six US dollars 70/100 cy) should be applied. Therefore, the total discount applied to the

[396] Reply and Answer to the Counterclaim, No. 169.
[397] Reply and Answer to the Counterclaim, No. 169.
[398] Complaint Memorial, No. 159 and 160.

Contract Price for these concepts amounts to US$ 3,060,888.18 (Three million sixty thousand eight hundred eighty-eight US dollars 18/100 cy)[399].

510. In support of its position, DUNOR points out that, in accordance with the Contract, the responses given in the Questions and Answers Matrix are clarifications to the Technical Specifications made by CFE itself and that, without a doubt, they are part of the Tender[400]. It also indicates that there is a contradiction between the responses given by the Commission, since the response to Question No. 85 included in the scope of the Contract the provision of spare parts and tools which, according to subsequent response No. 368, was to be delivered only to the Service Provider of the SPG Contract[401].

511. Given the above situation, DUNOR maintains that Clause 31.2 of the Contract expressly provides that "*in the event of a conflict between two responses, the last one temporally will prevail*." Consequently, Response No. 368 prevails over Response No. 85, the latter having no value for the interpretation of DUNOR's obligations. Therefore, it considers that the position of the Commission based on its answer to Question No. 85 should be rejected entirely[402].

512. It also adds that the obligation of the last response derives from the prevalence of the intention of the Parties, as indicated in the CCF. To this effect, DUNOR maintains that the Defendant's intention was formed, among other documents, through its Response No. 368 in the clarification meetings, where it expressly indicated that it considered correct the statement that "*the spare parts and special tools recommended for the [Gas Turbogenerator] are included only within the SPG Contract."* Therefore, the intention of the Parties at the time of contracting (Article 1851 CCF) was not to force DUNOR to deliver the Spare Parts, Tools, and special Equipment of the gas turbogenerators now claimed by CFE[403].

513. However, the Plaintiff states that the Defendant maintains that DUNOR must deliver the disputed Spare Parts for the following reasons: (i) they were included

[399] Complaint Memorial, No. 161 and 162.
[400] Complaint Memorial, No. 167.
[401] Complaint Memorial, No. 170.
[402] Complaint Memorial, No. 171.
[403] Complaint Memorial, No. 172.

in Section 7 of the Tender and (ii) because, in its opinion, DUNOR had included them in its Technical Proposal (TO-9), by confirming that the Scope of Supply complied with the Technical Specifications of Section 7404. It adds that the Commission maintains that there is no doubt[404] that the price of the Requested Spare Parts is included in the Contract Price.

514. Contrary to what CFE indicated in its Response to the Request for Arbitration, DUNOR maintains that the parts in dispute are exclusively the Requested Spare Parts for the gas turbogenerators. It points out that this is unequivocally confirmed by Official Letter 7B/2019/RJMN-00166, dated April 29, 2019, which specifies "*the total delivery of Spare Parts, Tools, and Special Equipment (requested) of the electrical and instrumentation and control areas… for the gas turbogenerators*"[405].

515. Regarding the Commission's argument that the delivery of the disputed Spare Parts was provided for in Section 7 of the Tender, DUNOR points out that Section 7.2.(11) contains a list of Spare Parts, Tools, and Special Equipment in which there are only two generic references to the gas turbine (specifically within the section referring to the Instrumentation and Control Area)[406].

516. DUNOR recalls that Section 7.2.11 refers to TO-10 and TO-11, these being the documents where all the parts that the Contractor is obliged to supply under the Contract are established in detail. DUNOR is not obliged to deliver parts other than those contained in its TO-10 and TO-11.

517. Consistent with the foregoing, DUNOR maintains that the Consortium's Technical Proposal (TO-10 and TO-11) was declared the winning proposal of the Tender. It clarifies that if CFE had wanted to include the spare parts of the gas turbogenerators that it now claims, it should have requested it at the time or even rejected the proposal for considering it insufficient.[407].

518. On the other hand, regarding the argument put forward by CFE, - i.e., that the Contractor had included the parts in its TO-9 - DUNOR states that said document

[404] Complaint Memorial, No. 175.
[405] Complaint Memorial, No. 179.
[406] Complaint Memorial, No. 180.
[407] Complaint Memorial, No. 181.

does not refer to Spare Parts and Special Tools, but to the Main Equipment. It points out that said document only contains a generic reference to Spare Parts, Tools, and Special Equipment that must be completed with documents that provide greater detail. Therefore, the TO-9 itself in its section j) refers to the TO-10, this being the document where the Spare Parts to be supplied by virtue of Section 7.2.11 of the Tender are listed[408].

519. In this regard, and in relation to the non-inclusion of the Requested Spare Parts of the GTs in the Detailed Engineering, DUNOR points out that CFE relies on the fact that the Technical Specifications only describe the basic engineering of the Project to argue that DUNOR must deliver the Requested Spare Parts of the GTs, since they are supposedly included in the Detailed Engineering. To support its position, CFE attaches a list of parts sent by DUNOR on December 6, 2017. This document, prepared by DUNOR, represents the detailed engineering of the parts that were included in the TO-10. It adds that this document does not contain or identify the Spare Parts of the GTs that CFE is now claiming. And they do not appear, for a simple reason: because these pieces were never numbered or listed in the TO-10[409].

520. DUNOR also specifies that it agrees that the Technical Specifications only contain basic engineering, and that it is the Bidder's responsibility to develop it in the detailed engineering phase. However, it is categorically false that DUNOR has not provided a piece-by-piece detail of the supplies that it promised to deliver to CFE. This detail is found, among others, in Doc. R-017, prepared in accordance with TO-10. This Doc. R-017 is the detail of the parts listed in TO-10. It emphasizes that this document refers to the parts for the entire Power Plant and includes all the parts that DUNOR must deliver. After this, other lists continued in which the number of pieces was reduced as DUNOR delivered them. The last list of missing pieces reconciled by the Parties is from February 18, 2019, in which there are only six (6) pieces (again, none of them related to the GTs). DUNOR emphasizes that the fact that the Spare Parts of the GTs were never part of any of these lists proves, without a doubt, the fact that DUNOR never promised to deliver them, and therefore, the Commission cannot justify

[408] Complaint Memorial, No. 183.
[409] Reply and Answer to the Counterclaim, No 180.

otherwise[410].

521. DUNOR notes that Section 2 of the Tender (Evaluation and Award Methodology), subsection 2.1.1.13 related to the Scope of Supply specified that, when evaluating the offers in the Tender phase, certain points would be assigned "*to the Proposal that provides in the TO-10 format, the confirmation of the supply of the Requested and Recommended Spare Parts... according to Section 3.3.9.2 of the Tender*". This last section, referring to the Information Required with the Technical Proposal, provided that: *"[t]he Bidder must indicate in the TO-10 format the confirmation of the supply of the Requested and Recommended Spare Parts and provide the list of Requested and Recommended Spare Parts, by area and by equipment, according to Section 7, subsection 7.2.11.(1) of the Tender"*[411].

522. DUNOR reiterates that it never included Siemens parts for the GTs in its Technical Proposal (TO-10) nor later in the detailed engineering phase, so it can in no way be derived now that it has an obligation to deliver them. The Commission was fully aware of the content of the TOs presented, and given that DUNOR was the Winning Bidder, it follows that its bid complied with all the requirements of the Tender, which was accepted by the Commission, therefore, there is an Agreement of wills in this regard. In the same sense, if CFE considered that DUNOR had not supplied all the Spare Parts, it should not have issued the Provisional Acceptance Certificate, which precisely confirmed the supply of all the Spare Parts by the Contractor[412].

523. Therefore, DUNOR considers that it has complied with the Technical Specifications and is only obliged to supply the Requested Spare Parts included in its TO-10. It affirms that this is also confirmed by Expert Cámara when affirming that DUNOR "*in its Technical Offer in TO-10 and 0T-11 indicates its commitment to supply "PHREES" in accordance with Section 7... which are the ones that must at least be supplied"*[413].

524. On the other hand, DUNOR reiterates that the Refurbishment of the GTs is the responsibility of the SPG Supplier. However, the Defendant argues that the

[410] Reply and Answer to the Counterclaim, No 181.
[411] Reply and Answer to the Counterclaim, No 182.
[412] Reply and Answer to the Counterclaim, No. 186.
[413] Reply and Answer to the Counterclaim, No. 187.

risk that the Spare Parts of the GTs would be delivered in duplicate was nil. In support of this position, the Commission points out that the sole function of the SPG Supplier is the maintenance of the GTs and that its obligation to provide spare parts cannot be inferred from any section of the SPG Contract, nor from its Appendices.[414].

525. In view of the foregoing, DUNOR maintains that: i) the instructions to the Bidders stipulated that "*spare parts will be the responsibility of the Service Provider*", which should only be provided by the technologists or manufacturers of this equipment, since they are *"the only ones capable of including the original spare parts" that may be required and, ii) the first clause of the SPG Contract expressly indicates that: '... the availability of spare parts shall be the responsibility of the SUPPLIER..."*[415]. It then points out that the SPG Contract also establishes the obligation of the SPG Supplier to deliver the spare parts of the GTs, therefore CFE's assertion that the SPG Contract does not include such an obligation is not true, nor can it be argued - as claimed by the Commission – that there was no risk that the refurbishment of the GTs would be delivered in duplicate.

526. However, in relation to the calculation of the discounts incorrectly applied by the Commission, the Plaintiff shows that the value of US$ 3,060,888.18 (Three million sixty thousand eight hundred and eighty-eight US dollars 18/100 cy) is broken down into two instalments:

1. First Instalment: US$ 1,667,781.48 (One million six hundred and sixty-seven thousand seven hundred and eighty-one US dollars 48/100 cy) as a discount of 100% of the market value of the Spare Parts when more than 10 weeks have elapsed from the Scheduled Provisional Acceptance Date; and
2. Second Instalment: US$ 1,393,106.70 (One million three hundred and ninety-three thousand one hundred and six US dollars 70/100 cy) for Unexecuted Work, an amount that corresponds to that of the quotation that the supplier (SIEMENS) made for the Spare Parts,

[414] Reply and Answer to the Counterclaim, No. 189.
[415] Reply and Answer to the Counterclaim, No. 193.

Tools, and Special Equipment allegedly not supplied.

527. In view of the foregoing, DUNOR notes that both items had been calculated in accordance with the quotation provided by the manufacturer (Siemens). However, the supporting document attached by CFE was not a quotation, but an "*Informative Letter"* that the technologist himself considered non-binding[416].

528. The Plaintiff adds, in relation to the First Instalment, that in its Communication DUNOR-CFE-1197, of January 23, 2019, it indicated that it is not in accordance with what is indicated in Clause 12.3 of the Contract since "*the dates of Critical Events are being modified by DUNOR and CFE without it being possible as of today to specify the new Scheduled Provisional Acceptance Date*". For this reason, "*Dunor does not accept the discount of any quantity until the Scheduled Provisional Acceptance Date of the works has been defined and the period and contractual conditions that support the discounts that may apply are fulfilled"*[417].

529. It also maintains that the Defendant recognized that "*its statement regarding the date of the Critical Event - Provisional Acceptance Date - is being modified jointly is correct (Dunor-CFE)*." However, the Commission indicated that it was "*obliged to comply with what is indicated in Clause 21.6 of the Contract"* using the Scheduled Provisional Acceptance Date prior to the modification as the basis for the application of discounts.[418].

530. DUNOR considers that the Commission's position is wrong, since, on the one hand, it recognizes that the modification of the Scheduled Provisional Acceptance Date is appropriate, which led to the signing of Amending Agreement No. 3 of October 21, 2019, which sets March 14, 2019 as the new Scheduled Provisional Acceptance Date; however, on the other hand, CFE proceeds (without real justification beyond a supposed obligation to apply Clause 21.6 of the Contract) to apply discounts based on a Provisional Acceptance date, which was modified[419].

531. Along these same lines, it indicates that Clause 21.6 of the Contract only

[416] Complaint Memorial, No. 191.
[417] Complaint Memorial, No. 192.
[418] Complaint Memorial, No. 193.
[419] Complaint Memorial, No. 194.

establishes that, "*[i]n the event of the Contractor's failure to provide the Commission with the Spare Parts... the Commission shall deduct from the Contract Price the amounts stipulated in subparagraph D of Appendix 3*". DUNOR concludes that from the literal wording of the clause it follows that discounts cannot be imposed when there is still no breach, and precisely there cannot be a breach when the Parties are negotiating the Scheduled Provisional Acceptance Date, which is the *dies a quo* from which the obligation to deliver Spare Parts arises[420].

532. It adds that, given the clarity of the clauses, the only interpretative guideline must be its literalness (Article 1851 of the CCF), and given the clarity of the terms of the Contract, there is no doubt that it is not possible to impose discounts until after the Definitive Scheduled Provisional Acceptance Date has been set, which is the one contained in Amending Agreement No. 3 and that this is the time from which the delay period can be calculated[421]. The foregoing is in accordance with a systematic interpretation of the clauses of the Contract (Article 1854 of the CCF), since the intention of the Parties, the true spirit of the Contract, is indivisible, which means that its clauses cannot be interpreted, much less applied in isolation from each other, but as an organic whole that allows the Contract to deploy all its effects in good faith. Therefore, CFE should have interpreted that before knowing the Scheduled Provisional Acceptance Date, it could not apply any contractual penalty for non-delivery of the Spare Parts.[422].

533. Also, in relation to the First Instalment, in its Reply Memorial, the Plaintiff indicates that CFE incorrectly calculated the discount of US$ 1,667,781.48 (One million six hundred sixty-seven thousand seven hundred eighty-one US dollars 48/100 cy), since it did not take as a basis the market value of the Spare Parts[423].

534. Regarding the Second Instalment, DUNOR points out that the discount that the Commission intends to apply for "*Unexecuted Work"* lacks a contractual basis and, therefore, is illegal, since CFE intends to penalize twice for the same breach, i.e., the lack of supply of the Spare Parts, treating this non-compliance as

[420] Complaint Memorial, No. 195.
[421] Complaint Memorial, No. 196 and 197.
[422] Complaint Memorial, No.198.
[423] Reply and Answer to the Counterclaim, No. 203.

Unexecuted Work[424].

535. For such purposes, it refers to Clauses 20.11, 2.1.6 and Appendix 3 of the Contract[425]. Based on these, DUNOR maintains that the Parties have expressly agreed not only on the contractual consequence of breaching the obligation to deliver the Spare Parts and Tools and Special Equipment, but also stipulated the maximum amount of the penalty that the Commission can apply to the Contractor in the event that this specific breach occurs[426].

536. Therefore, it reiterates that the Commission intends to penalize the same event in two ways without contractual support, which would generate, in addition to a Breach of Contract, an illicit enrichment[427].

537. In its Reply Memorial, DUNOR states that the Commission cites the content of Article 231 of the RLOPSRM as support for the discount, but forgets that this precept cannot be applied in isolation, but must be interpreted and applied in harmony with the other provisions of the RLOPSRM and, above all, with the provisions of the LOPSRM, a hierarchically superior standard[428].

538. It points out that Article 46 of the LOPSRM establishes in its section X that public works contracts must include the terms, conditions, and the procedure for the application of contractual penalties, withholdings and/or discounts[429]. It adds that, in the same way, Article 46 bis of the LOPSRM considers in its first paragraph the way in which the contractual penalties must be applied, which are determined based on the amount of the works not executed on the date agreed in the Contract for the total completion of the Works[430].

539. It adds that the RLOPSRM itself contains in its Article 86 a provision similar to the LOPSRM, and in the last paragraph of its Article 87 it establishes that penalties must be established taking into account the characteristics, complexity and magnitude of the Works to be contracted, the type of Contract, the degrees

[424] Complaint Memorial, No. 190 and 200.
[425] Complaint Memorial, No. 204.
[426] Complaint Memorial, No. 205.
[427] Complaint Memorial, No. 206.
[428] Reply and Answer to the Counterclaim, No. 212.
[429] Reply and Answer to the Counterclaim, No. 213.
[430] Reply and Answer to the Counterclaim, No. 214.

of progress and the possibility of establishing critical dates for the completion of the Works[431]. DUNOR also points out that, in accordance with the provisions of Article 2117 of the CCF, "*civil liability may be regulated by agreement of the parties, except for those cases in which the law expressly provides otherwise*."

540. DUNOR states that in this case, the intention of the Parties was clearly reflected in the Contract and its Appendix 3, where the consequences of each of the possible breaches by the Contractor were agreed and, in the case of Spare Parts and Special Equipment, the legal consequence of said breach is the application of the discounts contemplated therein. It states that, in addition, the regulations of the Contract comply fully and exactly with the provisions of Articles 46 and 46 bis of the LOPSRM and Article 87 of the RLOPSRM[432].

541. Thus, DUNOR maintains that the discount sought by CFE, for Unexecuted Work would only be possible if the Parties had not expressly agreed on the way to compensate the breach in question.[433]. Therefore, Article 231 RLOPSRM is not applicable.

542. On the other hand, DUNOR points out that in any case the last section of the standard expressly regulates an exception to the obligation to apply discounts to the amount initially agreed upon in the Contract, provided that "*at the conclusion of the contracted Works, it is proven... that, based on the characteristics... as well as the Tender... the objectives and purpose of the Works were achieved*". It then points out that this is exactly what happened in the case before the Arbitral Tribunal[434].

543. To the above, it adds that CFE has fully deducted from the Contract Price the value of the Spare Parts not delivered by DUNOR (US$ 1,667,781.48) (One million six hundred and sixty-seven thousand seven hundred and eighty-one US dollars 48/100 cy). With the amount of this discount, CFE can buy (if it so decides or requires), the missing parts and therefore DUNOR would have already compensated the damage caused by "*allegedly"* breaching the scope of the Contract (specifically for the full cost of the parts) which is regulated by the third

[431] Reply and Answer to the Counterclaim, No. 215.
[432] Reply and Answer to the Counterclaim, No. 216.
[433] Reply and Answer to the Counterclaim, No. 219.
[434] Reply and Answer to the Counterclaim, No. 225.

paragraph of Article 231 of the RLOPSRM[435].

544. It specifies that with this compensation (US$ 1,667,781.48) (One million six hundred sixty-seven thousand seven hundred eighty-one US dollars 48/100 cy), according to the literal meaning of the provision, the objectives and purposes of the Works have been fulfilled and achieved. It indicates that (i) CFE would have proven that the objectives of the work have been achieved when it issued the Provisional Acceptance Certificate; and (ii) that the purpose of the Work has been achieved and this is also proven by the fact that the Power Plant is generating at the demand of the Grid.[436].

545. The Plaintiff adds that even assuming that (i) DUNOR has breached its obligation to deliver the Requested Spare Parts that CFE now claims (*quod non*); (ii) that it is admissible to apply two discounts to the Contract Price for the same facts (*quod non*); and (iii) that the double discount applied by CFE is appropriate according to Article 231 of the RLOPSRM (*quod non*), it is not appropriate to reduce the Contract Price, in addition to the agreed penalty, since CFE has not proven the damage caused by the non-delivery of the Replacement Parts and whose indemnity may exceed the discounts or penalties agreed upon by the Parties[437].

546. DUNOR states that in accordance with Article 2110 of the CCF "*damages must be the immediate and direct consequence of the failure to comply with the obligation, whether they have been caused or must necessarily be caused*." This provision is applicable both in terms of Clause 30.1 of the Contract and Article 13 of the LOPSRM. It states that, in the present case, the discount that CFE intends to apply for Unexecuted Work cannot be considered an immediate and direct consequence of non-compliance, especially since there is already a penalty agreed for it.[438]. Therefore, any compensation or discount claimed by CFE in response to the alleged Unexecuted Work must be due to real damage that must also be proven and accredited both in its concept and in its amount.

547. Lastly, DUNOR maintains that in the unlikely event that the Arbitral Tribunal

[435] Reply and Answer to the Counterclaim, No. 226.
[436] Reply and Answer to the Counterclaim, No. 227.
[437] Reply and Answer to the Counterclaim, No. 228.
[438] Reply and Answer to the Counterclaim, No. 231.

finds that CFE has suffered damage other than that already compensated with the First Instalment, the penalty applied should be drastically reduced in accordance with the principle of "*restitutio in integrum*".

#### 12.1.3.2 Defendant's Position

548. For its part, the Commission points out that the Tender Announcement for this Project, in accordance with Article 31 of the LOPSRM, contained a succinct description of the object of the Public Tender indicating the general description of the works to be contracted, without it being necessary to specify in detail the number of elements that would be contained in the concepts to be executed, since the Contract modality is a Fixed Price[439].

549. It adds that the Commission attached to its Tender the Technical Specifications that describe the requirements to be considered by the participants for the elaboration of their offer, i.e., it delivered a basic engineering, clearly defining that the elaboration of the complementary basic Engineering and Detailed Engineering would be the responsibility of the Winning Bidder[440].

550. Based on the foregoing, the Commission points out that the Plaintiff, in its Technical Proposal, in the part related to the SCOPE OF SUPPLY, stated verbatim that "*In the event of any deficiency, omission, error or lack of clarity in the proposal in technical aspects, what is indicated in the technical specifications contained in Section 7 of the Tender shall prevail.*[441].

551. It adds that the Plaintiff, in its capacity as bidder, never provided a piece-by-piece breakdown of the supplies that would make up its offer (such is the case with Spare Parts, Tools, and Special Equipment), since this is developed from what is known as Detailed Engineering by the winning bidder[442].

552. CFE clarifies that the dispute raised is only in relation to the Requested Spare Parts that are part of the Gas Turbogenerator which are established in Section

[439] Counter-Memorial and Counterclaim, No. 74.
[440] Counter-Memorial and Counterclaim, No. 75 and 76.
[441] Counter-Memorial and Counterclaim, No 77.
[442] Counter-Memorial and Counterclaim, No 78.

7.2.11.1 of the Tender "*SPARE PARTS*"[443].

553. The Commission points out that DUNOR is unaware of its obligation to deliver the Requested Parts, derived from its understanding that the refurbishment would be the responsibility of the SPG Contract Service Provider. CFE states that it is difficult to believe that the Commission would have acquired a Gas Turbine without Spare Parts and waited for the supplier of the SPG Contract to be responsible for supplying them when the latter's function is only to provide a maintenance service for the Turbine itself[444].

554. It points out that, contrary to what the Claimant maintains, no section of the SPG Contract establishes the obligation of the supplier of these services to provide the Requested Spare Parts in Section 7 of the Tender, since its scope only refers to services of repair, maintenance replacement of components when they reach the end of their useful life, continuous monitoring, and technical guarantees for functional performance, without any of its annexes clearly indicating such a possibility[445].

555. Thus, CFE maintains that the Plaintiff is unaware of its obligation to deliver the Requested Spare Parts for the Gas Turbogenerator, which are established in Section 7.2.11.1 of the Tender.

556. It adds that during the clarification meeting phase of the Tender, two questions arose about Section 7 related to the SPG Contract. The Commission made the corresponding clarifications (Questions No. 85 and no. 368), however, contrary to what DUNOR maintains, there is no contradiction between them, but rather they correspond to different factual situations and therefore, they clarify two contractual aspects of the OPF Contract and the SPG Contract that have no relation to each other.

557. In this regard, it points out that in Question No. 85 of the Clarification Meeting, it is requested to define that "*ALL*" spare parts and special tools for the Gas Turbogenerator and its auxiliaries are within the scope of the Service Performance Guarantee Contract (SPG). For this purpose, the Commission

[443] Counter-Memorial and Counterclaim, No 79.
[444] Counter-Memorial and Counterclaim, No. 81 and 84.
[445] Counter-Memorial and Counterclaim, No 85.

responds and refers only to the spare parts and tools of the Gas Turbogenerators inherent to the mechanical area, maintaining the requirement of the delivery of the spare parts and tools from the other Electrical and Instrumentation and Control areas.[446].

558. On the other hand, in Question no. 368, the Bidder proposes to the Commission that both the Replacements (Spare Parts) and the RECOMMENDED Special Tools (highlighted by CFE) for the Turbogenerator package be included only within the SPG Contract[447]. The Commission points out that the approach is clearly aimed at the "*RECOMMENDED"* subgroups for both Spare Parts and Special Tools. It adds that, in the responses given by the Commission at the Clarification Meeting, it never made a statement to the effect that the Requested Spare Parts were part of the SPG Contract[448].

559. CFE clarifies that in Section 7 of the Tender, 7.2.11 Spare Parts, Tools, and Special Equipment – reference is made to two groups within the Scope of Supplies: 1) Spare Parts and 2) Tools and Special Equipment. These, in turn, are divided into:

1.1. Requested Spare Parts.

1.2. Recommended Spare Parts.

2.1. Requested Special Tools and Equipment.

2.2. Recommended Special Tools and Equipment[449]

560. Thus, it indicates that in accordance with Section 7.2.11 and the response to Questions No. 85 and 368, the scope of DUNOR's obligation is as follows according to the graph that it includes[450]: the Requested Spare Parts and Tools are within the Contract and those recommended outside of it.

561. The Commission adds that, in turn, this section covers three disciplines: a) Mechanical Area, b) Electrical Area, and c) Instrumentation and Control Area.

[446] Counter-Memorial and Counterclaim, No. 89 and 90.
[447] Counter-Memorial and Counterclaim, No. 91.
[448] Counter-Memorial and Counterclaim, No. 92 and 94.
[449] Counter-Memorial and Counterclaim, No. 97 and 98.
[450] Counter-Memorial and Counterclaim, No. 99.

562. Additionally, it indicates that Section 7 establishes Basic Engineering criteria necessary for the Contractor to develop Detailed Engineering (Scope of Contract). Therefore, it is until that moment when all the Spare Parts, Tools and Special Equipment Requested are defined, in accordance with the scope of the engineering definition of the Contract in its Clause 1.1., without this meaning that Contractor had not considered it in its offer[451].

563. In this regard, it points out that this obligation is corroborated in the document "*Technical Details that must be resolved prior to the signing of the Contract"*, a document that eventually formed part of Appendix 20 of the Contract. [452].

564. It adds that it is so true that it was agreed that the Requested Spare Parts were part of the scope of the Contract obligations, that there are clauses on: i) delivery conditions (Clause 21.5), and ii) consequences of non-compliance (Clause 21.6 in relation to Appendix 3 of the Contract)[453].

565. The Commission specifies that on December 06, 2017, Official Letter No. 742.161-JALV-420-22717, stated to the Contractor that deriving from the review made to the lists of Spare Parts, Tools, and Special Equipment Requested and Recommended that it delivered for the development of Detailed Engineering, particularly in the Area of Instrumentation and Control, a series of missing items of Requested Spare Parts in Section 7.2.11.1 were identified, as well as Tools and Special Equipment Requested in Section 7.2.11.2. It notes that the largest number of missing items requested are related to the Gas Turbine equipment.

566. The Commission adds that on March 13, 2018, through Official Letter DUNOR-CFE-413, the Contractor established its position for the first time regarding the comments put forward by the Commission, in relation to the missing items of Requested Spare Parts in Section 7.2.11.1 of the Tender and the Tools and Special Equipment Requested in Section 7.2.11.2, stating that it is not their obligation to deliver them, hiding behind the response to Question No. 368 of the clarification meetings[454].

[451] Counter-Memorial and Counterclaim, No. 101.
[452] Counter-Memorial and Counterclaim, No. 104.
[453] Counter-Memorial and Counterclaim, No. 108.
[454] Counter-Memorial and Counterclaim, No. 110.

567. The Commission notes that, through Official Letter No. 742.161-JALV-127-18 of May 12, 2018, the following clarifications were made: i). The response to Question No. 85 clarifies that only the Spare Parts and Tools for the Gas Turbogenerator corresponding to the mechanical area will be part of the scope of the Service Performance Guarantee Contract, in this regard, it is emphasized that the Spare Parts and Tools of the other disciplines must be considered within the present Contract. ii). The response to Question No. 368 is focused only on the Recommended Spare Parts and Special Tools. From the foregoing, it can be deduced that there is no dispute, since the Commission's requirement is based solely on the Spare Parts and Special Tools indicated in the Bidding Terms as "*requested"*, the supply of which is mandatory.[455].

568. It also maintains that, through Communication DUNOR-CFE-446 of June 15, 2018, the Contractor responds to official letter No. 742.161-JALV-127-056-18 of June 12, 2018, and once again reiterates its position regarding the non-obligation to supply the Requested Spare Parts, Tools, and Special Equipment for the Gas Turbogenerators, due to its understanding of the response to Question No. 368. In view of this, the Commission, through Official Letter No. 742.161-JALV-139-056-18 of July 09, 2018, answers indicating clearly and concisely that Question No. 368 only considers the Spare Parts and Special Tools recommended for the Turbogenerator package and that they are included only within the SPG Contract, but does not allude to the Requested Spare Parts[456].

569. Subsequently, through Official Letter No. 7B/2019/RJMN-00166 of April 29, 2019, the Commission requests the Contractor to deliver the Spare Parts, Tools, and Special Equipment Requested under the Contract, and again provides clear explanations of the Contractor's contractual obligation to supply them [457].

570. The Commission notes that the Plaintiff reiterates its position in the sense of not supplying the Spare Parts, Tools, and Special Equipment requested in question through Communication DUNOR-CFE-545 of May 09, 2019.[458].

571. Finally, with Official Letter No. 7B/2019/RJMN-00238 of May 31, 2019, the

[455] Counter-Memorial and Counterclaim, No. 111.
[456] Counter-Memorial and Counterclaim, No. 113 and 114.
[457] Counter-Memorial and Counterclaim, No. 116.
[458] Counter-Memorial and Counterclaim, No. 117.

Commission responds to the communication referred to in the previous paragraph, reiterating the obligation of the Contractor to supply the Spare Parts, Tools, and Special Equipment Requested, specifically those of the Electrical and Instrumentation and Control Areas of Gas Turbines, therefore ratifying the content of Official Letter No. 7B/2019/RJMN-00166. Likewise, it is indicated that if the obligation is not fulfilled, the corresponding discounts will be applied in accordance with Clause 20.11 of the Contract.[459].

572. The Commission points out that the Plaintiff intends to confuse the Tribunal, arguing that only the documents where all the parts to be supplied are set out in detail are contained in Appendix OT-10 and 11, which is false since it is not until the Winning Bidder becomes Contractor that Detailed Engineering is developed and the final list of Requested Spare Parts is broken down, which was even confirmed by the Plaintiff in the document entitled "*Technical Details that must be resolved before signing the Contract*", which forms part of Appendix 20 of the Contract[460].

573. It also adds that the statement in the sense that on February 18, 2019, the Parties reconciled a list of Spare Parts, noting that only 6 pieces were pending delivery, is an act of bad faith on the part of the Plaintiff. In this regard, it notes that this is a unilateral document developed by the Contractor of the parts that, in its understanding, were those that had not been delivered, but since December 2017 and in various Official Letters, the Defendant pointed out that the Requested Spare Parts of the Gas Turbogenerators were not included in the Detailed Engineering, specifying that DUNOR had the obligation to supply them, in accordance with the Contract[461].

574. The Commission emphasizes that both Section 7.2.11 of the Tender and the TO-10, are made up of 19 concepts to be supplied; however, the quantities to be supplied must be verified by the Commission once the Detailed Engineering has been developed. The above has been confirmed by DUNOR itself[462].

575. In this regard, the Commission questions the following case: if TO-10

[459] Counter-Memorial and Counterclaim, No. 118.
[460] Counter-Memorial and Counterclaim, No. 121.
[461] Rejoinder Memorial and Reply to Counterclaim, No. 214.
[462] Rejoinder Memorial and Reply to Counterclaim, No. 216.

contemplates the supply of 1 piece for Concept I&C-01, why did DUNOR deliver to the Commission a total of 12 pieces for said Concept? To the above, it responds: because the number of parts to be supplied for Concept I&C-01 results from the development of Detailed Engineering, for which DUNOR supplied CFE with 1 (one) complete Operation Station for each type supplied, resulting in a total of 12 pieces, taking into account the number of Stations supplied[463].

576. Regarding the legitimacy of the discounts applied, it points out that the Commission was forced to proceed with them in order to be in a position to issue the CP, avoiding aggravating the consequences of the Plaintiff's breach, since Clause 18.1 Provisional Acceptance of the Contract establishes as a condition for its issuance "*the supply of all the Spare Parts*"[464].

577. The Commission notes in relation to the discount identified by the Plaintiff as the **First Instalment** (US$ 1,667,781.48) (One million six hundred and sixty-seven thousand seven hundred and eighty-one US dollars 48/100 cy), that this is based on the terms of the Contract, specifically in Clauses 21.5, 21.6 in relation to Appendix 3 of the Contract up to the limit established in Clause 20.11 subsection d) and 21.7[465] and to proceed with its calculation, the Scheduled Provisional Acceptance Date was taken into consideration, which was finally extended by Amending Agreement No. 3, which is that of March 14, 2019[466].

578. Based on the foregoing, the Commission states that, by means of Official Letter 7B/2019/RJMN-00364 of August 20, 2019, it informed the Plaintiff that it would proceed to make discounts for non-compliance in the delivery of the Replacement Parts and a discount for Unexecuted Work, since the requirements for it had already been satisfied, that is, i) the Provisional Acceptance Date had arrived both for Agreement 2 and that which was finally formalized in Agreement 3. ii) The Plaintiff had not delivered the Requested Spare Parts. iii) The Commission acquired the right to charge a non-refundable discount. iv) The Commission proceeded to value the Requested Spare Parts not delivered with the technologist manufacturer of the SIEMENS Gas Turbine. v) After the

[463] Rejoinder Memorial and Reply to Counterclaim, No. 221.
[464] Counter-Memorial and Counterclaim, No. 123.
[465] Counter-Memorial and Counterclaim, No. 124.
[466] Counter-Memorial and Counterclaim, No. 125-126.

Provisional Acceptance Date, an equivalent of 10% of the market value of the Requested Spare Parts not supplied was recorded for each week of delay. vi) From March 14, 2019 to May 23, 2019, 10 weeks elapsed, and therefore 100% of the market value of the Requested Spare Parts not supplied was reached[467].

579. The Commission notes that it required from Siemens the quotation of the list of missing Spare Parts, Tools, and Special Equipment Requested to support the market value of the missing spare parts, in accordance with the provisions of paragraph D "*DISCOUNTS FOR FAILURE TO DELIVERY SPARE PARTS AND SPECIAL TOOLS*", of Appendix 3 of the Contract[468].

580. It adds that the Contractor's argument that the document sent by Siemens (July 2019) to the Commission cannot be taken as a reference to the market value of the Requested Spare Parts of the Gas Turbogenerators not supplied has no merit because it is a document issued by the manufacturer SIEMENS at the express request for a "*Quotation"* by the Commission[469].

581. The Commission concludes that the Plaintiff's position is inconsistent, erroneously considering that the market value cannot be proven with the offers made by the manufacturer at 2 different times with similar amounts, requiring formalisms that are simply incomprehensible and that of course are not established in the Contract to carry out an action as specific as obtaining the market value of the Requested Spare Parts for the Gas Turbogenerators that were not supplied[470].

582. Now, regarding the discount identified as the Second Instalment (US$ 1,393,106.70) (One million three hundred and ninety-three thousand one hundred and six US dollars 70/100 cy), the Commission indicates that this is based on what was agreed in the Contract, particularly in clauses 4.1 paragraph p) in relation to 1.1 and 9.1.

583. It adds that "*Works*" as defined in clause 1.1 of the Contract are all Materials

[467] Counter-Memorial and Counterclaim, No. 129.
[468] Rejoinder Memorial and Reply to Counterclaim, No. 236.
[469] Rejoinder Memorial and Reply to Counterclaim, No. 237.
[470] Rejoinder Memorial and Reply to Counterclaim, No. 239.

that must be provided by the Contractor and for which a Price is paid[471].

584. In addition, it indicates that in accordance with Clause 9.1 "*the Contract Price covers all the Works to be supplied or carried out in accordance with this Contract...*"[472].

585. For all of the foregoing, the Defendant maintains that DUNOR's failure to deliver the Spare Parts, Tools and Special Equipment, which are part of the Contract Price, results in the incomplete execution of the Works, therefore, based on article 231 of the RLOPSRM, the discount for Unexecuted Work from the Contract Price was made, for the amount that resulted from the present market value, deflated to the date on which the Contractor submitted its technical and economic proposal.[473].

586. The Defendant adds, in its Rejoinder Memorial, that the fact that Siemens, as the technologist of the turbogenerators supplied in the Empalme II Project, is the one who has all the necessary licenses and patents, and has the original spare parts and therefore is the best suited party to offer the services of the SPG Contract, does not imply in any way that they are not spare parts to be supplied by DUNOR. In such a case, the Contractor should have acquired them from the supplier of the Gas Turbogenerators so that they could guarantee the condition of originals in accordance with the provisions of Section 1.[474]

587. It adds that the Contract does not provide for sanctioning a breach twice, but rather that it is a situation in which two breaches of a different nature are combined and sanctioned, such as, on the one hand, "*failure to deliver on time*" and, on the other hand, the "*failure to supply*", in both cases, of the Requested Spare Parts of the Gas Turbogenerators. To this effect, it refers to the consequence foreseen for non-timely delivery and adds that notwithstanding the delay of more than 10 weeks in the delivery of the Spare Parts, Tools, and Special Equipment by the Contractor that would result in a charge of 100% of the commercial Value of the same in accordance with the provisions of Clause 21.5 and 20.11, this does not extinguish the latter's obligation to supply them, and

[471] Counter-Memorial and Counterclaim, No. 131.
[472] Counter-Memorial and Counterclaim, No. 132.
[473] Counter-Memorial and Counterclaim, No 133.
[474] Rejoinder Memorial and Reply to Counterclaim, No. 201.

therefore, since the Spare Parts, Tools, and Special Equipment are part of the Works to be paid for in the Contract Price Payment, the Commission remains fully entitled to deduct the cost thereof from the Contract Price Payment[475].

588. In that vein, the Defendant maintains that understanding the contractual obligation according to the Contractor's reasoning would only encourage advantageous contractors to stop supplying the Spare Parts, Tools and Special Equipment once they incurred the first week of delay in the delivery of the same, which would mean rewarding the breach of its obligations under the Contract[476].

589. In view of the foregoing, it adds that the penalties for the Contractor's failure to supply the Requested Spare Parts for the Gas Turbogenerators have been correctly applied.[477].

590. It also argues that none of these discounts constitute damages and much less prejudices that it intends to claim from the Commission, but rather discounts agreed in the Contract for the failure to deliver on time, as well as for the non-execution of the Work contemplated in the Specifications of the Contract, which are perfectly determined[478].

#### 12.1.3.3 Considerations of the Tribunal

591. In relation to the dispute between the Parties regarding whether or not the Contractor complied with its obligation to deliver certain Spare Parts, Tools, and Special Equipment by reason of the Contract, this Tribunal first considers it necessary to specify the scope of the obligation agreed in the Contract, to subsequently and secondly determine what, if any, are the consequences of breaching said obligation.

592. First, it is clear that the Contract establishes the obligation of the Contractor to supply Spare Parts and Special Tools and Equipment. In this regard, Clause 4.1 of the Contract, entitled "Basic Obligations", establishes that "*The Works to*

[475] Rejoinder Memorial and Reply to Counterclaim, No. 244-248.
[476] Rejoinder Memorial and Reply to Counterclaim, No. 249.
[477] Rejoinder Memorial and Reply to Counterclaim, No. 250.
[478] Rejoinder Memorial and Reply to Counterclaim, No. 260.

*be carried out by the Contractor in accordance with this Contract will include, but not be limited to, the following:...(p) to deliver Spare Parts and Special Tools and Equipment in accordance with Clause 21.5 of the Contract*".

593. For its part, Clause 21.5 of the Contract provides:

> *"21.5 Conditions for Delivery of Spare Parts and Special Tools and Equipment. Spare Parts and Special Tools and Equipment must be delivered in suitable condition for storage no later than the Scheduled Provisional Acceptance Date of the Power Plant in accordance with the Execution Program. The delivery must be made to the warehouses located on the Site that the Commission indicates in writing for such purpose. It must be indicated in a timely manner to allow the Contractor to make the necessary arrangements for the transportation of the Spare Parts and Special Tools and Equipment. All delivery expenses shall be borne by the Contractor."*

594. Thus, the Contract established an obligation to deliver Spare Parts and Tools and Special Equipment no later than the Scheduled Provisional Acceptance Date.

595. However, the dispute that has arisen between the Parties stems from the fact that CFE considers that DUNOR did not deliver all the spare parts that the former claims that the latter should have delivered, in the manner indicated below.

596. CFE refers[479] in its answer to Official Letter 742.161-JALV-420-227-17 by which it informed DUNOR "*that, based on the review carried out on the lists of Requested and Recommended Spare Parts, Tools, and Special Equipment DUNOR should have delivered for the development of Detailed Engineering, particularly in the Instrumentation and Control Area, a series of missing items of Requested Spare Parts in Section 7.2.11.1 as well as Tools and Special Equipment Requested in Section 7.2.11.2, the largest number of missing items requested are related to the Gas Turbine equipment.*"[480].

597. However, by email dated February 7, 2018, sent by Elecnor to CFE, considerations were made regarding the scope of the obligations regarding Requested Spare Parts and alludes to the response to question No. 368 in the

[479] CFE's Answer, paragraph 106.
[480] CFE identifies this Official Letter as Appendix R-017. However, Appendix R-017 does not contain this communication but a sheet that identifies a "Transmission" Dunor-CFE-372.

Tender phase[481].

598. On March 13, 2018, through Official Letter DUNOR-CFE-413[482], the Plaintiff stated that it was not obliged to deliver the missing batches of Requested Spare Parts in Section 7.2.11.1 and the Requested Tools and Special Equipment in Section 7.2.11.2, for which it invoked the response to Question No. 368 from the clarification meetings stage.

599. By Official Letter 742.161JALV-12718, of May 12, 2018[483] the Commission noted that there is no contradiction between Sections 7.2.11.1 and 7.2.11.2 of the Contract and questions No. 85 and 368 of the clarification meetings and added that the spare parts and tools of the Gas Turbogenerators for the instrumentation area and control were considered in the Technical Offer and the Economic Offer. The Commission concluded that Spare Parts for the Turbogenerators should be supplied.

600. For its part, DUNOR by Official Letter DUNOR-CFE-446 dated June 15, 2018[484], responded to Official Letter No. 742.161-JALV-127-056-18 dated June 12, 2018, and reiterated its position on its non-obligation to supply the Spare Parts, Tools, and Special Equipment Requested for Gas Turbogenerators, due to the response to Question No. 368.

601. By Official Letter 7B2019RJMN-00166 of April 29, 2019[485] the Commission instructed the contractor to *"make the 'total delivery of the Spare Parts, Tools, and Special Equipment (requested)' for the electrical and instrumentation and control area, indicated in Section 7 of the Tender and confirmed in TO-9 of its Technical Proposal, particularly those required for the Gas Turbogenerators of the manufacturer SIEMENS, since these are part of the scope of this OPC Contract*". Likewise, the Commission clarified that question 368 refers to Section 7.2.11.2 "*Special Tools and Equipment*", "*and the question is clearly focused on the recommended spare parts*", to Clause 31.2 of the Contract, to TO-9 and, finally, it demanded compliance with the scope of supply of all the Spare Parts

[481] Doc. C-099.
[482] Doc. C-103.
[483] Doc. C-100.
[484] Doc. C-104.
[485] Doc. C-102.

and Special Tools, or otherwise the corresponding discounts shall be applied under the terms of Clause 20.11.

602. By Official Letter No. 7B2019RJMN-00364[486] dated August 20, 2019, the Commission referred to the Requested Spare Parts for the Gas Turbines and indicated: 1. That in accordance with Appendix 3 of the Contract, it would proceed to make a discount of US$1,667,781.48 (One million six hundred and sixty-seven thousand seven hundred and eighty-one US dollars 48/100 cy), and 2. that it would proceed to make a discount to the Contract Price as Unexecuted Work for US$1,393,106.70 (One million three hundred and ninety-three thousand one hundred and six US dollars 70/100 cy).

603. Thus, the Dispute to be resolved is whether or not DUNOR was obliged to supply the spare parts and specific tools requested by CFE.

604. In this regard, it is pertinent to point out that the Contract establishes the following in its definitions with respect to the Spare Parts:

> *"'Spare Parts': are the spare parts and Tools and Special Equipment indicated in Section 7 of the Call and in the Technical Proposal, which must be supplied by the Contractor under the terms of Clause 21.5."*

605. However, in Section 7 of the Tender, the following was expressed:

> *"7.2.11 Spare Parts, Tools, and Special Equipment*
>
> *"The Commission requires that the Spare Parts, Tools and Special Equipment necessary for the operation, conservation work and preventive and corrective maintenance of the Power Plant be supplied.*
>
> *"The Spare Parts will be divided into two groups:*
>
> *"a) Requested*
>
> *"These are specified by the Commission, they must be supplied as mandatory, and their price must be included in the Total Cost of the Project.*
>
> *"b) Recommended*

[486] Doc. C-006.

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> *"These are the Spare Parts that complement those requested and that are necessary to carry out the maintenance work indicated by the suppliers of equipment and systems in the period from the date of Provisional Acceptance to the date of Definitive Acceptance of the Power Plant. If, when carrying out any maintenance within the period indicated above, Spare Parts are required that were not supplied by the Contractor it shall be the Contractor's obligation to deliver them to the Commission without charge.*
>
> *"Requested and Recommended Spare Parts must be completely new and equal to the original parts, be interchangeable, and have the same quality of materials as the original parts required by the Commission*
>
> *"…*
>
> *"The price of all Spare Parts (requested and recommended), Special Tools and Equipment must be included in the Total Project Cost.*
>
> *"Requested and Recommended Spare Parts (subsections a and b above) must be presented listed in the TO-10 format, indicating the description, quantity of parts to be supplied and unit of measure, as indicated in Section 7.2.1 1"* (emphasis added).

606. Thus, while the Requested Spare Parts must be provided in any case, the Recommended Spare Parts are those necessary for maintenance work indicated by the suppliers of the equipment and systems in the period from the date of Provisional Acceptance until the date of Definitive Acceptance of the Power Plant.

607. However, the dispute between the Parties arises from the responses given at the clarification meeting, since DUNOR considers that from the responses given it follows that it is not obliged to provide the Requested or Recommended Spare Parts, while CFE considers that the response referred to by DUNOR refers only to Recommended Spare Parts.

608. The reason for the discrepancy is linked to the fact that within the Tender that had as its object the execution of the Contract referred to in this process, it was also established that the bidder should include in its Proposal an offer for the Service Performance Guarantee (SPG) of the Gas Turbogenerators, based on which the Commission would enter into the Service Performance Guarantees Contract. The future coexistence of these two Contracts generated doubts

among the Parties to the tender about the spare parts and tools that the Contractor had to provide, for which they formulated the questions during the stage of the clarification meetings whose responses generated the dispute to be resolved.

609. Therefore, the Tribunal must examine the responses given by the Commission to Questions 85 and 368.

610. Regarding the response to Question 85, it was found that it indicated:

"…

| | | | | |
|---|---|---|---|---|
| 85 | ABE. 1.49 | Section 7.2.11.2 | Spare parts and special tools for Gas Turbogenerators | Question:<br>The Commission is kindly requested to confirm that all spare parts and special tools for the Turbogenerator and its auxiliaries are within the scope of the Service Performance Guarantees contract. Response:<br>The Commission clarifies that the SPGC must include the spare parts and tools of the Gas Turbogenerators inherent to the mechanical area only; however, additionally, the Commission requires that the Special Tools included in the Gas Turbine package be supplied, which must be delivered to the Commission.<br>Regarding the spare parts and tools of the other disciplines (Electrical, Instrumentation and Control, environmental protection, among others) these must be included in this Public Works Contract as requested in Sections 7.2.11, TO-10 TO-11 of the Tenderl. |

"…" (emphasis added).

611. Thus, according to the response to question 85, the Turbogenerator Long-Term Service Performance Guarantee Contract (SPGC) should include spare parts and tools for Gas Turbogenerators inherent to the mechanical sector. The other spare parts and tools (Electrical, Instrumentation and Control, environmental protection, among others), should be included in the Public Works Contract, that is, in the Contract that is the subject of this process.

612. Subsequently,, it was asked:

"…

| | | | | |
|---|---|---|---|---|
| 368 | ABE. 3.11 | Section 7.2.1 1.2 | Spare Parts and Special Tools | Question:<br>It is kindly requested to consider that both the spare parts and the special tools **recommended** for the Turbogenerator package be included only within the SPG Contract. This is to ensure that the responsible party for the SPG Contract provides such spare parts and special tools to guarantee the Services of the SPG Contract and to avoid confusing scope with the Contractor of the Public Works Contract. We also understand that the special tools for the assembly of Gas Turbogenerators must be included in the Public Works Contract.<br>Response:<br>Your assessment is correct provided the Turbogenerator package to which the question refers is the gas one and the special tools for the assembly of the Turbogenerators are considered within the Public Works Contract. |

"…" (emphasis added)

613. As can be seen, in Question 368, CFE was asked to clarify that both the spare parts and the special tools recommended for the Turbogenerator would be included only within the SPG Contract, and it requested confirmation that "*the special tools for the assembly of the Gas Turbogenerators must form part of the Public Works Contract*". In its response, CFE stated that said assessment was correct, provided it referred to the Gas Turbogenerator. It also pointed out that the special tools for the assembly of the Turbogenerator are considered within the Public Works Contract.

614. DUNOR invokes this last response to maintain that it should take precedence over the answer to Question No. 85 and that it (DUNOR) is not obliged to deliver the Spare Parts and Special Tools for the Turbogenerator, except those destined for their assembly. However, the Commission considers that Response 368 is only with respect to the Recommended Spare Parts and Special Tools and not with respect to those requested, and that therefore there is no contradiction between Response 85 and 368.

615. In this regard, the Tribunal shares CFE's understanding to the extent that Question 85 does not distinguish between requested spare parts and tools and recommended spare parts, and on the contrary, Question 368 refers specifically to recommended spare parts and tools. Since the answer is limited to confirming the assessment of the questioner, by indicating "*(your) assessment is correct"* it is clear that it refers to the Recommended Spare Parts and Special Tools.

616. Therefore, in relation to the Requested Spare Parts and Tools, the response to Question 85 must be applied. Thus, what is excluded from the Contractor's

obligation are the requested spare parts inherent to the mechanical sector. On the contrary, the Public Works Contract must include the spare parts and tools of the other discipline areas (Electrical, Instrumentation and Control, environmental protection, among others) since there is an express instruction in the Tender and no particular provision to the contrary in this regard.

617. In any case, since DUNOR invokes other arguments to support its thesis that response 368 should be applied to the Spare Parts and Tools requested, the Tribunal must examine them to establish whether they confirm or deny the conclusion resulting from the text of the Responses.

618. On the one hand, DUNOR points out that its thesis is related to the fact that the spare parts and tools for the gas generation turbines are included in the SPG Contract. The Commission points out that the SPG Contract only refers to the services to repair, maintain and replace components when they reach the end of their useful life. In view of the foregoing, DUNOR points out that the Instructions for Bidders stipulated that "*refurbishment shall be the responsibility of the Service Provider*", which should only be provided by the technologists or manufacturers of this equipment, since they are "the only ones capable of including the original Spare Parts" that may be required. It adds that the first clause of the SPG Contract expressly states that: "*the availability of spare parts shall be the responsibility of the SUPPLIER*". DUNOR points out that the SPG Contract also establishes the obligation of the SPG Supplier to deliver the spare parts of the GTs, therefore the Commission's statement that the SPG Contract does not include such an obligation is not true; it also cannot be sustained - as the Commission affirms – that there was no risk that the spare parts of the GTs would be delivered in duplicate.

619. In this regard, the Tribunal finds that in the Tender[487], the following is expressed:

> *"Likewise, the Bidder must include in its Proposal an offer for the Service Performance Guarantee (SPG) of the Gas Turbogenerators, taking into account the following:*

[487] Doc. C-49.

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> *"The Commission requires the execution of various projects that include the construction of power generation plants structured as PIDIREGAS projects, of direct investment, in the modality of Financed Public Works (PFW).*
>
> *"Some of these power generation plants work based on Gas Turbogenerators or internal combustion engines, technologies that, in order to guarantee their efficiency, availability and capacity, require adequate long-term maintenance, known as a "Service Performance Guarantee", which should only be provided by technologists, manufacturers or subsidiaries of the equipment, who happen to be the holders or have the exclusive licenses of the corresponding patents and the only ones capable of including the original spare parts that, if applicable, are required to guarantee these services.*
>
> *"For the long-term 'Service Performance Guarantee', Refurbishment shall be at the Service Provider's expense.*
>
> *"Based on the foregoing, the technologist, manufacturer or subsidiary of the Gas Turbogenerators must include an offer for the Service Performance Guarantee (SPG) of the Gas Turbogenerators in the Proposal (which may not be modified if the Contractor wins the tender) including all Type A, B, and C maintenance, in accordance with Appendix 14 of Appendix 24 of Section 6, to guarantee efficiency, availability, and capacity, including up to the second major Type C maintenance. The start date for the Service Performance Guarantee Contract will be the Provisional Acceptance Date of the Power Plant"* (emphasis added).

620. In the SPG Long-Term Contract Model for Gas Turbogenerators[488] it was expressed:

> *"THE SERVICE PROVIDER undertakes to provide THE COMMISSION with the Long-Term Service Performance Guarantee of the Gas Turbogenerators of the 313 CC Empalme II Project".*

621. In the same clause it was stated:

> *"The scope of the Service Guarantee includes, illustratively but not exclusively, the following:*
>
> • *Performance of Two (2) Type "C" or "major" Scheduled Maintenance and necessary type "A" and "B" Scheduled maintenance activities, in accordance with the provisions of Appendix 14 of this Contract;*

[488] Doc. C-050.

> • *Replacement of components when they reach the end of their useful life. The parts that are replaced as part of the Service Guarantee may be new or refurbished;*
>
> *"In case of failure of the components of the equipment(s) covered in this Contract, these shall be replaced by THE SERVICE PROVIDER, including the activities required to restore the Unit to its original operating conditions, at no cost to THE COMMISSION...*
>
> *"THE COMMISSION shall not act as the owner of the exchange parts, but shall be the owner of the parts that are installed and in operation, therefore, the parts as such shall not form part of the fixed assets of the Commission, but the fixed assets with regard to Gas Turbogenerators shall be one complete element; the foregoing must be taken into account by THE SERVICE PROVIDER, since THE COMMISSION shall not have control over ownership and serial number of individual parts, hence the availability of spare parts, their control in the process of import, export, repair, and/or reconditioning, transport, protection and availability on Site shall be the responsibility of THE SERVICE PROVIDER. Within its Proposal, THE SERVICE PROVIDER must provide the criteria for estimating the useful life of all the parts covered by the Contract"* (emphasis added).

622. From the text of the SPG Model Contract submitted to the file, it can be deduced that basically the guarantee provider must carry out scheduled maintenance and replace components that reach the end of their useful life.

623. On the other hand, the Contractor refers to its own conduct when presenting its offer and to the conduct of the Commission when awarding it the Contract. To this effect, it is worth noting that the Tender stipulated that the Spare Parts should be submitted in the TO-10 format. It adds that the Contractor included in its TO-10 the Spare Parts that it was going to provide. It emphasizes that DUNOR's proposal was accepted by the Commission, considering that it met the requirements of the Tender, since otherwise it would have been rejected, "*there being, therefore, an agreement of wills in this regard*"[489].

624. In relation to the above, CFE indicates that the Technical Specifications contain the basic engineering and that it is DUNOR's responsibility to specify the

[489] Dunor Answer and Reply, para. 186.

Spare Parts in the Detailed Engineering[490]. It adds that Dunor's Technical Proposal states that "*in case there is any deficiency, oversight, or error in the Proposal, what is indicated in the Technical Specifications will prevail*".

625. In this regard, the Tribunal notes that in the present case it is provided in the TO-9 Scope of Supply that "*III. In the event that there is any deficiency, oversight, error, or lack of clarity in the proposal, in the technical aspects, what is indicated in the technical specifications contained in Section 7 of the Tender shall prevail* [491]."

626. The foregoing implies that it cannot be considered that because something has been omitted in the offer and the Contract is awarded, this means that the Contractor is not obliged to comply with the services derived from the Tender and that there is consent on the part of CFE.

627. It is worth adding to the above that the content of the document TECHNICAL SPECIFICATIONS TO BE RESOLVED BEFORE SIGNING THE CONTRACT[492] (Appendix 20 of the Contract)[493], which includes the following:

| TECHNICAL DETAILS TO BE RESOLVED BEFORE SIGNING THE CONTRACT | | | | | |
|---|---|---|---|---|---|
| No. | Damages | CFE reference | Required precision according to what is specified by CFE | Reference Proposal | Agreement between CFE and |

[490] CFE Answer, paragraphs 75, 78, and 101.
[491] CFE Answer, paragraph 77. The image of the text of the relevant part of the TO-9 appears in Doc. C-102, Official Letter 7B2019RJMN-00166, of April 29, 2019.
[492] Doc. R.016.
[493] Appendix R-016.

| | | | | | |
|---|---|---|---|---|---|
| DIYC-OI | Requested and Recommended Spare Parts | Section 2.1.1.13<br>Section 3.3.9.2<br>Section 7.2<br>Section 7.2.11.1 | Specify that the final list of Requested Spare Parts by the Commission and those recommended by the equipment manufacturers, for all equipment and Control and Instrumentation Systems of this Project that will be | Technical Proposal Technical Proposition Folder 1 of 1 Pages 000219 to 000220 and 000234, 000238 | DURO FELGUERA, SA/ELECNO SA/ ELECNOR MEXICO SA DE C. specifies that the final list of Requested Spare Parts by the Commission and those recommended by the equipment manufacturers, for all equipment |
| | | | supplied will be defined during the Detailed Engineering, adhering to the quantities specified in Section 7.2.11.1 of the Tender. | | and Control and Instrumentation Systems of this Project that will be supplied, will be defined during the Detailed Engineering, adhering to the quantities specified in Section 7.2.11.1 of the Tender. |

| | | | | | |
|---|---|---|---|---|---|
| DIYC-02 | Requested and Recommended Special Tools and Equipment | Section 2.1.1.13 Section 3.3.9.3 Section 7.2 Subsection 7.2.11.2. | Specify that the final list of Tools and Special Equipment requested by the Commission and those recommended by the equipment manufacturers, for all the equipment and Control and Instrumentation Systems of this Project | Technical Proposal Technical Proposal Folder 1 of I Pages 000241 and 000242 | DURO FELGUERA, SA/ELECNO SA/ ELECNOR MEXICO SA DE CV specifies that the final list of Requested Special tools and Equipment by the Commission and those recommended by the equipment manufacturers, for |
| | | | to be supplied, shall be defined AND itemized during Detailed Engineering, adhering to the quantities specified in Section 7.2.11.2 of the Tender. | | all the equipment and Control and instrumentation Systems of this Project to be supplied, shall be defined AND itemized during Detailed Engineering, adhering to the quantities specified in Section 7.211 of the Tender. |

628. Therefore, in accordance with this document, the final list of Tools and Special Equipment Requested shall be itemized during the detailed engineering.

629. It is pertinent to point out that DUNOR agrees with the Commission that the Technical Specifications only contain basic engineering, and that it is the responsibility of the Bidder to develop it in the detailed engineering phase[494].

630. Based on the foregoing, for the Tribunal it is clear that what was included in relation to spare parts and special tools in TO-10 and in TO-11 regarding Spare Parts was not definitive, since it depended on the detailed engineering.

631. Now, CFE makes reference [495] in its answer to Official Letter 742.161- JALV-420-227- 17 by which it "*made it known that based on the review of the lists of Spare Parts, Tools, and Special Equipment Requested and Recommended that it had delivered for the development of the Detailed Engineering, in particular in the Instrumentation and Control Area, a series of missing items of Requested Spare Parts in Section 7.2.11.1 of the Tender were identified as well as Tools and Special Equipment Requested in Section 7.2.11.2 of the Tebder, the largest number of missing items requested being related to the Gas Turbine equipment"*, which is identified as Appendix R- 017[496].

632. For its part, DUNOR refers to the same Appendix to point out that it is a list of parts sent by DUNOR on December 6, 2017 and points out that "*As can be verified, this document does not contain or identify the Spare Parts of the GTs that CFE is now claiming. And they do not appear for a simple reason: because these pieces were never numbered or listed in the TO-10*" [497].

633. When examining said document, the Tribunal does not find that it is the communication indicated by the Commission; on the other hand, the only thing said document states is "*List of spare parts and special tools requested and recommended"*, but it does not contain any details. Therefore, the aforementioned document does not provide additional elements.

[494] Reply and Answer to the Counterclaim, paragraph 181.
[495] CFE's Answer, paragraph 106.
[496] Appendix R-017 does not contain this communication but a sheet that identifies a "Transmission" Dunor-CFE-372.
[497] Reply and Answer to the Counterclaim, paragraph 180.

634. Taking all of the above into account, the Tribunal concludes that DUNOR was obliged to supply the spare parts and tools requested in Section 7 of the Tender, "Technical specifications", Section 7.2.11.1, with the exception of those inherent to the mechanical area of the Turbogenerators.

635. This is what is clear from the Contract, taking into account the response to Question 85, which is relevant to the specific case. One may also add that this conclusion is not undermined by the fact that the Spare Parts were not included in TO-10, to the extent that it was expressly stated that in the event of omission, what is indicated in the Tender prevails.

636. Having said the foregoing, the Tribunal then proceeds to analyze the consequences of the Contractor's breach of obligation.

637. In this regard, the Tribunal finds that Clause 21.6 of the Contract states:

> *"…*
>
> *"In the event of the Contractor's failure to supply the Commission with the Spare Parts in accordance with this Clause 21.6, the Commission shall deduct from the Contract Price the sums set out in paragraph D of Appendix 3 to the Contract"* (emphasis added).

638. Likewise, subparagraph D of Appendix 3 states:

> *"In the event that the Contractor does not provide the Commission with the Spare Parts and Special Tools in accordance with Clauses 21.5, 21.6 and 21.7 of the Contract, the Commission shall have the right to charge and the Contractor must pay, as non-refundable Discounts, the equivalent of ten percent (10%) per week in arrears of the market value of the Spare Parts not supplied in accordance with Clauses 21.6 and 21.7 [sic] on the Date of Provisional Acceptance of the Power Plant by the Party(ies) of Spare, Special Tools not supplied in accordance with Clauses 21.5, 21.6 and 21.7 of the Contract, up to the limit established in Clause 20.11*" (emphasis added).

639. For its part, Clause 20.11 of the Public Works Contract states:

> *"…*
>
> *"d) The global maximum amount of discounts applicable for non-compliance with the Contractor in the supply of Spare Parts and Tools and Special Equipment in accordance with Clauses 21.5, 21.6 and 21.7, will be the equivalent of 100%*

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*(one hundred percent) of the market value of the Spare Parts not supplied in accordance with Clauses 21.6 and 21.7 of the Contract*" (emphasis added).

640. As can be seen from the transcribed texts, the Contract establishes a sanction for the "*case of non-compliance by the Contractor in not providing the Commission with the Spare Parts", or the "case in which the Contractor does not provide the Commission with the Spare Parts and Special Tools"* and likewise establishes the maximum amount applicable *"for non-compliance by the Contractor in the supply of Spare Parts and Special Tools and Equipment*".

641. Based on the foregoing, through Official Letter 7B/2019/RJMN-00364 dated August 20, 2019, the Commission informed DUNOR that it would proceed to make discounts for non-compliance in the delivery of the Spare Parts and a discount for Unexecuted Work[498] and indicated a discount of US$1,667,871.48 (One million six hundred and sixty-seven thousand eight hundred and seventy-one US dollars 48/100 cy) for non-delivery of Spare Parts, and US$1,393,106.70 (One million three hundred ninety-three thousand one hundred and six US dollars 70/100 cy), for Work not executed.

642. The Tribunal proceeds to analyze the first discount made by the Commission for failure to deliver the Spare Parts.

643. DUNOR questions the application of the discount by the Commission, for which it points out that the Siemens quote is not a binding quotation but a mere Information Letter, valid for 90 days[499]; therefore, the requirement that the discount is calculated according to the market value of the parts supplied is not met.

644. In relation to the foregoing, the Tribunal finds that the Commission is basing itself on the Siemens Information Letter of July 23, 2019, which appears as an Appendix to Official Letter 7B2019RJMN-00364[500].

645. If the Communication from Siemens is examined, it can be seen that it states "*Siemens Energy, Inc. (hereinafter as Siemens) is pleased to present you with*

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[498] Doc. C-006.
[499] Dunor Reply and Answer to the Counterclaim, paragraph 201.
[500] Doc. C-110, Siemens Information Letter, dated July 23, 2019, Attached Official Letter 7B2019RJMN-00364.

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*this Information Letter based on your email received on May 14 of this year for purposes of a quotation request, in which Siemens will supply Components for the Gas Turbine of the Empalme II Combined Cycle Power Plant*". It is pertinent to note that in the same communication it is stated that "*Siemens will not accept a Purchase Order based on this Information Letter and we would appreciate the opportunity to discuss the specific scope and technical, and commercial program requirements with you in more detail in order to reach a mutual agreement"* (emphasis added). It is also stated that the prices "*do not include VAT and that the prices quoted are based on a DDP delivery condition, excluding import taxes and using the Importer Registry of the Comisión Federal de Electricidad*" (emphasis added). It also states that this "*Informative Letter is a quotation price and cannot be considered as a final price promise, nor would it exceed the price indicated here. This price and/or scope are for reference only and are subject to change..."* (emphasis added). Additionally, it states that "*The validity of this informative letter is 90 days from its issuance*."

646. In light of the foregoing, the Tribunal considers that, although the price provided by Siemens is not a definitive price, because it is subject to negotiations, in principle it does reflect the value of the Spare Parts indicated therein, since its purpose is to allow a quotation to be made, in addition to indicating that the indicated price would not be exceeded. It is also pertinent to point out that the informative letter is valid for 90 days, which indicates that although the price indicated therein is not final, it is valid to make a quotation within that period.

647. Consequently, the Tribunal considers the amount discounted by the Commission of US $1,667,781.48 (One million six hundred sixty-seven thousand seven hundred eighty-one US dollars 48/100 cy) admissible.

648. However, through Official Letter 7B/2019/RJMN-00364 of August 20, 2019 already cited, the Commission stated "*that the non-delivery of the Spare Parts constitutes a non-delivery of the Requested Spare Parts in Section 7.2.11 of the Bidding Terms and thus constitutes a breach of the Contract Specifications, which translates into an incomplete execution of the Works…for which reason the Commission shall apply to the Contractor the corresponding discount to the Contract Price as Work not executed*". To this end, the Commission indicated that the discount in this case is equivalent to US$1,393,106.70 (One million three

hundred and ninety-three thousand one hundred and six US dollars 70/100 cy).

649. In this regard, the Tribunal finds that the Parties expressly agreed that in "*the Contractor's failure to provide the Commission with the Spare Parts in accordance with this Clause 21.6, the Commission shall deduct from the Contract Price the amounts stipulated in subsection D of Appendix 3 of the Contract*." As can be seen, this clause clearly specifies that, in case of non-compliance, without distinction between a definitive non-compliance or a delay, the applicable sanction is that provided in Clause 21.6. In accordance with the foregoing, subparagraph D of Appendix 3 states that "*in the event that the Contractor does not provide the Commission with the Spare Parts and Special Tools"* the sanction provided for in said clause shall be applied. In this case, the clause does not indicate that said sanction is only applied in case of delay. Finally, Clause 20.11 of the Contract establishes that the "*The **maximum global amount of discounts applicable for breach of the Contractor in the supply of Spare Parts and Tools and Special Equipment** in accordance with Clauses 21.5, 21.6, and 21.7, shall be the equivalent of 100% (one hundred percent) of the market value of the Spare Parts not supplied in accordance with Clauses 21.6 and 21.7 of the Contract*" (emphasis added). As in the previous cases, this clause does not distinguish between definitive breach or delay in compliance.

650. Therefore, for the Tribunal it is clear that from the point of view of the Contract the sanction applicable for the non-delivery of the Spare Parts is the one provided for in Appendix 3 of the Contract, which is, according to the text of the Contract, the maximum total amount.

651. It is pertinent to point out that in order to try to justify the two discounts applied by the Commission, the latter points out that there is no double sanction since different breaches are sanctioned: "*non-timely delivery"* on the one hand and, on the other hand, "*non-supply"*[501]. However, if the text of the Contract is reviewed, it can be seen that it does not make the distinction indicated by the Commission, since it provides for the discount for the "*case of non-compliance by the Contractor in not supplying the Commission with the Spare Parts",* or for the "*case that the Contractor does not provide the Commission with the Spare Parts*

[501] Rejoinder and Reply to CFE Counterclaim, paragraph 244.

*and Special Tools.*" The Contract also provides for "*The maximum total amount of discounts applicable for non-compliance by the Contractor in the supply of Spare Parts....*".

652. Thus, the Contract provides for a discount that can be applied both in the case of late delivery and in the case of non-delivery.

653. The fact that the way in which the discount is calculated takes weeks of delay into account does not determine that the discount only seeks to suppress the delay, but rather that, after a number of weeks of delay, non-compliance is of such importance that it amounts to a final default.

654. It is worth noting that the contractually established sanctions are based on Article 2117 of the CCF [Federal Civil Code], which establishes that "*[c]ivil liability can be regulated by agreement between the parties, except in those cases in which the law expressly provides otherwise*."

655. However, the Commission invokes Article 231 of the RLOPSRM [Regulations of the Law on Public Works and Related Services], the last paragraph of which states:

> *"When the work performed does not correspond to the scope, quantity, or volume required in the invitation to tender, in the contract specifications or in the contractor's proposal, the contracting agencies and entities shall discount the amount initially agreed in the original fixed price contract or in the part of the mixed contract of the same nature, unless at the conclusion of the contracted works, it is accredited by the agency or entity and by the Contractor that, taking into account the characteristics, complexity and magnitude of the works, as well as the call for public Tender, the objectives and purpose of the Works or Services were achieved."*

656. In this regard, one notes that Article 231 of the RLOPSRM establishes the possibility of applying discounts when the works do not correspond to what was required in the Tender, but for the Tribunal this should not be interpreted in the sense that this discount is additional to that provided for in the Contract for two fundamental reasons. On the one hand, the Federal Civil Code allows for stipulation of what was provided for in the Contract, including the limit of the indemnity, and the Parties have not challenged the lawfulness of such a stipulation. On the other hand, the discount provided for in the Contract, in cases

where the spare parts were not definitively delivered, fulfills the same function as the discount provided for in Article 231 of the RLOPSRM, to the point that it can be considered a development thereof. It is pertinent to note that both the contractual clause and Article 231 of the RLOPSRM mention a discount.

657. The following jurisprudence serves as support:

*Supreme Court of Justice of the Nation*

*Digital record: 189919*

*Instance: Collegiate Circuit Courts*

*Ninth Edition*

*Subject(s): Civil Thesis: I.4o.C.39 C*

*Source: Semanario Judicial de la Federación y su Gaceta. Volume XIII, April 2001, page 1101*

*Type: Isolated*

*CONTRACTUAL PENALTY. THE PROHIBITED DUPLICATION ONLY EXISTS WHEN IT REFERS TO THE SAME OBLIGATION (ARTICLE 1840 OF THE CIVIL CODE OF THE FEDERAL DISTRICT).*

*From the reading of the articles relating to the clauses that contracts may contain, in relation to the Contract of a conventional penalty, one notes that they regulate the existing relationship between the unfulfilled obligation and the obligation to pay it, as a consequence of non-fulfilment, which may be total or partial. Moreover, Article 1840 of the Civil Code of the Federal District establishes the possibility of agreeing a penalty in the event that the obligation is not fulfilled or is not fulfilled in the agreed manner, but adds that if such a stipulation is made, damages may not be claimed in addition, from which the prohibition of agreeing a double conventional penalty can be inferred. Articles 1844 and 1845 refer to the modification of the penalty for partial breach of the obligation, and 1846 provides for the impossibility of simultaneously demanding compliance with the obligation and payment of the penalty, unless it is agreed upon by the simple delay or because it is not fulfilled in the agreed manner. Now, the fact that the Defendant is ordered to pay two or more conventional penalties,*

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*each one of them agreed upon for breach of different obligations, agreed upon simultaneously, such as, for example, not making payment for the use of the telephone line or for the supply of electricity, making use of the property in an unagreed manner, delivering the property under unagreed conditions, terminating the Contract early, among others, does not mean that the sentence is duplicated, since said penalty clauses are not directed to the same obligation; therefore, since there is no legal impediment to agree on various conventional penalties, it cannot be considered that a sentence is duplicated, when they have been agreed with respect to different obligations, but only in the event that said penalties sanction the same non-compliance, since in that case the law does prescribe its illegality, in order to avoid a double penalty*.

*FOURTH COLLEGIATE COURT IN CIVIL MATTERS OF THE FIRST CIRCUIT.*

*Direct protection 6874/2000. María de la Luz Martínez Guevara and others. October 13, 2000. Unanimous vote. Speaker: Gilda Rincón Orta. Secretary: Gloria Esther Sáanchez Quintos.*

*See: Semanario Judicial de la Federación y su Gaceta, Ninth Edition, Volume XI, April 2000, page 978, thesis I.6o.C.195 C, heading: "CONTRACTUAL PENALTY. THERE IS NO DUPLICATION WHEN TWO CLAUSES AGREE ON DIFFERENT MATTERS IN A CONTRACT.*

*Note: By decision of September 2, 2015, Expert Cámara declared the contradiction of Thesis 80/2014, derived from the complaint of which the criteria contained in this thesis was the object, to be non-existent, considering that the criteria that are the subject of the respective complaint are not discrepant"* (emphasis added).

658. It is also worth noting that the last part of the paragraph of Article 231 provides for the non-application of discounts when it is proven that "*the objectives and purpose of the contracted works or services have been achieved"*. In the present case, the objective of the Contract was to have the Power Plant in operation and, in particular, in relation to the spare parts, to have those requested available to

meet any requirements that might arise. In this case, the Power Plant was received, and the discounts made under the Contract allow CFE to purchase the necessary spare parts, thus achieving the objectives and purposes of the contracted works, and therefore the discounts provided for in Article 231 of the RLOPSRM are not applicable.

659. Based on all of the foregoing, the Tribunal concludes that, in accordance with the provisions of the Contract, in the event of non-compliance with the obligation to deliver the requested spare parts, the applicable penalty is that provided for in subparagraph D of Appendix 3 of the Contract, in accordance with clause 21.6, without it being able to exceed the maximum total amount of discounts agreed in Clause 20.11, which is equivalent to 100% (one hundred percent) of the market value of the Spare Parts. Due to the above, since there is a contractual regulation, the application of additional discounts in accordance with Article 231 of the RLOPSRM is not appropriate.

Therefore, the amount that could be deducted by CFE for non-compliance with the obligation to deliver Spare Parts is US $1,667,781.48 (One million six hundred and sixty-seven thousand seven hundred and eighty-one US dollars 48/100 cy). Consequently, CFE made an undue discount for US$ 1,393,106.70 (One million three hundred and ninety-three thousand one hundred and six US dollars 70/100 cy) that must be reimbursed to DUNOR in terms of this award.

### 12.1.4 Application of Degradation Curves to the Results of the Performance Tests of the Power Plant.

#### 12.1.4.1 Plaintiff's Position

660. In relation to this claim, DUNOR states that it guaranteed the Commission that once the Performance Tests were carried out, the Power Plant would comply with the Guaranteed Values in Appendix 13(1), in accordance with the terms established in the Technical Proposal[502].

661. It points out that Clause 18.5 of the Contract establishes the consequences of the test being unsatisfactory and establishes the right for the Commission to

[502] Complaint Memorial, No. 218.

make the corresponding discounts as a result of non-compliance with the obligations of the Contractor regarding these concepts in accordance with Appendix 13[503].

662. DUNOR refers to Section 7.2(10) of the Tender, which defines the Performance Tests as: "*the tests that must be carried out once the Commissioning and Operation Tests of the equipment have been completed in accordance with the provisions in Appendix 13*".

663. It adds that Clauses 17.1, 17.2 and 17.3 of the Contract, referring to the Commissioning, Operation and Performance Tests respectively, provide that all the Tests "*must take place in accordance with the Execution Program and with the provisions of Appendix 13"*[504].

664. DUNOR points out with respect to the Execution Program, that the Parties agreed that, about 5 months would have to elapse between the First Synchronization of the Gas Turbogenerator and the Scheduled Provisional Acceptance Date. During this period, the Contractor had to carry out the Commissioning, Operation, and Performance Tests at the Power Plant. However, the Execution Program underwent substantial modifications for reasons attributable to CFE, which caused the time interval between the aforementioned milestones to be extended to 13 months, that is, 8 months more than initially planned[505]. Likewise, it states that the execution of all the Tests at the Power Plant was seriously affected by the enormous delays derived from the continuous load restrictions imposed by CENACE, as well as the lack of security and reliability conditions of the SEN. None of these causes are attributable to DUNOR[506].

665. DUNOR adds that the constant change of instructions on the availability of the network forced the Power Plant to remain in operation. Since there was no certainty or planning on how and when the Tests were to be carried out, a scheduled shutdown could not be foreseen[507].

[503] Complaint Memorial, No. 219.
[504] Complaint Memorial, No. 211.
[505] Complaint Memorial, No. 213.
[506] Complaint Memorial, No. 221.
[507] Complaint Memorial, No. 235.

666. It points out that, despite the load restrictions and the unavailability of the network conditions, DUNOR continued to carry out the stipulated tests within its scope even with the limitations. In this regard, DUNOR refers to a chart that shows the result of the review carried out jointly by the Parties, which proves that the Gas Turbines (GT21 and GT22) were kept on for an excess of 2,580 and 2,359 hours, respectively, which represents a much longer operating time than expected[508].

667. On the other hand, it refers to Appendix 13 that comprehensively regulates the performance of Tests by the Contractor. It indicates that before starting the Tests, and in accordance with Clause 17.4 of the Contract, DUNOR had to provide CFE with "*a list of procedures and protocols for tests and commissioning, including those for Performance Tests"* for its approval[509], and therefore, on July 2, 2019, it sent to the Commission, in accordance with Appendix 13, the Performance Tests Procedure with code EMP-UEDF-YYY-01201 REV 1 (the "*Procedure"*), which was reviewed and approved by the Defendant "*without comment*". Said "Procedure" was also included in the Provisional Acceptance Certificate issued by the Defendant itself[510]. It adds that Appendix VIIIA of the Gas Turbine Performance Tests Procedure provided by Siemens - its manufacturer - includes the degradation curves for situations such as the present one. Regarding the content of the aforementioned Appendix, it states that "*As SGI explains, 'the manufacturers of the equipment, in order to verify whether or not they comply with the guaranteed values, consider [the degradation] by establishing the EBH for each type of Gas Turbine and its operating conditions depending on the brand, type, and model... which is why the manufacturers themselves provide the corresponding degradation curves...in order to allow the objective analysis of [their] performance, discounting the natural degradation that occurs during their use*." Thus, "*the application of degradation curves is a technical parameter that applies when the turbines operate for a longer time than expected and suffer greater degradation/fouling"* (emphasis is from the quoted text)[511].

[508] Complaint Memorial, No. 236-238.
[509] Complaint Memorial, No. 214.
[510] Complaint Memorial, No. 242.
[511] Complaint Memorial, No. 244 and 245.

668. It points out that, ultimately, the Performance Tests Procedure does provide for the application of degradation curves for the Power Plant's gas turbines when the Performance Tests cannot be carried out in a New Clean Condition (that is, having accumulated less than 600 EBH). It states that this is consistent with the defined terms of the Contract where it is stipulated that, at the beginning of the Performance Tests, the Power Plant must be in New Clean Condition.

669. DUNOR points out that, since the Performance Tests were carried out in a situation that is not the agreed "New Clean Condition", it is necessary to apply the degradation curves to the results obtained "*to objectively assess what the values are... in the guarantee condition*"[512].

670. The Plaintiff adds that the Defendant maintains that the degradation curves are not applicable for two reasons: (i) because Appendix 13 indicates that "*it is not accepted to apply curves due to aging and/or fouling, therefore the guaranteed values must consider the degradation of the equipment that could exist due to the Test stages prior to the Performance Tests*", and (ii) because the Performance Tests Procedure does not include the correction factor for degradation in point 7.8.1, but only corrections for operating conditions[513].

671. DUNOR adds that the Commission maintains that having obtained results different from the Guaranteed Values implies a breach of the Technical Specifications. Specifically, due to the (i) discrepancy between the Demonstrated Net Capacity ("DNC") and the Guaranteed Net Capacity ("GNC"), the Commission alleges that, according to the results obtained from the Performance Tests, the DNC result was 653.17 kW lower than the GNC. (ii) Discrepancy between the Demonstrated Net Weighted Average Unit of Thermal Consumption ("DNWAUTC") and the Guaranteed Net Weighted Average Unit of Thermal Consumption ("GNWAUTC"): the Commission alleges that the DNWAUTC result was 7.38 kJ/kWh higher than the GNWAUTC[514].

672. DUNOR points out that the Commission has unilaterally applied a series of conventional penalties, deducting from the Contract Price the amounts that are

[512] Complaint Memorial, No. 250.
[513] Complaint Memorial, No. 251.
[514] Complaint Memorial, No. 252.

detailed below as a consequence of the results of the performance tests: (i) For the discrepancy in the DNC, US$370,048.43 (Three hundred seventy thousand forty-eight US dollars 43/100 cy). (ii) For the discrepancy in the NWAUTC, US$3,623,871.88 (Three million six hundred twenty-three thousand eight hundred and seventy-one US dollars 88/100 cy), that is, a total of US$3,993,920.31 (Three million nine hundred and ninety-three thousand nine hundred and twenty US dollars 31/100 cy)[515].

673. Moreover, DUNOR points out that the Defendant calculated said discounts on the basis of the LAPEM K3323-105-19 Report, dated August 14, 2019, which was included in the Provisional Acceptance Agreement with the specific mention that it was "preliminary".(which DUNOR refers to as the "Preliminary Report"). The Commission did not wait for a final report to be issued. In this regard, DUNOR points out that SGI stated that "*the Preliminary Report was based on imprecise data and inconclusive analysis, which yielded incorrect results*." Therefore, it maintains that CFE applied Penalties based on an Inconclusive Report[516].

674. It notes that the Report did not include "*correction factors for environmental conditions and other variables to be applied ... and uses values for fuel mass flow rate and lower calorific value"* that differ from the values determined in the LAPEM-K3323/95A/19 Report, dated November 6, 2019 which DUNOR refers to as the "Final Report"). These values have a considerable impact on the calculation of the NUTC and the NWAUTC[517].

675. DUNOR points out that, unlike the "*Preliminary Report"*, in the Final Report all the standards established in the Performance Tests Procedure were applied (with the exception of the degradation factor now discussed). Therefore, as SGI concludes, "*given the great difference between the results of the Preliminary Report and the Final Report, from a technical point of view, the latter should be chosen"*[518]. In addition, DUNOR highlights that both Reports used gas samples

[515] Complaint Memorial, No. 254.
[516] Complaint Memorial, No. 255.
[517] Complaint Memorial, No. 256.
[518] Complaint Memorial, No. 258.

taken in series, that is, taken at the same point in the Test execution process[519].

676. In any case, DUNOR points out that it is evident that (i) the provisions of Clause 17.3 of the Contract, which establishes that the Performance Tests must be carried out in accordance with the Execution Program, were not complied with, and (ii) neither were they carried out in accordance with Appendix 13. Instead, they were carried out with equipment that had been in use for a much longer period of time than originally planned and, therefore, could not produce the same results as in a New Clean Condition[520].

677. DUNOR asserts that disregarding the additional hours of operation is contrary to the Contract. To this effect, it points out that CFE ignores what is established in Clause 17.4 paragraph 2 of the Contract that provides "*The Commission will notify the Contractor within 4 (four) Days following the receipt of the aforementioned notification, if the Commission is in a position to receive the energy generated during the Tests in a manner compatible with Prudent Industry Practices... The Contractor will not be penalized under this Contract for non-compliance with the Critical Dates related to the synchronization of the Power Plant to the extent that said non-compliance was the result of the Commission not receiving the energy generated in the Tests, unless said non-receipt was caused by the Contractor, and it will be understood that the Contractor has complied with the Critical Dates for the synchronization of the Power Plant*"[521].

678. The Plaintiff points out that the Contract itself thus contains a specific provision applicable to this situation to precisely avoid the imposition of penalties for non-compliance with the Critical Dates when this derives from the fact that CFE has not received the energy from the Tests or, of course, not enough energy to complete the Tests that require higher energy generation. It adds that a good faith interpretation of the clause, in accordance with Article 1796 of the Federal Civil Code, leads to the conclusion that, if the Commission cannot penalize the Contractor for non-compliance with the Critical Dates in these circumstances, it cannot penalize DUNOR either for the necessary consequence of non-compliance with the Critical Dates – that is – the wear and tear of the gas turbines

[519] Complaint Memorial, No. 257.
[520] Complaint Memorial, No. 261.
[521] Complaint Memorial, No. 262.

and the consequent results of the Tests[522]. DUNOR points out that if the Parties recognized a Modification Period of 208 days through Amending Agreement No. 3, it would be absurd for the Commission to penalize DUNOR for the effect of said Period[523].

679. DUNOR argues that the failure to take into account the additional operating hours constitutes an action against one's own acts. It considers that the Commission simply cannot both (i) recognize the existence of an Impact Period resulting from causes not attributable to DUNOR, and (ii) seek to penalize Dunor for the effects that this Impact Period has on the results of Tests, which are a direct consequence of equipment wear. Its position to date has been grossly inconsistent[524].

680. It adds that, under the own acts doctrine*, "one should not be able to go against one's own acts"*, this doctrine being known as "*[o]ne of the general principles of Law*" also recognized in the UNIDROIT Principles on International Commercial Contracts (2016)[525]. It points out that the *non venire contra factum proprium* principle has also been accepted by Mexican jurisprudence. For this purpose, it cites the jurisprudence thesis by reiteration of the Tenth Edition (Thesis: I.3o.C.J/11 (10a.)) of April 24, 2015 of the Third Collegiate Court of the First Circuit and the resolution of Direct Protection 614/2011 of December 8, 2011 of the Third Collegiate Court in Civil Matters of the First Circuit. The latter concludes that in order for the doctrine of own acts to be applied, the following elements must be met: a) A legally prior, relevant and effective conduct... that is transcendental, relevant... b) A subsequent contradictory behavior that affects the expectations that arise from the previous one... this conduct means exercising a claim that in another context is lawful, but is inadmissible because it is contradictory to the first one... c) The identity of the subject or centers of interest that are linked in both conducts[526].

681. DUNOR states that by applying this theoretical framework it identifies that (i)

[522] Complaint Memorial, No. 263.
[523] Complaint Memorial, No. 264.
[524] Complaint Memorial, No. 266.
[525] Complaint Memorial, No. 267.
[526] Complaint Memorial, No. 268.

First, the Commission approved "*without comments*" the Performance Tests Procedure prepared by DUNOR, which included in Appendix VIIIA, Appendix D, the degradation durves now discussed. There is no doubt that, by approving said Procedure, the Defendant also accepted the applicability of its Appendices. ii) Second, the Commission recognized that the 208-day Impact Period was not attributable to DUNOR[527].

682. DUNOR considers that these conducts created the legitimate expectation in DUNOR that it would not suffer any penalty either for the delays attributable to the Commission or for their necessary consequence - that is - the wear and tear of the Gas Turbines for having operated longer than originally agreed and the consequent results in the Performance Tests[528].

683. However, DUNOR adds that, at a later time and completely disregarding its previous conduct, CFE questioned the application of degradation curves, imposing penalties on DUNOR for not having reached, without the application of degradation curves, the Guaranteed Values after the Performance Tests. It considers that it is an opportunistic and bad faith conduct of the Defendant that betrays the impression that its previous conduct had generated in DUNOR, consisting, therefore, in the subsequent contradictory conduct that Mexican jurisprudence requires for the application of the doctrine of own acts[529].

684. Finally, DUNOR maintains that it is evident that the Parties to both the prior conduct and the subsequent contradictory conduct are the same: CFE and DUNOR. Thus, if it is not considered that CFE has incurred in a strict contractual breach (*quod non*), the application of the doctrine of own acts to this case is obvious. Therefore, the imposition of penalties by CFE must be considered inadmissible and contrary to good faith[530].

685. It points out that, although it is true that these curves were not expressly included in the Tender process or in the Contract, it is also true that at the time these documents were prepared, it was not foreseeable that there would be a delay of no less than 208 days in the execution of the Tests, which would prevent

[527] Complaint Memorial, No. 269.
[528] Complaint Memorial, No. 270.
[529] Complaint Memorial, No. 271.
[530] Complaint Memorial, No. 272 and 273.

the Tests from being carried out under "*normal circumstances*". In this regard, it adds that the Guaranteed Values proposed by DUNOR considered the possible degradation of the equipment in accordance with the provisions of the Execution Program, but as is logical and as SGI affirms "*they could not foresee the additional degradation derived from its greater use*"[531].

686. It adds that the Commission knew which gas turbine model was going to be incorporated into the Power Plant, the technical specifications of which established the need to apply degradation curves in certain circumstances. Consequently, by accepting DUNOR's Technical Proposal, CFE expressly accepted that this turbine model be installed at the Power Plant, all its operating conditions and technical specifications being applicable, including the degradation curves[532].

687. Additionally, DUNOR indicates that Appendix 13, Section 13.2. establishes the Contractor's obligation to submit a Testing and Commissioning Procedure to CFE for its approval[533]. There is no doubt that said Procedure, which was approved without comments, is a contractually provided document that binds the Parties. Contrary to what CFE maintains, the fact that Section 7.8.1 of the Procedure does not refer to Appendix VIIIA does not imply that said Appendix was not accepted by the Commission and, therefore, is equally applicable to the case. Needless to say, when the Commission approved the Procedure, it also approved all its Appendices, including Appendix VIIIA, which refers to the application of the degradation curves. It reiterates that said Procedure and its Appendices were included in the Provisional Acceptance Certificate issued by the Defendant[534]. It adds that Appendix VIIIA expressly establishes the obligation to apply degradation curves to the Test results in circumstances such as those present in this case, that is, when the Performance Tests cannot be carried out in a New Clean Condition[535].

688. It points out that, in the opinion of the SGI Expert, the application of

[531] Complaint Memorial, No. 276.
[532] Complaint Memorial, No. 277.
[533] Complaint Memorial, No. 280.
[534] Complaint Memorial, No. 281.
[535] Complaint Memorial, No. 282.

degradation curves is necessary to objectively evaluate the performance of the turbines and their compliance with the Guaranteed Values. These curves "*simulate the result of the Performance Tests discounting the EBH that the gas turbines worked in excess of what would be technically necessary to perform such tests under normal circumstances*"[536]. DUNOR adds that its application in combined cycle power plants is common. In fact, it maintains that "*SGI has participated in procedures involving the Commission, in which degradation curves have been applied for the real analyses of the performance of gas turbines or combined cycles*"[537].

689. DUNOR adds that if it is considered that the use of the Degradation Curves is not expressly agreed in the Contract, in any case, their application would result from a natural consequence of the longer operating time of the gas turbines for reasons attributable to CFE. In other words, said application would be justified by applying good faith and usage as a source of integration of the Contract, as recognized by Mexican jurisprudence[538].

690. Additionally, DUNOR maintains that the application of the penalties made by the Commission, in accordance with Clause 18.5 of the Contract, is inadmissible. In this regard, it indicates that SGI independently calculates the NC and NWAUTC values obtained in the Performance Tests, based on the Final Report. It adds that based on these results, SGI applies the degradation factor and concludes that the Power Plant complied with the Guaranteed Values, and said penalties are inadmissible[539].

691. DUNOR indicates that SGI analyzes two different scenarios in which it applies degradation curves, based on the EBH attributable to CFE[540]:

- Scenario 1: is based on the EBHs accepted by the Commission in the Third Amending Agreement, that is, 2,043 hours of GT21 and 1,834 hours of GT22.

[536] Complaint Memorial, No. 283.
[537] Complaint Memorial, No. 290.
[538] Complaint Memorial, No. 296.
[539] Complaint Memorial, No. 297-299.
[540] Complaint Memorial, No. 300.

- Scenario 2: is based on the sum of the EBHs corresponding to the days accepted by CFE in accordance with the Minutes of July 31, 2019, that is, 3,171 hours for GT21 and 3,470 hours for GT22.

692. From the results obtained in both scenarios, DUNOR points out that the SGI expert concludes that Scenario 2 not only complies with the Guaranteed Values, but is also more favorable than Scenario 1. Thus, under any of the scenarios, DUNOR complies with the Guaranteed Values, and the application of penalties is inadmissible[541].

693. On the other hand, DUNOR points out that even if it is considered that the application of degradation curves is not appropriate and that CFE can apply penalties to DUNOR (*quod non*), the truth is that the Defendant calculated the discounts applied to the Contract Price on the basis of the "Preliminary Report" and, therefore, it is incorrect[542].

694. DUNOR points out regarding the results of the two reports (Preliminary and Final) that it is evident that even without applying degradation curves, the results of the Final Report show different results, which are much more in line with the Guaranteed Values. DUNOR points out that based on these results, the SGI expert calculated the discounts to be applied, resulting in: (i) US$ 386,376.61 (Three hundred and eighty-six thousand three hundred and seventy-six US dollars 61/100 cy) for a NC lower than the GNC, and (ii) US$ 348,586.92 (Three hundred and forty-eight thousand five hundred and eighty-six US dollars 92/100 cy) for a NWAUTC higher than that guaranteed[543].

695. DUNOR concludes that, ultimately, the penalties applied by the Defendant are excessive, because even if the application of degradation curves were not appropriate (*quod non*), of the total of US$3,993,920.31 (Three million nine hundred and ninety-three thousand nine hundred twenty US dollars 31/100 cy) effectively deducted from the Contract Price by CFE, only US$734,963.53 (Seven hundred thirty-four thousand nine hundred sixty-three US dollars 53/100 cy) should have been deducted. Consequently, CFE should reimburse the

[541] Complaint Memorial, No. 304.
[542] Complaint Memorial, No. 305.
[543] Complaint Memorial, No. 308 and 309.

difference in accordance with Clause 9 of the Contract[544].

696. From all of the foregoing, the Plaintiff points out that the following is clear[545]:

- First. Clause 17 of the Contract establishes that the Power Plant Commissioning, Operation, and Performance Tests are carried out in accordance with the Execution Program (Appendix 10) and Appendix 13 of the Contract. The Guaranteed Values (GNC and GNUTC) in Appendix 13(1) were established based on the assumption that the Performance Tests would be carried out under "*normal operating conditions"* at 100% load, as required by Appendix 13 (2) itself.
- Second. Performance Tests were not conducted under normal conditions. The Execution Program suffered serious delays due to the load restrictions imposed by CENACE, extending the periods between the First Synchronization of the gas turbogenerator and the Performance Tests by a total of 8 months. This meant that the equipment at the Power Plant remained operational for much longer than initially planned (208 days of the Impact Period). Not all of these delays are attributable to DUNOR, as the Defendant itself has acknowledged.
- Third. This overuse caused wear and tear on the gas turbines, which were not in a "*New Clean Condition"* at the time of the Performance Tests, as required by the Contract itself. As a result of this wear in the gas turbines, the Guaranteed Values were not achieved. For this reason, CFE imposed penalties on DUNOR in the form of discounts to the Contract Price.
- Fourth. These discounts are undue since Clause 17.4 of the Contract states that the Contractor will not be penalized for non-compliance with the Critical Dates to the extent that said non-compliance is due to CFE not receiving enough energy generated to complete the Tests. In other words, if the Commission cannot penalize DUNOR for non-compliance with the Critical Dates under the circumstances, it cannot penalize DUNOR for the consequences derived from said non-compliance, that is, the wear and tear of the equipment and its consequent results. And, even

[544] Complaint Memorial, No. 310.
[545] Complaint Memorial, No. 311.

considering that the Commission has not breached the Contract *(quod non*), CFE's subsequent action imposing these discounts on DUNOR is contrary to its own acts and, therefore, flagrantly in breach of contractual good faith.

- Fifth. Since it is clear that DUNOR cannot be penalized for the Commission's non-compliance, it is evident that the wear and tear on the gas turbines due to the delay in the execution of the Tests must be compensated through reasonable criteria. The application of degradation curves is included in the Technical Specifications drawn up by its manufacturer and, therefore, these undoubtedly constitute an expert and reasonable criterion. This is also the conclusion of the SGI expert, stating that "*it is appropriate and technically reasonable to apply degradation curves to the results of the Power Plant Performance Tests*."
- Sixth. Appendix 13.2(A) of the Contract requires the Contractor to prepare a Performance Tests Procedure prior to the execution of the tests. This procedure must be approved by the Commission. DUNOR presented its Procedure on July 2, 2019, which was approved by CFE "*without comments"* and was included in the Provisional Acceptance Certificate issued by CFE.
- Seventh. In its Appendix VIIIA, said Procedure foresees the application of degradation curves to the results of the Performance Tests when it has not been possible to conduct said Tests when the Gas Turbines are in a '*New Clean Condition'*.
- Eighth. As can be seen from the Expert Report prepared by SGI, taking into account that the degradation of gas turbines is an inevitable phenomenon, inherent to the operation of the Power Plant itself, the application of degradation curves is technically reasonable. The application of said curves to the results of the Performance Tests would be justified by applying good faith and usage as a source of integration of the Contract.
- Ninth. In any case, if the application of penalties were appropriate - quod non - the penalties applied to DUNOR on the basis of a "Preliminary

Report" with imprecise data that yielded incorrect results should not be accepted, therefore it would not be appropriate to apply the discounts to the Contract price in the amount that CFE intends. Instead, only a penalty of a maximum of US$ 734,963.53 (Seven hundred thirty-four thousand nine hundred sixty-three US dollars 53/100 cy) would be applicable. Consequently, CFE should pay the difference to DUNOR in accordance with Clause 9 of the Contract.

697. On the other hand, DUNOR refers to the arguments presented by the Commission in its Answer. This refers to the Commission's thesis in the sense that if DUNOR had any right regarding the application of the degradation curves, by signing the Amending Agreements it waived the causes that gave rise to Agreements 2 and 3 for which it transcribes the third clause. In this regard, DUNOR points out that the transcribed clause can only be found in Amending Agreement No. 1 of April 24, 2018. This waiver was neither agreed nor recorded in Amending Agreements No. 2 and 3. It points out that, on the contrary, the third clause of Amending Agreement No. 2, of November 23, 2018, states that "*The Contractor... waives any present or future claim to obtain a new extension derived from the same causes that gave rise to this Agreement*"[546]. It adds[547] that the Amending Agreement No. 3, of October 21, 2019, further limits this waiver of rights and states in its third clause that: "*The Contractor... waives any additional claim to obtain a new extension derived from the same causes that gave rise to this Agreement*."

698. It then points out that from a simple reading of these clauses it is clear that DUNOR has in no case waived its rights in relation to the application of degradation curves but, solely and exclusively, its rights to extend the Dates of Critical Events "*for the same causes*" that are included in each Amending Agreement. Therefore, the Commission's assertion of an alleged general waiver of rights by DUNOR is false and, having consciously omitted the clauses of Amending Agreements No. 2 and 3, is a sign of absolute bad faith. DUNOR adds that in accordance with Article 7 of the Federal Civil Code, the waiver of rights does not produce any effect if it is not performed in clear and precise terms, in

[546] Reply and Answer to the Counterclaim, No. 252.
[547] Reply and Answer to the Counterclaim, No. 253.

such a way that there is no doubt about the right that is being waived[548].

699. Regarding the fact that the Commission maintains that the Contractor should have considered the possible impact due to degradation or aging in the values offered, regardless of the circumstances in which the Tests were carried out, DUNOR points out that in the first place, it must be taken into account that the values initially offered by DUNOR in its TO-2 (subsequently included as Guaranteed Values in Appendix 13 of the Contract) are dated September 10, 2015. Appendix 13 stipulates that "*the guaranteed values must consider the degradation of the equipment that may exist during the Commissioning Tests and Operation Tests stages prior to the Performance Tests*." As is logical, by then, DUNOR could only foresee the degradation and/or fouling of the Equipment corresponding to the days initially foreseen for the performance of said Tests. It adds that on the date of signing the Agreement, on September 17, 2018, the Parties had only signed Amending Agreement No. 1, for which only 19 days of extension were recognized (out of the 320 total days of delay). In other words, at the time of signing the Agreement, the delay in the Testing Program was minimal, so DUNOR did not even have to consider the need to apply degradation curves[549]. Second, it points out that on November 13, 2018, at the Consultative Commission Meeting, although the Parties agreed to discuss the effects suffered in the Execution Program, the days of delay due to causes not attributable to DUNOR. Therefore, it was impossible that DUNOR had foreseen anything as of that date. It was not until November 23, 2018, by signing Amending Agreement No. 2, when the Commission recognized a delay of 93 days. However, by then, only some of the Commissioning Tests had started and, therefore, DUNOR could not foresee the 208 days of delay prior to the Performance Test and the consequent degradation of the GTs[550].

700. DUNOR affirms that, from the foregoing, it follows that, at the time of signing of (i) the Agreement, on September 17, 2018; (ii) the Minutes of the Meeting, of November 13, 2018: and (iii) the Amending Agreement No. 2, of November 23, 2018, DUNOR could not in any way foresee the delay of 208 total days that finally

[548] Reply and Answer to the Counterclaim, No. 254 and 255.
[549] Reply and Answer to the Counterclaim, No. 261.
[550] Reply and Answer to the Counterclaim, No. 262.

took place (acknowledged in Amending Agreement No. 3) and that had a more severe impact on the Test Program and on the operation time of the GTs[551].

701. DUNOR adds that despite the fact that Amending Agreement No. 3 was signed after the Tests (that is, when the Parties became aware of the effects suffered), nothing was included because none of the referred Instruments had the purpose of regulating issues related to the Performance Tests Procedure. For this purpose, it points out the following: first, that in accordance with the provisions of Clause 25.5 of the Contract, the purpose of the Agreement of September 17, 2018 was "*to agree on the terms and conditions that will reasonably compensate the Contractor for the reasonable and documented costs it may incur directly related to the works*...". This document was not intended to address technical issues relating to Performance Tests and applicable correction factors[552]. Second, in accordance with clause 8 of the Contract, the Consultative Commission (consisting of representatives appointed by both Parties) has the purpose of consulting and planning on the progress of the Project. It then refers to the Minutes of the Meeting of November 13, 2018 of said Commission and points out that in no case was it proposed to agree on the technical detail of the Performance Tests, such as the degradation curves[553]. Third, with regard to Amending Agreements Nos. 2 and 3, the purpose of these is to extend the Dates of Critical Events and thus agree on the modification of the Execution Program, in accordance with the provisions of Clause 12.3 of the Contract. DUNOR points out that these Amending Agreements were not intended to agree on technical issues related to the Tests, such as the Degradation Curves. Finally, DUNOR points out that it was unnecessary to consider the degradation curves in the Amending Agreements, since none of these instruments are intended to address technical issues related to the development and execution of the Performance Test[554].

702. Additionally, DUNOR states that the degradation factor was included in the instrument provided for it. It adds that Appendix 13 of the Contract

[551] Reply and Answer to the Counterclaim, No. 263.
[552] Reply and Answer to the Counterclaim, No. 268.
[553] Reply and Answer to the Counterclaim, No. 270.
[554] Reply and Answer to the Counterclaim, No. 275.

comprehensively regulates the performance of Tests by the Contractor, including DUNOR's obligation to deliver a Performance Tests Procedure to CFE. Therefore, on July 2, 2019, DUNOR sent the Commission the Performance Tests Procedure EMP-UEDF-YYY-01201 REV 1 (the "*Procedure"*). Said Procedure, reviewed and approved by the Defendant "*without comment"*, was also included in the Provisional Acceptance Certificate issued by CFE[555]. DUNOR included the technical specifications for this equipment, which do include the degradation factor, in Appendix VIIIA of the Procedure.

703. Likewise, Section 4.1 of said Appendix stipulates that[556]: "*Gas Turbine performance testing should be performed as soon as possible after initial synchronization while the unit is in a New and Clean condition, as defined in Section 10.8.1…. If testing is not possible within the New and Clean period, corrections for Gas Turbine degradation per Section 10 shall apply*"[557].

704. DUNOR highlights the binding nature of Appendix VIIIA of the Procedure given that (1) it uses imperative language ("*is intended for", "the performance test on the gas turbine must be conducted"* and "*corrections for gas turbine degradation will be applied*"; (ii) the instructions given by the manufacturer of the GTs cannot be ignored, otherwise there is a risk that they will be damaged, and (iii) the Public Works Contract does not regulate the technical issues applicable to the Tests and refers expressly to another document – the Performance Tests Procedure – which does have the purpose of detailing these issues[558].

705. With this, DUNOR concludes that the degradation factor was indeed included in the Performance Tests Procedure, this being the only document contractually provided to regulate the technical issues related to the execution of these Tests.[559]

706. DUNOR points out that CFE maintains that "*the Contract consistently,*

[555] Reply and Answer to the Counterclaim, No. 277.
[556] The original text in English states "8 "The performance test on the gas turbine must be conducted as soon as possible after initial synchronization while the unit is in New and Clean condition, as defined in Section 10.8.1. If testing within the New and Clean period is not possible, corrections for gas turbine degradation will be applied per Section 10.8".
[557] Reply and Answer to the Counterclaim, No. 282.
[558] Reply and Answer to the Counterclaim, No. 283.
[559] Reply and Answer to the Counterclaim, No. 284.

*unequivocally, irrefutably prohibits and under any assumption the application of degradation curves*." DUNOR argues that this interpretation by CFE is absurd.

707. It points out that, as explained in the Second SGI Report, although it is true that Appendix 13 stipulates that degradation curves will not be applied, it is also true that this statement is based on the assumption, in SGI's technically reasonable opinion, that the Performance Tests must be carried out under normal conditions "*and not with a large increase in the number of hours estimated at the beginning of the Contract*". This is because, although Appendix 13 stipulates that the Guaranteed Values must be analyzed considering the degradation of the equipment that could exist until the Performance Tests are carried out, the existence of a delay of this magnitude could not be foreseen in said Appendix. Therefore, according to SGI's technical criteria, the prohibition set forth in Appendix 13 can only be understood as applicable if the Tests are carried out in accordance with the agreed program or are carried out outside the program, but for reasons attributable to the Contractor. DUNOR adds that in the present case neither of these two circumstances occurred[560].

708. It indicates that Article 1854 of the Federal Civil Code provides that: the clauses of the Contracts must be interpreted one by the other, attributing to the doubtful ones the meaning that results from all of them as a whole[561].

709. Based on the foregoing and a systematic interpretation of the clauses of Appendix 13, it is concluded that the exclusion of degradation curves was foreseen for the Performance Tests to be carried out under "*normal operating circumstances"*, that is, as originally provided in the Execution Program[562].

710. It adds that although it was CENACE who decided the times and capacities in which the energy could be delivered, this does not have to prejudice DUNOR in any way, which was subject to the decisions of CENACE and the Commission itself[563].

711. DUNOR maintains that the Power Plant Tests were not carried out under

[560] Reply and Answer to the Counterclaim, No. 295.
[561] Reply and Answer to the Counterclaim, No. 296.
[562] Reply and Answer to the Counterclaim, No. 297.
[563] Reply and Answer to the Counterclaim, No. 299.

normal operating conditions, as required by Appendix 13, which is why the exclusion of the degradation curves does not apply.

712. DUNOR points out that the Commission affirms that Appendices VII, VIIIA and B and IX are not part of the information required by the Guide to prepare the Performance Tests Procedure and, therefore, are not applicable to the case.

713. However, DUNOR points out that the Guide establishes on its first page that "*it is presented in an indicative but not limiting manner*", and that the procedure "*must be modified according to the technical, operational, and contractual particularities applicable to each project*". This was exactly what DUNOR did, completing the Procedure in accordance with the technical specifics required by the Power Plant, including the need to apply degradation curves[564].

714. Additionally, DUNOR points out that the Commission argues that Appendix VIIIA of the Procedure is not applicable since it is an internal Siemens document issued for DUNOR and, therefore, it is not related to the Contract signed between the Parties. DUNOR specifies that this assertion is not correct, because the Performance Tests Procedure must be prepared following the guidelines of the MEJ2.6 Guide, according to which it is necessary to adapt the content and detail of the Procedure to the technical needs of the Power Plant. In particular, and as far as this is of interest here, the gas turbine model installed in it was the SGT6-8000H model, from the manufacturer Siemens[565]. For this reason, DUNOR asked Siemens for instructions on how to carry out the Performance Tests on the installed GTs. To this end, it highlights that Appendix VIIIA itself establishes that "*it is intended to be used as a manual by the test engineer who performs a thermal performance test on the SGT6-8000H gas turbine that operates in the combined cycle with natural gas fuel in the 313 CC Empalme 2 Project*"[566][567].

715. It adds that further evidence that Appendix VIIIA does relate to what was expressly agreed to by the Parties is that Section 4 of the Procedure – the

[564] Reply and Answer to the Counterclaim, No. 307.
[565] Reply and Answer to the Counterclaim, No. 310 and 311.
[566] Translation of the Tribunal, the original text in English states: "it is intended for use as a manual by the test engineer conducting a thermal performance test on the SGT6-8000H Gas Turbine operating in combined cycle on natural gas fuel at the 313 CC Empalme 2 Project".
[567] Reply and Answer to the Counterclaim, No. 312.

applicability of which is not questioned by CFE - regarding the "*Applicable Documentation"* states that: "*The Performance Test will be carried out in accordance with the provisions of this Procedure, the reference documents and the codes listed below"*[568]. It points out that the reference standards listed include ASME PTC 22. Therefore, it notes that, in line with the above, Appendix VIIIA prepared by Siemens states that "*this specification is written in general accordance with ASME PTC 22"*. In other words, Appendix VIIIA is in accordance with the provisions of the Procedure agreed between the Parties, it being irrelevant who issued the document[569].

716. Based on all of the above, DUNOR concludes that[570]:

- The MEJ2.6 Guide provided by CFE is a reference document for preparing the Performance Tests Procedure. The same Guide states that it must be modified according to the technical, operational, and contractual particularities applicable to each project.
- The gas turbines installed in the Power Plant are the SGT68000H model, manufactured by Siemens.
- The Procedure prepared by DUNOR and approved by CFE stipulated that the Performance Test should be carried out in accordance with the provisions of the reference codes and standards listed therein, among which is the ASME PTC 22 code for Gas Turbines.
- In accordance with the foregoing, Appendix VIIIA of the Procedure was prepared by Siemens in accordance with the provisions of the ASME PTC 22 code.

717. Additionally, DUNOR points out that the Defendant maintains that Appendix VIIIA is not applicable because it indicates that it has the character of "*Reference"* and that, therefore, it had no objection to its being attached to the Procedure. DUNOR points out that CFE's position in this regard lacks any legal basis. In this regard, it first recalls that the Procedure – including all its Appendices – were sent by DUNOR to CFE, and approved by the latter "*without comments*". Furthermore,

[568] Reply and Answer to the Counterclaim, No. 313.
[569] Reply and Answer to the Counterclaim, No. 318.
[570] Reply and Answer to the Counterclaim, No. 319.

said Procedure and its Appendices are included in the Provisional Acceptance Agreement issued by CFE, so there is no doubt that the Procedure (and its Appendices) are binding on both Parties.[571].

718. Secondly, DUNOR maintains that the extensive interpretation that CFE makes of the "*reference*" note cannot be correct since it would imply that, regardless of the circumstances, said document would never be applicable. Why then did the Parties agree to include it? Why did the Commission not request that it be expressly excluded from the Procedure? The answer to these questions is simple: Appendix VIIIA was included in the Procedure because the Parties so agreed. This is reflected in the final version of the Procedure, which does not include the "reference" note[572].

719. Thirdly, it states that this position of the Commission directly contradicts the provisions of article 1853 of the CCF, that is, that "*if any clause of the contracts admits different meanings, it shall be understood in the most appropriate one for it to take effect*." For this reason, CFE's interpretation cannot be correct, as it would completely void Appendix VIIIA of its content[573].

720. For all of the above, it indicates that maintaining that Appendix VIIIA is not applicable to the Procedure because it includes a note indicating "*reference"* is not only insufficient per se to justify its exclusion (insofar as it was attached to the Procedure finally approved by the Parties), but also that an interpretation in accordance with Mexican law requires that ambiguous contractual clauses be interpreted in such a way that they produce their effects. Only DUNOR's position allows Appendix VIIIA to be effective. Therefore, the Commission's interpretation cannot be sustained, neither factually nor legally[574].

721. Additionally, DUNOR highlights that the Power Plant does not comply with the New Clean Condition agreed upon *ab initio*. In this regard, DUNOR points out that the Commission argues that the definition of New Clean Condition included in Appendix VIIIA differs from the definition given by the Contract, the latter being the only one applicable to the case and concludes, following this criterion that,

[571] Reply and Answer to the Counterclaim, No. 322.
[572] Reply and Answer to the Counterclaim, No. 323.
[573] Reply and Answer to the Counterclaim, No. 324.
[574] Reply and Answer to the Counterclaim, No. 325.

according to the Contract, "*the Power Plant is ALWAYS in a 'new clean condition' prior to Performance Tests*". DUNOR points out that this position of the Commission is incorrect[575].

722. To this effect, it specifies that the Contract envisages that at the beginning of the Performance Tests, the Plant must be in a New Clean Condition, which according to the defined terms means: "*the condition of the Power Plant at the beginning of the Performance Tests and in which the possible degradation and fouling derived from the first startup of the Units, Commissioning Tests and Operation Tests are already included*". As is logical, this definition was based on the assumption that the Project would be carried out in 916 days according to the Initially agreed Execution Program and with an estimate of operating hours of the GTs of around 1110 EBH. That is, at the time this contractual definition was included, it was impossible for the Parties to foresee the circumstances that finally occurred. It adds that, for this reason, and in accordance with what was stated in the Second SGI Report, the provisions of the equipment manufacturer in Section 4.1 of Appendix VIIIA must be applied[576].

723. DUNOR adds that if the Parties had wanted the New Clean Condition to be independent and completely autonomous of the actual hours of operation, they would have said so. It was sufficient to have made an insertion to that effect in the definition of Clause 1.1 of the Contract[577].

724. It indicates that the Second SGI Expert Report clarifies that it is technically understandable that the contractual definition of "*New Clean Condition"* did not contemplate the application of degradation and fouling factors. This is because the Contract "*envisages a prototype scenario where there are no factors attributable to CFE that generate an extension of the testing period and, precisely, in that ideal scenario it was the responsibility of the Contractor to design and prepare its Test Program and have all the conditions for the GT's to function as designed"*. [578]

725. DUNOR adds that the reality here exceeded by far what was stipulated in the

[575] Reply and Answer to the Counterclaim, No. 326.
[576] Reply and Answer to the Counterclaim, No. 329.
[577] Reply and Answer to the Counterclaim, No. 331.
[578] Reply and Answer to the Counterclaim, No. 335.

Contract, which leads the SGI Expert to affirm that "*from a technical point of view, these conditions were altered by the significant delays that the aforementioned tests had undergone"*, and hence the need to apply degradation curves, which are "*the only mechanism that technically allows the evaluation of the impact of this additional time*"[579].

726. DUNOR points out that the SGI Expert concludes that it is evident that at the time the Performance Tests were carried out, the GT21 and GT22 gas turbines were no longer in the New Clean Condition that the Contract provided for, that is, there was no defined prototypical or ideal situation. It emphasizes that CFE's Expert reaches the same conclusion, as indicated by SGI, in his paragraph 472, in which he establishes "...*indeed the Performance Tests were not carried out under contractually established conditions"*.[580]

727. From all of the foregoing, it follows that maintaining, as the Defendant does, that the Power Plant is "*always"* in a New Clean Condition is an entelechy. If that were the case (*quod non*), it would not have been necessary to define said term since, regardless of the circumstances, this requirement would always be met. On the contrary, the Procedure does specify and delimit the definition of the New Clean Condition and establishes the obligation to apply degradation curves to the results of the Performance Tests when this condition is not met, as is the case[581].

728. DUNOR points out that CFE maintains that it has not been proven that the breach of the Guaranteed Values was due to degradation of the GTs. Additionally, the Commission argues that with the application of the Degradation Curves, DUNOR only seeks to obtain an additional tolerance "*given the evident reduction in the performance of the expected values in the Steam Turbine"*, "*for which reason there is a reasonable doubt as to the real cause of the default in the Guaranteed Values*"[582].

729. In view of the foregoing, DUNOR points out: firstly, that the Commission recognizes that the additional hours of operation in the GTs imply greater degradation, which can inevitably affect their performance. This is a conclusion

[579] Reply and Answer to the Counterclaim, No. 336.
[580] Reply and Answer to the Counterclaim, No. 337.
[581] Reply and Answer to the Counterclaim, No. 340.
[582] Reply and Answer to the Counterclaim, No. 341.

that CFE itself affirms is based "*on basic technical aspects and even on the basic comprehension of the subject*"[583]. It notes that the Defendant agrees with DUNOR that the additional hours of operation of the GTs affected their performance. There is also no doubt, considering Expert Cámara's opinion, that the technically reasonable way to correct the negative effects of the degradation is through the degradation curves.[584]

730. It adds that Report LAPEM-K3323-95A-2019, dated October 30, 2019, shows that, at the time the degradation effect is corrected by applying the curves, DUNOR comfortably complies with the Guaranteed Values. In other words, it is evident that degradation is a sufficiently important factor by itself to determine compliance with the Guaranteed Values. In that sense, it considers that it is true that the Performance Tests of the GTs is the fundamental component of the Combined Cycle, the degradation of the GTs being sufficient to determine compliance or non-compliance with the Guaranteed Values[585].

731. DUNOR adds that the SGI expert fully agrees with what was explained, also considering that the studies carried out demonstrate the causality between the breach of the Guaranteed Values and the degradation of the GTs without the need to use the root cause methodology (RCA for its initials in English) that CFE's expert claimed[586]. In this regard, DUNOR recalls the conclusion of the SGI expert, which indicates that since there was no failure during the Performance Tests, it was not necessary, much less possible, to apply the Root Cause Analysis (RCA) methodology, which is the review of the characteristics and causes of component or machine failures[587]. It adds that the unnecessary need to apply the RCA methodology is also derived, according to the technical criteria of the SGI Expert, from the existence of scientific literature that proves that the root cause of the decreases in Net Capacity and increase in Unit Thermal Consumption are due to the degradation of the GTs.

732. DUNOR refers to RG87 which, in CFE's opinion, could have contributed to

[583] Reply and Answer to the Counterclaim, No. 342.
[584] Reply and Answer to the Counterclaim, No. 343.
[585] Reply and Answer to the Counterclaim, No. 345.
[586] Reply and Answer to the Counterclaim, No. 347.
[587] Reply and Answer to the Counterclaim, No. 347.

the breach of the Guaranteed Values. To this end, it specifies that it is an event identified in the steam turbine on October 17, 2019, that is, approximately three months after the end of the Performance Tests. DUNOR considers that this defect could not have had an impact on the execution and results of the Performance Tests in any way since: (i) the RG87 was produced long after the Performance Tests had been completed, the Power Plant being available and the Guarantee Period having practically ended; (ii) it occurred in the steam turbine, which has nothing to do with the GTs and, (iii) according to the manufacturer's information in Report EMPII-RG-0087 ("RG87 Report"), it was determined that this event had not affected the performance of the steam turbine or the Combined Cycle[588].

733. In sum, DUNOR points out that the Defendant only speculates without any evidence on possible additional causes of the breach of the Guaranteed Values and, even if it were the case (*quod non*), it would correspond to the Commission and not to the Plaintiff to prove such point[589].

734. Regarding the reasons why the Commission defends having relied on Report LAPEM K3323105-19, DUNOR points out that CFE's arguments lack any merit for various reasons. In the first place, because as much as the Commission maintains that Report LAPEM K3323105-19, of August 14, 2019, should be considered final, the report itself specifically states that it is of a "*preliminary"* nature. Following a literal interpretation (Article 1851 Federal Civil Code), it is concluded that it cannot be a definitive report, as the Commission erroneously claims[590].

735. Second, DUNOR points out that CFE defends the definitive nature of the "*Preliminary Report"* on the basis that it meets all the requirements in accordance with the Performance Tests Procedure.[591] To this end, DUNOR points out that, as indicated in the Second SGI Report, it is not possible to change the Preliminary status of report K3323-105-19 given that: i) as established in the same report in Section 4, in the preparation of the "*Preliminary Report"* only the

[588] Reply and Answer to the Counterclaim, No. 349.
[589] Reply and Answer to the Counterclaim, No. 350.
[590] Reply and Answer to the Counterclaim, No. 358.
[591] Reply and Answer to the Counterclaim, No. 359.

ASME PTC 46 Standard was considered, while the Performance Tests Procedure establishes that the ASME PTC 46 Overall Plant Performance Standards, ASME PTC 22 Standard for Application to Gas Turbines, ASME PTC 4.4 should be applied, as well as Application Standard ASME PTC 19.1 Calculation of Uncertainties and ASME PTC Standards 19.2 to 19.17 Measurement Uncertainty of Instruments and Apparatus. ii) From a technical point of view, the non-application of this regulation provided for in the Performance Tests Procedure implies that "*the Preliminary Report is inadequate and inadmissible because its results have been obtained without complying with the technical regulations that must validate them"*. DUNOR points out that all of the above makes this report invalid, much less can it be used as a basis for the application of discounts[592].

736. Third. DUNOR states that the Defendant maintains that the "*Final Report"* of October 30, 2019, lacks validity because it was untimely (after the date of issuance of the Provisional Acceptance Certificate) and for not having been submitted in a timely manner to the Commission for its review. DUNOR considers that these CFE arguments are completely irrelevant for the purposes of this dispute[593]. In this regard, DUNOR clarifies that the "*Final Report"* is presented as one more probative element in the framework of this Arbitration. And this in order to demonstrate that the results of the "*Preliminary Report"* are incorrect for not following all the rules of the Performance Tests Procedure. It maintains that it is irrelevant when the report was issued. DUNOR affirms that what the Defendant cannot claim is to ignore the material conclusions reached by the "*Final Report*" by relying on a merely formal matter. CFE affirms that the "*Final Report"* is not acceptable, but it does not justify this claim at all[594].

737. DUNOR adds that, given that the results of the "*Final Report"* show that DUNOR would comply with the Guaranteed Values (see section IX(vi) of the SGI Expert Report); the fact that the Defendant does not refute the conclusions reached by it is indicative that its position lacks merit. Consequently, the Tribunal

[592] Reply and Answer to the Counterclaim, No. 361.
[593] Reply and Answer to the Counterclaim, No. 362.
[594] Reply and Answer to the Counterclaim, No. 363.

must assess the "*Final Report*"[595].

738. In addition, DUNOR points out that it is noted that the "*Final Report*" used gas samples comparable to those of CFE, obtained in series, that is, taken at the same sampling point, at the same moment in the execution process of the Tests and on the same day. Therefore, when the "*Final Report*" was prepared or delivered does not affect the validity of its result at all[596].

739. In short, DUNOR affirms that it has sufficiently justified the following: i) The "*Preliminary Report*" is not definitive in that it expressly indicates that it is "*preliminary*" and did not follow all the rules stipulated in the Procedure. ii) The "*Preliminary Report*" and the "*Final Report*" were made by the same expert. iii) The "*Final Report*" is applicable since its extemporaneity is technically irrelevant given that the gas samples on which it is based were taken in series, it complies with all the rules of the Procedure and justifies the differences with respect to the results achieved by the "*Preliminary Report*"[597].

740. Due to the foregoing, the Plaintiff reiterates that the discounts applied by CFE to the Contract Price are inappropriate because they were calculated based on the "*Preliminary Report*", which yielded incorrect results.[598]

741. Finally, DUNOR points out that taking into account the results obtained in accordance with the agreed procedure, SGI considers that, if the degradation curves are not applicable, a discount of a maximum of US$ 348,586.92 (Three hundred and forty-eight thousand five hundred and eighty-six dollars US dollars 92/100 cy) for breach of NUTC and US$ 386,376.61 (Three hundred eighty-six thousand three hundred and seventy-six US dollars 61/100 cy) for breach of Net Capacity, exceeding the penalty applied by CFE by US$ 3,275,284.96 (Three million two hundred and seventy-five thousand two hundred and eighty-four US dollars 96/100 cy)[599].

[595] Reply and Answer to the Counterclaim, No. 364.
[596] Reply and Answer to the Counterclaim, No. 365.
[597] Reply and Answer to the Counterclaim, No. 366.
[598] Reply and Answer to the Counterclaim, No. 367.
[599] Reply and Answer to the Counterclaim, No. 370.

### 12.1.4.2 Defendant's Position

742. The Commission emphasizes that the Contract and Appendix 13 exclude the application of Degradation Curves. For this purpose, it indicates that Appendix 13 establishes: "*It is not accepted to apply curves due to aging and/or fouling, for which the guaranteed values must consider the degradation of the equipment that could exist during the stages of Commissioning Tests and the Operation Tests prior to the Performance Tests*"[600]. Additionally, insistently, it indicates that "*The only corrections for conditions other than those of guarantee that will be applied to the results of the tests will be obtained using the Correction Curves that were supplied with the Proposal.*"[601]. For this purpose, CFE indicates that "*the Correction Curves that were supplied with the Proposal*" are the Correction Curves of Net Capacity and GNUTC for[602]: Atmospheric Pressure, Dry Bulb Temperature, Relative Humidity, Lower Calorific Value of Fuel, Power Factor, and Seawater Temperature.

743. The Commission points out that the Contract and Appendix 13 exclude the application of Degradation Curves during the Impact Period of 208 days recognized in the Third Amending Agreement, during which the Contractor was responsible for the custody, safekeeping, operation and maintenance of the Power Plant, so that the effects of degradation after the formalization of the agreements to compensate the Contractor and comply with the purpose of the Contract, must be assumed by the latter.

744. The Commission states that the Contractor indicates that the Performance Tests were not carried out under normal operating conditions, in clear contradiction with the connotation given in Appendix 13 to this qualification, given that the Contractor fails to indicate that the said paragraph also establishes that these "*normal operating conditions*" are those related precisely to the condition of the Performance Test itself, since it indicates that they must be evaluated at different loads; i.e.: at 100%, 75%, and 50% of Net Demonstrated Capacity, further clarifying that this must take place with the control of the unit fully

[600] Rejoinder and Reply to Counterclaim, No. 311.
[601] Rejoinder and Reply to Counterclaim, No. 314.
[602] Rejoinder and Reply to Counterclaim, No. 316.

automatically, just as the Power Plant would normally be operated[603].

745. The Commission warns that none of the 3 Amending Agreements made a reservation or safeguard regarding the degradation curves issue, but quite the contrary, in the third clause of each one the statement is made that "*the Contractor acknowledges that with the extension indicated in the first clause of this Amending Agreement, all your rights are satisfied, so you waive any present or future claim of any nature or any cost that has been generated or could be generated, derived from the same that gave rise to this agreement*". Due to the foregoing, it considers that in the event that the Plaintiff has a right regarding the issue of degradation curves, it was expressly waived due to the causes that gave rise to Agreements 2 and 3[604].

746. It adds that the fourth Clause of the Third Amending Agreement indicates that the Parties acknowledge that each and every one of the stipulations and clauses of the Contract are maintained in full force and effect. This implies, without limitation, the provisions of Appendix 13 of the Contract[605].

747. Likewise, it points out that both in the Agreement and in the meeting of the advisory Commission, the Plaintiff never expressed disagreement, nor did it request that the degradation of Gas Turbines be included in the Performance Tests[606].

748. Along these same lines, it points out that the Plaintiff was able to request the Commission to include degradation in gas turbines in the formalization of the following instruments: i) in the Second Amending Agreement, ii) in the agreement for the Application of Clause 25.5, iii) at the meeting of the Consultative Commission or, iv) in the Third Amending Agreement, which was subsequent to the performance tests carried out by the Contractor, since the agreement is dated October 21, 2019 and testing ended on July 07, 2019[607].

749. It warns that it is inadmissible to believe that a company such as the

[603] Rejoinder and Reply to Counterclaim, No. 301.
[604] Counter-Memorial and Counterclaim, No. 141 and 142.
[605] Counter-Memorial and Counterclaim No. 143.
[606] Counter-Memorial and Counterclaim No. 144.
[607] Counter-Memorial and Counterclaim, No. 145.

Contractor, which has the degree of experience and expertise for the construction and Commissioning of Combined Cycle Power Plants, was not able to foresee the possible consequences in terms of degradation due to the effects that were occurring, which now, according to its statements, affected the result of the Performance Tests[608]. Thus, it adds that said conduct of the Contractor is due to the fact that he did not expect to breach the Guaranteed Values of the Contract, generating dispute over a responsibility assumed by himself[609].

750. On the other hand, the Commission points out that all the actions of the Contractor contravene the principles of contractual good faith, for which the Defendant refers to the arguments contained in the jurisprudential thesis itself invoked by the Contractor, corresponding to the Tenth Edition (Thesis: I.3o.CJ/11 (10a.) of April 24, 2015, of the Third Collegiate Court of the First Circuit 374 and the resolution of Direct Amparo 614/2011 of December 8, 2011 of the Third Collegiate Court in Civil Matters of the First Circuit), when it is indicated: "*a later contradictory behavior that affects the expectations that arise from the previous one... this behavior means exercising a claim that in another context is illegal, but it is inadmissible because it is contradictory to the first one...*"[610].

751. It points out that the behavior presented by the Contractor, by requiring the consideration of degradation curves in the results of the Performance Tests of the Guaranteed Values, is contradictory to the agreements reached between the Parties to comply with the purpose of the Contract, taking into account the recognition of the modifications due to the delays in the different legal acts[611].

752. The Commission points out that by excluding the application of degradation curves in Appendix 13, the values of Guaranteed Net Capacity (GNC) and GNUTC offered in the Contractor's Technical Proposal are subject to possible losses caused by aging, fouling or degradation, during the entire period prior to carrying out the performance tests, regardless of the circumstances in which the latter are carried out, especially when, once the application of Clause 25.5 of the Contract is triggered by signing the Agreement on the terms and conditions that

[608] Counter-Memorial and Counterclaim, No. 146.
[609] Counter-Memorial and Counterclaim, No. 148.
[610] Counter-Memorial and Counterclaim, No. 151.
[611] Counter-Memorial and Counterclaim, No. 152.

would compensate the Contractor to achieve the completion of the Project, it was not established that during the Performance Tests, degradation curves should be considered in the gas turbines[612].

753. CFE adds that in Appendix 13, Section C) "*Performance Tests"*, of the Contract, it is included that the "*corrections to the Unitary Thermal Consumption and the Net Capacity that result from the Tests for conditions other than those of design or guaranteed must be carried out based solely on the correction curves provided by the Contractor in its Proposal*..." Likewise, it is indicated that "*The only corrections for conditions other than those of guarantee that will be applied to the results of the tests, will be obtained using the Correction Curves that were supplied with the Proposal. Tolerances are not accepted in the Correction Curves for the determination of the GNUTC*"[613]. The Commission expresses that, in this way, it is evident that the Contract does not allow the correction of the values obtained in the Performance Tests, through any procedure other than the Correction Factors obtained through the Guaranteed Correction Curves, contained in the Technical Proposal of the Plaintiff[614].

754. On the other hand, it indicates that the "*New and Clean Condition"*, in accordance with the definition included in Clause 1.1 of the Contract, means: "...*the condition of the Power Plant at the beginning of the Performance Tests and in which the possible degradation and fouling derived from the first start-up of the units, Commissioning tests and operation tests, which implies that factors for degradation and fouling will not be applied to the values of capacity [gross/net] and UTC [gross /net] resulting from the Performance Tests*"[615].

755. Note that in this way, at the beginning of the Performance Tests, the Power Plant is considered, regardless of any other factor: "*New and Clean"*[616]. It points out that for the specific case, it is necessary that if the Guaranteed Net Capacity and Unit Term Consumption Tests began on July 5, 2019, the "*New and Clean Condition"* of the Power Plant must be considered just before the start of the

[612] Counter-Memorial and Counterclaim, No. 164.
[613] Counter-Memorial and Counterclaim, No. 165.
[614] Counter-Memorial and Counterclaim, No. 166.
[615] Counter-Memorial and Counterclaim, No. 167.
[616] Counter-Memorial and Counterclaim, No. 168.

latter[617].

756. The Defendant adds that the Performance Tests must be carried out in accordance with MEJ Guide 2.6 and the codes cited in Appendix 13[618]. The Commission points out that Appendices VII, VIII A and B, and IX are not part of the information it requires nor are they applicable in the Performance Test Procedure as indicated in Appendix 13[619]. In this regard, it warns that in the event of a discrepancy between what is indicated in the codes cited in Appendix 13 and/or the MEJ Guide, what is indicated in Appendix 13 shall prevail[620].

757. The Commission notes that within the scope of the agreement between the Parties (Commission and Contractor), regarding the recognition of the effects derived from the restrictions in the authorization of Tests, no effect was envisaged on the result of the Performance Tests that would be carried out once the Commissioning Tests were completed, much less was any possible degradation effect considered[621].

758. Additionally, the Commission refers to the Expert Cámara Report and points out that there is no documentary evidence that allows verifying that the non-compliance with the Guaranteed Values is caused by degradation in the Gas Turbogenerators. What is true is that after carrying out the Performance Tests of the Power Plant, Warranty Claim No. 87 indicated in Section 7 of this Opinion was generated, for which there was a need for rehabilitation work on the Steam Turbine by the Contractor, for which there is reasonable doubt as to the real cause of non-compliance in the Guaranteed Values[622].

759. It points out that, even Section 7.8.1 of the approved Performance Tests Procedure (document EMP-UEDF-YYY-OP-01201_00_1) does not contain the methodology used to determine the calculation of the demonstrated values in order to verify the Guaranteed Values based on the correction factors to be used and in the Appendices required for this, the Contractor tries to transfer to the

[617] Counter-Memorial and Counterclaim, No. 169.
[618] Counter-Memorial and Counterclaim, No. 174 and 175.
[619] Counter-Memorial and Counterclaim, No. 176.
[620] Counter-Memorial and Counterclaim, No. 177.
[621] Counter-Memorial and Counterclaim, No. 184.
[622] Counter-Memorial and Counterclaim, No. 200.

Commission a contractual condition that the manufacturer Siemens agreed with DUNOR for compliance with the Guarantees agreed between them, the Degradation Curves included in Appendix VIIIA of the Performance Tests Procedure, Revision 1.[623]

760. Dunor points out that this is an internal Siemens document issued to DUNOR, which mentions at all times the Contract that they maintain for the purchase order of the SGT68000H Turbines (MB000064, MB000144) for the Empalme II Project, as can be read in the Scope of Specification DP21T-00002937; therefore, it is a document that only applies between Siemens and DUNOR and is not related to the Contract[624].

761. It adds that the Commission has in no way denied that the hours of operation imply degradation or dirt in the gas turbines, which can inevitably affect their performance. This statement is even envisaged in the Contract itself, since it is based on basic technical aspects and even on basic comprehension of the subject, as described in the foregoing, in line with "SGI" when it indicates: "*the longer the operating time of the equipment, the greater the wear or dirt they suffer. This inevitably affects its performance.*"[625].

762. Indicates that, notwithstanding the foregoing, Appendix 13 of the Contract clearly establishes that Curves for aging and/or soiling are not applied.[626] It adds that this situation is fully in accordance with the definition of "*New and Clean Condition"* included in Clause 1.1 of the Contract which: "*Means the condition of the Power Plant at the beginning of the Performance Tests and in which the possible degradation and soiling derived from the first startup of the units, Commissioning tests and operation tests are already included; which implies that no factors for degradation and fouling will be applied to the values of capacity [gross/net] and UTC [gross/net] that result from the Performance Tests*"[627].

763. The Commission emphasizes that the definition of "*New and Clean Condition"* of the Contract is completely different from the definition indicated by the

[623] Counter-Memorial and Counterclaim, No. 201.
[624] Counter-Memorial and Counterclaim, No. 201.
[625] Counter-Memorial and Counterclaim, No. 205.
[626] Counter-Memorial and Counterclaim, No. 206.
[627] Counter-Memorial and Counterclaim, No. 207.

manufacturer SIEMENS for the same concept indicated in the specification DP21T-00002937, considered by DUNOR in all the arguments of its Complaint Memorial.

764. It specifies that the definition included in Appendix VIIIA is part of Specification DP21T-00002937 of the Contract between individuals entered into between SIEMENS and DUNOR, therefore, it is not valid for the Contract. Therefore, the definition of Clause 1.1 of the Agreement prevails, as indicated in Clause 31.2 of the Agreement[628].

765. It is noteworthy that in the list of "*each variable that intervenes in the performance of the Power Plant"*, indicated in the same approved Performance Tests Procedure, "*degradation"* or any other additional variable is not mentioned.[629] Likewise, it indicates that in Appendix II included in the same Section 9 "*Appendices"* of said Procedure, the applicable Correction factors are indicated, without considering any related to degradation in gas turbines, thus demonstrating that it was not until non-compliance of the Guaranteed Values that the Contractor decided to manipulate the content of the Procedure.[630]

766. The Commission refers to the comments issued on the Procedure by the Commission on Revision 0 of the same, in relation to Section 9 "Appendices", and points out that for Appendices VIIIA for Gas Turbines (Siemens), VIIIB for the Steam Turbine (DSPW) and Appendix IX for the Thermal Behavior of the Heat Recovery (Cerrey), can be seen in a sentence which says "*does not apply"*. Likewise, the message to delete from one page onwards appears. Due to the foregoing, it is evident that the Commission did not accept the application of Appendix VIII A (including the Degradation Curves) in the Performance Tests Procedure, as can be verified from Review 0[631].

767. It warns that, however, since in Revision 1 of the Procedure it is indicated that this information has a "*Reference"* character, CFE did not consider it inconvenient to maintain said Appendix since in the meeting of July 3, 2019 convened by DUNOR personnel to address the comments of the Commission on the Rev. 0

[628] Counter-Memorial and Counterclaim, No. 213.
[629] Counter-Memorial and Counterclaim, No. 221.
[630] Counter-Memorial and Counterclaim, No. 222.
[631] Counter-Memorial and Counterclaim, No. 223-225.

delivered with official letter CSPPS/CCEII-0393/2019 of June 10, 2019, DUNOR personnel stated that Appendices VIIIA, VIIIB, are "*Reference only*" since they were internal documents between DUNOR and the main equipment suppliers, that they had no interference in the methodology for calculating and validating the Guaranteed Values indicated in Section 7.8.1 of the Performance Tests Procedure[632].

768. It adds that, in good faith Contractual to the statements made by the Contractor, the Commission had no objection to their being attached as "*reference*" documents[633].

769. The Commission adds that the interpretation of the Contractor regarding the mandatory application of the Degradation Curves is out of place, based on this Appendix VIII A "*Performance Tests Procedure of Main Suppliers*", since the Contract does not provide for the performance of performance tests for each main team, but for the Power Plant as a whole[634].

770. It also points out that on July 18, 2019, by means of Official Letter No. 742.161/JALV-080/19, in response to the delivery of the "*Preliminary Report*" of the results of the Performance Tests, CFE told DUNOR its rejection of the results of the "Preliminary Report" delivered by the Contractor due to the consideration of degradation, for which reason it was requested to present the respective report as soon as possible, in accordance with the agreed procedure[635]. It maintains that in subsequent communications, CFE reiterated to DUNOR the inappropriateness of considering Degradation Curves in the Performance Test Report.

771. It also indicates that on August 23, 2019, by means of Official Letter No. 7B/2019/RJMN-00370, CFE informed the Contractor that, according to the results obtained from the Performance Tests, it was entitled to the following discounts, which would be deducted from the Contract Price[636]:

[632] Counter-Memorial and Counterclaim, No. 226.
[633] Counter-Memorial and Counterclaim, No. 227.
[634] Counter-Memorial and Counterclaim, No. 228.
[635] Counter-Memorial and Counterclaim, No. 231.
[636] Counter-Memorial and Counterclaim, No. 234.

- US$ 370,048.43 (Three hundred and seventy thousand forty-eight US dollars 43/100 cy) because the Demonstrated Net Capacity turned out to be less than the Guaranteed Net Capacity.
- US$ 3,623,871.88 (Three million six hundred twenty-three thousand eight hundred and seventy-one US dollars 88/100 cy) due to the Demonstrated Net Weighted Average Unit of Thermal Consumption being higher than the Guaranteed Net Weighted Average Unit of Thermal Consumption of the Project.
- US$ 2,009.79 (Two thousand and nine US dollars 79/100 cy) because the Demonstrated Hydrogen Consumption turned out to be higher than the Guaranteed Hydrogen Consumption of the Project.

772. The Commission notes that the Contractor never made any comment on the discounts for non-compliance with the Guaranteed Values.

773. On the other hand, the Defendant refers to LAPEM official letter No. K3323-101-19 of August 14, 2019 requested by the Commission, and indicates that it was "final". It adds that LAPEM report No. K3323-105-19, prepared after the chromatographic analysis by the Certified Laboratory (MOVILAB S.A. de C.V.) of the gas samples taken during the Tests, is consistent with what is indicated in the LAPEM Report No. K3323-101-19 dated August 14, 2019, included in the Provisional Acceptance Agreement and erroneously identified in the heading as Preliminary[637]. Based on the foregoing, the Commission points out that there should be no doubt that LAPEM Report No. K3323-105-19 is definitive and was used to proceed with the respective applicable discounts, indicated in Official Letter No. 7B/2019/RJMN-00370 of August 23, 2019[638].

774. Further, the Commission refers to LAPEM Report No. K3323-95A-19 of October 30, 2019, which the Contractor refers to as the "*Final Report*", but which is not acceptable to the Commission since it was delivered after the CAP issuance date of August 14 of 2019 and consequently, after the Payment of the Contract Price[639].

[637] Counter-Memorial and Counterclaim, No. 240.
[638] Counter-Memorial and Counterclaim, No. 242.
[639] Counter-Memorial and Counterclaim, No. 244.

775. It points out that the LAPEM Report No. K3323-95A-19 of October 30, 2019, was not presented to the Commission until it was sent as an Appendix to the Complaint Memorial, which is why it should be rejected as Proof of the results obtained in the Performance Tests carried out on the Power Plant in July 2019[640].

776. It states that in the assumption without conceding, that the Plaintiff had submitted the LAPEM Report No. K3323-95A-19 of October 30, 2019, before the issuance of the CAP issuance (August 14, 2019), CFE would have the contractual right to verify and, if applicable, make the corresponding statements, but that in this case the counterparty intentionally submits it extemporaneously for the purposes of the Contract[641].

777. Therefore, it reiterates that the discounts applied to the Payment of the Contract Price, notified by Official Letter No. 7B/2019/RJMN-00370 of August 23, 2019, based on LAPEM Report No. K3323-105-19, whose character is Definitive (Final) once the results of the gas samples have been obtained by the certified laboratory and the corrections that were applicable according to Procedure EMP-UEDFYYY-01201[642].

778. It concludes that from all the arguments made by the Commission there is no doubt about the following[643]:

i. The damages suffered to the Execution Program were recognized to the Contractor, which gave rise to the formalization of the three Amending Agreements.

ii. Regarding the Third Amending Agreement, the criteria for recognition of said impacts to the Execution Program, as well as the terms and conditions that would compensate the Contractor to comply with the purpose of the Contract, were agreed upon by mutual agreement between the Parties, through the formalization of the so-called "*Agreement between the Parties on the application of Clause 25.5, to achieve the conclusion of the object of the Contract"* dated September 17, 2018 and the Minutes of the

[640] Counter-Memorial and Counterclaim, No. 246.
[641] Counter-Memorial and Counterclaim, No. 247.
[642] Counter-Memorial and Counterclaim, No. 248.
[643] Counter-Memorial and Counterclaim, No. 276.

Consultative Commission of November 13, 2018, without the aforementioned Contractual instrument, foresees the application of degradation curves to the Performance Tests, due to the delays to the Project.

iii. The Third Amending Agreement to the Contract, formalized on October 21, 2019, recognized an extension of 208 days that satisfied all the rights of the Contractor regarding the recognized extension. Likewise, the fourth clause indicated that all the stipulations and Contractual Clauses remain in full force, including without limitation Appendix 13 of the Contract, which rules out the application of Degradation Curves in Gas Turbines, as well as the contractual clauses, particularly referring to the definition of "*New and Clean Condition"*, provided for in Clause 1.1 of the Contract.

iv. During the recognized Modification Period of 208 days in the Third Amending Agreement, the Contractor was responsible for the custody, protection, operation and maintenance of the Power Plant, therefore the effects of degradation after the formalization of the Agreements to compensate the Contractor and comply with the purpose of the Contract, must be assumed by the latter.

v. From the contractual (legal) support available, Appendix 13 rules out the use of Degradation during Performance Tests and establishes that the Contractor must consider the degradation of the equipment, from the beginning of the Tests until the Performance Tests. It indicates that the foregoing is strengthened by the definition of "*New and Clean Condition"*. It adds that all this remains in full force and effect after the formalization of the Third Amending Agreement.

vi. The Contractor's conduct in claiming that the supposed effects of degradation to the results of the Performance Tests be considered, in light of its non-compliance with the Guaranteed Values, having agreed and formalized the respective agreements that would compensate it for the effects suffered, must be understood as contrary conduct and in bad faith.

vii. Degradation is an inevitable effect; however, this must be assumed by the Contractor himself in accordance with the terms of the Contract, as well as

the contractual instruments that allowed the conclusion of the Project and evaluation of its purpose.

viii. The EMP-UEDF-YYY-01201 REV 1 Performance Tests procedure issued by the Contractor establishes the applicable methodology of the Performance Tests Procedure in its Section 7, where the applicable correction values are defined.

ix. The Contractor manipulates the content and meaning of the terms of the EMP-UEDF-YYY-01201 REV 1 Performance Tests procedure, intending to modify the Performance Tests methodology included in Section 7 of the Procedure, where the only correction factors are clarified applicable to the Tests. For this purpose, it intends to apply additional correction factors, based on the content of Appendix VIII A of Section 9 "*Appendices"* of the procedure, whose character is defined in the same Appendix with "Note 1", which indicates it is "*Reference"*. This conduct must be understood as one more act of bad faith by the Contractor.

x. The Contractor's action is advantageous whenever it tries to transfer to the Commission a contractual condition that the manufacturer Siemens agreed with DUNOR for compliance with the Guarantees agreed between them, since Appendix VIIIA of the Performance Tests Procedure, Revision 1, is an internal Siemens document issued to DUNOR, which mentions at all times the Contract that DUNOR maintains for the purchase order of the SGT6-8000H Turbines (MB000064, MB000144) for the Empalme II Project, indicated in the Scope of Specification DP21T-00002937, therefore, it is a document that only applies between Siemens and DUNOR and is not related to the Contract signed between the Commission and DUNOR.

xi. The LAPEM Report No. K3323-105-19 of August 14, 2019, issued by LAPEM, is "*Definitive"* and considers both the applicable corrections according to the EMP-UEDF-YYY-01201 procedure and the results of the Calorific Value of the gas samples obtained during Tests. In this sense, since it served as a basis to determine the discounts notified to the Contractor in Official Letter No. 7B/2019/RJMN-00370 of August 23, 2019, these must be considered entirely appropriate.

xii. The Contractor presents the LAPEM Report No. K3323-95A-19 of October 30, 2019, which he refers to as "*Final*"; however, the latter was not submitted to the Commission in a timely manner, therefore there was a breach of the contractual obligations with respect to the delivery of information at the end of the Performance Tests. It adds that the LAPEM Report No. K332395A-19 of October 30, 2019 was issued approximately 4 months after the execution of the Performance Tests, approximately 3 months after Provisional Acceptance and after the Payment of the Contract Price.

779. The Commission emphasizes that when the Contractor indicates that the objective of the Performance Tests is to verify the performance of the Power Plant under normal operating conditions, it omits to indicate that these "*normal operating conditions"* will be the operating conditions that prevail during the same Performance Test, that is, that the Test is carried out with all the equipment and systems operating in stable, reliable, and safe conditions; and not to the state of the facilities before the start of said test, as claimed by the Plaintiff[644].

780. The Commission also points out that the extension of the Third Amending Agreement recognized a total modification of 208 days to the Testing Program due to the impossibility of carrying out Tests; this implies, logically, that the Contractor maintained full responsibility and decision regarding the continuity of the operation of the Power Plant, as detailed in paragraph 276 items III, IV, and V of the Commission's Counter-Memorial to the Complaint[645].

781. The Commission maintains that the effects of degradation were assumed by the Contractor in accordance with the contractual terms that remained in full effect and force after the legal acts that occurred prior to the execution of the Performance Tests[646]. In this regard, it maintains that the non-consideration of degradation to the results of the Performance Tests is due to the fact that: i) it was not agreed in any contractual instrument signed in advance of the Tests; ii) it was not considered in the legal instruments signed after the Tests[647].

[644] Rejoinder and Reply to Counterclaim, No. 263(B).
[645] Rejoinder and Reply to Counterclaim, No. 263(C).
[646] Rejoinder and Reply to Counterclaim, No. 267.
[647] Rejoinder and Reply to Counterclaim, No. 271.

782. Additionally, in relation to the argument that on the date of signing the Agreement, the Meeting Minutes and Amending Agreement No. 2, DUNOR could not foresee the scope of the effects due to delays, the Commission considers that it is true that the Contractor cannot quantify the impact of the degradation on the Guaranteed Values, due to the restrictions imposed by CENACE since September 2018. However, if it was fully aware that said restrictions implied a longer operating time and, therefore, a greater wear and tear with an inevitable effect on the expected performance on the date on which Amending Agreements No. 2 and No. 3 (November 23, 2018 and October 21, 2019 respectively). It adds that the Contractor was fully aware of the effects suffered by the Project due to the restrictions imposed by CENACE, recognizing in Agreement 3 a total of 208 days of modification[648].

783. The Commission adds that Clause 8 “Consultative Commission” of the Contract establishes a mechanism through which the Parties discuss and resolve in contractual good faith, all technical, financial, or administrative disputes related to the execution of the Project. The Contractor did not exercise the right to resort to this mechanism with the diligence required in Clause 8 itself, an omission that surprises the Defendant, considering that the Contractor has knowledge and experience in this type of Project.[649] To this end, the Commission wonders: if the Plaintiff indicates that the degradation is a consequence of the CENACE restrictions, why did the Contractor not indicate this dispute of Degradation Curves on the agenda, since one of the issues indicated in paragraph 4 of the Minutes is that of the impacts related to the Cargo Restriction by CENACE? It states that the answer is clear, the Plaintiff had not envisaged said degradation, since it was not until the Guaranteed Values were met that it skillfully shielded itself by pointing out that this phenomenon is envisaged in a reference Appendix in the Performance Tests Procedure[650].

784. It adds that, even though the Contractor did not introduce the issue of Degradation Curves in the Minutes indicated in the previous paragraph, it had the right to request that the Commission meet to discuss and resolve said

[648] Rejoinder and Reply to Counterclaim, No. 272 and 276.
[649] Rejoinder and Reply to Counterclaim, No. 283.
[650] Rejoinder and Reply to Counterclaim, No. 285.

modification as established in Clause 8, a fact that never It occurred. Now the Plaintiff, in contractual bad faith, wants to transfer its omission to envisage the degradation or, as the case may be, to have stated to the Commission that the Parties agree in any legal instrument to determine the effects that had originated in the execution of the Project.[651].

785. The Commission also points out that the SGI Expert makes an incomplete statement by investigator J. Zachary. To this end, it should be noted that the Expert Cámara observed that the study also indicates that the use of correction curves must be clearly agreed in advance as part of the commercial contract between the owner, the supplier, and the EPC Contractor, a fact that did not occur in the execution of the contract[652].

786. In relation to the argument proposed by DUNOR, which indicates that it did include the degradation factor in the instrument provided for it (that is, the Performance Tests Procedure), the Commission indicates that the Plaintiff's statement is invalid. It warns that Procedure EMP-UEDF-YYY-OP-01201 Rev. 1 only envisages the mathematical development according to subsection 7.8.1. *"Calculation of the correction factors"* and the methodology indicated in the validation examples of the "*Correction Curves Guaranteed and Applicable to the Performance Tests"* included in the TO-2 of the Technical Proposal; being the only variables envisaged and provided from the evaluation of the Technical Proposal by the Contractor[653].

787. Also, the Commission indicates that the Contract fully specifies, integrates and unequivocally the mathematical procedure by which the Demonstrated Values of Demonstrated Net Capacity and Demonstrated Unit Term Consumption will be determined, which must be compared with the Guaranteed Values of the Contract. Thus, it points out that the Expert Lorenzo José Cámara Anzures correctly indicates: "*DUNOR guaranteed the Commission that the Power Plant, once the Performance Tests were carried out, would comply with the Guaranteed Values established in Appendix 13.1, in accordance with the*

[651] Rejoinder and Reply to Counterclaim, No. 286.
[652] Rejoinder and Reply to Counterclaim, No. 290.
[653] Rejoinder and Reply to Counterclaim, No. 293.

*terms established in the Technical Proposal (TO-4)*"[654].

788. The Commission states that the Contractor misinterprets what the MEJ26 Guide indicates. In this regard, CFE makes the following clarifications: First, Section 4 "*Applicable Requirements"* indicates: "...*Corrections for conditions other than those guaranteed must be made based on the correction curves requested in Section 3 of the Bidding Terms and included in Appendix II of this Procedure and that are part of the Contract between CFE and (name of the Contractor)*".

789. Secondly, it indicates that Appendix III of the MEJ2.6 Guide rules out any factor for degradation, stating that the calculations must be carried out in accordance with Appendix 13 of the Contract and paragraph 8 of the same Guide.[655]

790. Third, the subsection of the MEJ2.6 Guide refers again to the content of Appendix 13 and Section 7.3.1. both for the calculation of GNC and DNUTC.[656]

791. It adds that the MEJ2.6 Guide does not envisage Appendices VII, VIIIA, VIIIB, and IX. Likewise, Procedure EMP-UEDF-YYY-01201 REV 1 carried out in accordance with the same Guide, reaffirms that it does not envisage in its section 7 (Calculation Methodology) and 8 (Development of Tests) the application of said Appendices, which makes it evident that Test Result and Procedure do not consider degradation factors[657].

792. Additionally, it points out that Section 3.2.3 Guaranteed Correction Curves clearly establishes that "*All curves must include a note indicating: "GUARANTEED AND APPLICABLE CURVE IN PERFORMANCE TESTS". Typical curves and/or with tolerances will not be acceptable*". Therefore, it is not understandable the action of the Plaintiff who has the intention of applying the curves indicated by it in Appendix VIIIA, even when Note 1 "*reference*" is observed in Rev. 1 of the Procedure (Final), and this action is not described in

[654] Rejoinder and Reply to Counterclaim, No. 310.
[655] Rejoinder and Reply to Counterclaim, No. 324.
[656] Rejoinder and Reply to Counterclaim, No. 325.
[657] Rejoinder and Reply to Counterclaim, No. 326.

the calculation methodology contained in Section 7 of the Procedure[658].

793. Now, regarding DUNOR's argument that Appendix VIIIA is not an internal document agreed between Siemens and DUNOR, the Commission maintains that its content bears no relation to the contractual terms provided for in the Contract[659].

794. The Commission points out that if Appendix VIIIA that the Plaintiff tries to uphold is applicable, it should have been incorporated from the Tender and include[660]:

i. During the stage of preparation of Bidders' proposals and Questions and Responses to them, specifically in Section 3 and in TO-2, requesting it as a Guaranteed Correction Curve and Applicable to Performance Tests.

ii. Consequently, it had to be submitted by the Contractor, together with its technical proposal, to be reviewed and evaluated during the Technical Proposal Evaluation stage of the Project, which did not take place.

iii. It should have been submitted as part of the Draft Book during the engineering review stage.

iv. Likewise, it had to be delivered in Spanish language according to the terms of Appendix 5 of the Contract and Clause 31.6 of the same, in order to be considered as information for "*Review"*.

v. Likewise, the consideration of degradation would have been clearly described in Section 7 of the same, where the calculation methodology is described, without identifying it with Note 1 "*Reference*".

795. CFE adds that for Appendix VIIIA to have been applied:

i. Section 3 of the Contract should have allowed its application, identifying it with the legend "*Guaranteed and Applicable Curve in Performance Tests*".

ii. At least the terms contained in Appendix 13 and Clause 1.1 "*New and Clean Condition"* should have been modified, which expressly prohibit their

[658] Rejoinder and Reply to Counterclaim, No. 327.
[659] Rejoinder and Reply to Counterclaim, No. 330.
[660] Rejoinder and Reply to Counterclaim, No. 331.

application; however, all these contractual terms were ratified without any modification, remaining in full effect and force after the formalization of the Amending Agreements and various legal instruments that were carried out to discuss all the technical and legal aspects due to the Contractor's modifications.

iii. For said Appendix to be applicable, the definition of the "New and *Clean* Condition" indicated in the Siemens Performance Procedure (GT PERF TEST SPEC - EMPALME 2, DP21T-00002937), should be the same as that indicated in the definition of Clause 1 of Contract PIF-039/2015, which is not the case. It adds that, according to what is indicated in the Contract itself, in the event of a discrepancy between a Code, Standard, etc., with respect to what is indicated in the Contract, what is indicated in the Contract prevails; for this reason, since it does not contain the same definition and above all the same scope, its application is not appropriate, since it differs from what is indicated in the Contract.

iv. And finally, for it to be applicable, the Degradation Curves should consider at their point of zero correction, the hours of operation indicated by DUNOR, that is, at 1,110'7 and 1,111'2 hours of operation and not at 600 hours. as the adjustment begins, which verifies that the Degradation Curves indicated in Appendix D of the Siemens Performance Procedure, are only applicable between DUNOR and said Gas Turbine manufacturer to correct the Guarantees that they agreed with each other, since they are Conditions Contractual between them and are not related to the Contract.

796. However, with respect to DUNOR's position which indicates that Appendix VIIIA does not have the character of "*reference*", the Commission maintains that the character of "*reference*" is not due solely to the note included in Appendix VIIIA itself, but rather that this character also emerges from carrying out a comprehensive analysis of the information and background information that make up the procedure[661].

797. First, the Commission reiterates that the nature of Appendix VIIIA confirms its nature as "*Reference"*, since it is completely unrelated to the calculation

[661] Rejoinder and Reply to Counterclaim, No. 338.

methodology included in section 7 of the Procedure; that is, said methodology does not refer to using degradation factors included in Section 9, in particular what is indicated in Appendix VIIIA[662].

798. Second, it reiterates that the non-applicability of the degradation content for Gas Turbines is evident, in accordance with the applicable Appendices IIA to VII[663].

799. Additionally, the Commission refers to the LAPEM Report No. K3323-95B-19, to indicate that this report confirms that the Nominal Capacity values corrected to the design conditions for the Gas Turbogenerators (GT1=258.68 MW, GT2=257.02 MW) are higher than the values indicated by the Plaintiff in its Thermal Balance in New Clean Condition - Summer Design Conditions at 100% Load and for quarter 0 of the Guaranteed Nominal Capacity chart (255,663 MW), while the Nominal Capacity values obtained for the Steam Turbine are 6.8 MW less than the value indicated in the aforementioned Thermal Balance[664].

800. It maintains that the foregoing fully supports the Commission's position that it was the deficient performance of the Steam Turbine that caused the deficiency in the Net Capacity of the Cycle, as stated in the results of report K332395B-19 issued by LAPEM regarding to the Thermal Behavior Tests of the Combined Splicing Empalme II[665].

801. It therefore concludes that the non-compliance with the Guaranteed Values during the Performance Test was not due to the degradation of the Gas Turbogenerators (GTs) but to a severe capacity deficit of the Steam Turbogenerator (STG)[666].

802. To this end, it refers to the Complementary Opinion of the Expert Cámara who states that: "*in report No. K3323-95B-19, it has been possible to verify that the non-compliance with the Guaranteed Values was not due to degradation in the Gas Turbines, therefore, the Contractor's intention in its application would*

[662] Rejoinder and Reply to Counterclaim, No. 339.
[663] Rejoinder and Reply to Counterclaim, No. 340.
[664] Rejoinder and Reply to Counterclaim, No. 364.
[665] Rejoinder and Reply to Counterclaim, No. 366.
[666] Rejoinder and Reply to Counterclaim, No. 367.

*simply result in obtaining an additional tolerance in the event of non-compliance with the Guaranteed Values*"[667].

803. Also, in relation to the argument that the Penalties imposed by the Commission were calculated according to the First Report, CFE clarifies that the note that it erroneously identifies in the heading as "*Preliminary"* is part of a format for the Provisional Acceptance Agreement, prepared by a third party, completely unrelated to the person who prepared the LAPEM Report No. K3323-101-19 dated August 14, 2019. The foregoing makes evident the incredible manipulation of information carried out by the Contractor[668].

804. It points out that neither the LAPEM Report No. K3323-101-19 of August 14, 2019, nor the LAPEM Report No. K3323-105-19 of August 14, 2019, in its same content, refer to the results obtained as "*Preliminary"*. On the contrary, the LAPEM Report No. K3323-105-19 of August 14, 2019, at all times gives a "*definitive"* character to the results, as can be seen in paragraph 7 Conclusions of the same Report[669].

805. It adds that with respect to the arguments put forward by the Plaintiff in the Reply Memorial, in which it alleges that certain norms that are envisaged in Evidence Procedure No. EMP-UEDF-YYY-OP-01201, affirming that they were not applied in Report LAPEM K3323-105-19 as established in section 4 of the same Report, notes that section 4 of the report indicates that the document applicable to the Performance Tests in the first instance is the procedure EMP-UEDF-YYY-OP01201, so if this procedure envisages the application of said regulation, therefore, the results of the LAPEM report K3323-105-19 envisage its application in the same way[670].

806. It maintains that it is unthinkable that a Report delivered almost two years later could be considered valid to apply the discounts to which the Contractor has become a creditor, especially since the clarifications made by the Commission, the Contractor lacks technical, factual and to maintain that the LAPEM Report

[667] Rejoinder and Reply to Counterclaim, No. 368.
[668] Rejoinder and Reply to Counterclaim, No. 380
[669] Rejoinder and Reply to Counterclaim, No. 381.
[670] Rejoinder and Reply to Counterclaim, No. 384.

K3323-105-19 of August 14, 2019 is invalid[671].

807. Based on all of the foregoing, the Commission concludes that[672]:

- The Reports LAPEM K3323-101-19 and LAPEM K3323-105-19 of August 14, 2019 are definitive (final).
- The Reports LAPEM K3323101-19 and LAPEM K3323-105-19 envisage all the applicable Regulations in the Test Procedure EMP-UEDF-YYY-OP-01201, since, as can be verified in section 4 of the Report, when Consider said Procedure as the main applicable document and all the regulations contained therein are also applicable to the results of the Reports cited.
- Taking into account that LAPEM is an accredited Laboratory to carry out this type of Test, the results obtained in the LAPEM Report K3323-105-19 of August 14, 2019 are completely technically and legally valid.
- Due to the foregoing, the Commission and the Expert Lorenzo José Cámara Anzures conclusively demonstrated that the discounts applied based on the reports indicated above must be considered correct, resulting in a discount for non-compliance with the Guaranteed Net Capacity of US$ 370,048.43 (Three hundred and seventy thousand forty-eight US dollars 43/100 cy), US$ 3,623,871.88 (Three million six hundred twenty-three thousand eight hundred and seventy-one US dollars 88/100 cy) for non-compliance with the Guaranteed Weighted Net Average Unit of Thermal Consumption of the Project and for Guaranteed Hydrogen Consumption of the Project for the amount of US$ 2,009.79 (two thousand and nine US dollars 79/100 cy).

#### 12.1.4.3 Considerations of the Tribunal

808. In the present case, the discussion between the Parties concerns whether or not the Degradation Curves provided by Siemens in the GT PERF TEST SPEC-EMPALME 2 document, which appears as part of the Performance Tests

[671] Rejoinder and Reply to Counterclaim, No. 388.
[672] Rejoinder and Reply to Counterclaim, No. 389.

Procedure, are applicable to the Performance Tests, Appendix VIIIA. Said document is applicable between the Manufacturer (Siemens) and DUNOR, but the question is whether it should be applied in the relationship between DUNOR and CFE.

809. In the first place, the Tribunal must analyze the provisions of the Contract, in order to subsequently review whether the inclusion of Appendix VIII A in the Performance Tests Procedure was a modification of the Contract; if not, what is the scope of the Performance Tests Procedure and the consequence of including the Siemens document referred to above, which includes the Degradation Curves and, finally, whether there are other reasons why the Degradation Curves contained in said Appendix should be applied.

810. Regarding the content of the Contract, it is appreciated that Appendix 13 of the same, which regulates the Performance Tests, establishes the following[673]:

> *"It is not accepted to apply curves due to aging and/or soiling, for which the guaranteed values must consider the degradation of the equipment that could exist due to the stages of Commissioning Tests and the Operation Tests prior to the Performance Tests"* (emphasis added).

It was also provided in said Appendix that:

> *"The corrections to the Unitary Thermal Consumption and the Net Capacity that resulting from the Tests for conditions other than those of design or guaranteed should be performed based solely on the correction curves provided by the Contractor in its Proposal; The Contractor must develop and deliver for approval in the Performance Tests Procedure the equations that describe the correction curves delivered in the Proposal, considering that the exact values of the tabulations also delivered in his Proposal must be obtained from said equations. (with the same decimals and applying rounding). The Guaranteed Values must consider the Testing and operation stages prior to the Performance Tests"* (emphasis added).

811. On the other hand, the Contract in its first clause defines "*New Clean Condition"* and states that "*means the condition of the Power Plant at the*

[673] Doc. C-14.

*beginning of the Performance Tests and in which the possible degradation and fouling derived from the first start-up of the Units, Commissioning Tests and Operation Tests are already included; which implies that no degradation and fouling factors will be applied to the net capacity and net CTU values resulting from the Performance Tests"* (emphasis added).

812. From the above, it follows that according to the text of the Contract, curves due to aging or soiling would not be accepted, therefore the guaranteed values should consider the degradation values of the equipment that may exist due to the stages of Commissioning Tests and Operation Tests. Likewise, the Contract indicated that the corrections, due to conditions other than those of design or guaranteed, must be carried out only with the correction curves of the Contractor's proposal.

813. However, the GUIDE FOR THE ELABORATION OF THE PERFORMANCE TESTS PROCEDURE FPW PROJECTS MEJ2.6, states[674]:

> *"THE PRESENT PERFORMANCE TESTS PROCEDURE:*
>
> *"• IT IS PRESENTED IN AN INDICATIVE BUT NOT LIMITING MANNER.*
>
> *"…*
>
> *"IT IS PRESENTED IN A GENERAL WAY, AND MUST BE MODIFIED ACCORDING TO THE TECHNICAL, OPERATIONAL AND CONTRACTUAL SPECIFICATIONS APPLICABLE TO EACH PROJECT (AS INDICATED IN SECTIONS 2, 3, AND IN APPENDIX 13 OF SECTION 6 OF THE BIDDING TERMS, AS WELL AS THE STIPULATED IN TO-2 GUARANTEED VALUES AND TO-4 THERMAL BALANCES OF THE TECHNICAL PROPOSAL)"*

It is also indicated:

> *"Corrections for conditions other than those guaranteed must be performed based on the correction curves requested in Section 3 of the Bidding Terms and that are included in Appendix II of this Procedure and that are part of the Contract between CFE and (name of the Contractor)*" (emphasis added).

814. Thus, the Guide, in accordance with the text of the Contract and its Appendix

[674] R-028.

13, established that the corrections should be made with the correction curves requested in Section 3 of the Bidding Terms.

815. It goes without saying that Appendix 13 of the Contract stated that if there were discrepancies between the codes cited in said Appendix and the Appendix or the guide "*the provisions of this Appendix and the guide shall prevail*". In other words, the will of the Parties was that what was envisaged in the Appendix and the Guide should prevail.

816. From all of the above, it can be deduced that the Contract excluded the application of Degradation Curves and only authorized the application of the correction curves indicated by the Contractor in its proposal. Now, given the text of the Contract, it is worth asking the reason why Degradation Curves could be applied to establish the result of the Performance Tests as claimed by the Plaintiff. The foregoing would be justified if there was a modification of the Contract, or if the Contract itself had authorized the establishment of a different rule. Although it is clear that there was no express modification of the Contract, given that it could be disputed whether there was a tacit modification, in any case the Tribunal considers it pertinent to specify whether the inclusion of Appendix VIII A in the Performance Tests Procedure implied a change to the Contract.

817. At this point it is pertinent to point out that Clause 31.5 of the Contract provides for *"31.5 Modifications and Waivers. Any modification or clarification to this Contract must be made by prior written agreement duly signed by each Party to this Contract, in accordance with the provisions of Article 59 of the LOPSRM and Title Three, Chapter Three, Section 111 of the RLOPSRM, in whatever is applicable. The waiver of any provision of the Agreement by any Party must be made in writing, duly signed by such Party, making express reference to the right to which said Party waives, as well as to the Clause of this Contract in which said right is consigned*."

818. It is pertinent to note that in accordance with the first clause of the Contract, "'*Contract' means this Public Works Contract Financed at a Fixed Price, including all Appendices attached to it (which constitute an integral part of this Contract), as well as all amendments made thereto in accordance with its terms*."

819. Thus, in accordance with Clauses 1 and 31.5 of the Contract, any modification

of the Contract must be made by prior written agreement signed by each party, which includes Appendix 13, to the extent that it is part of the Contract.

820. From this perspective, what must be determined is whether the approval of the Performance Test Procedure by CFE, insofar as it contains Appendix VIII A that includes Degradation Curves for the Performance Test, could be considered a modification of the Contract, for which, in light of the contract itself, a duly signed written agreement would be required.

821. In the Tribunal's opinion, a stipulation such as the one set forth in Clause 31.5 seeks to prevent the contract from being modified by those who do not have the competence or power to enter into it and also to ensure that there is clarity about the modifications to the Contract.

822. From this perspective, it is observed that a formal modification to the Contract has not been proven and the Tribunal has not found evidence in the file that the person who authorized the procedure presented by the Contractor was empowered to enter into contracts on behalf of CFE. The foregoing leads the Tribunal to conclude that there was no modification to the Contract.

823. To the foregoing, it is worth adding that the Parties signed three Amending Agreements, which the Defendant has invoked to oppose the application of the Degradation Curves.

824. For this purpose, the Tribunal considers it pertinent to examine the Second and Third Amending Agreements. The first thing to note is that CFE invokes the third Clause of said Agreements, which includes a waiver by the Contractor "*of obtaining a new extension derived from the same causes that gave rise to this Agreement*." As can be seen, said clause is not relevant to the dispute over the application of the Degradation Curves since the waiver it contains refers to the possibility of requesting an extension.

825. On the other hand, it is pertinent to refer to the fourth clause of said Agreements whose content is practically identical. For this purpose, the fourth Clause of the Second Amending Agreement of November 23, 2018[675] states that "*Except as expressly modified in this Agreement, the Parties acknowledge that*

[675] Appendix Doc. C-004.

*the Contract maintains each and every one of its stipulations and Clauses in full force and effect"* (the Third Amending Agreement[676] adds the following expression after the word "Contract": "*and Amending Agreements 1 and 2"*). Thus, pursuant to said provision, the Contract continues as in full force and effect.

826. Therefore, before the Performance Tests were carried out, when the Second Amending Agreement was signed, and after them, when the Third Amending Agreement was signed, the Parties ratified the binding force of the Contract, which includes Appendix 13, and consequently, the rule contained therein that only the curves included in the proposition would be applicable, and that the Degradation or Soiling Curves would not be applicable. In this way, the Parties reaffirmed that the Contract had not been modified, except as provided in the Amending Agreements.

827. On the other hand, the Performance Tests Procedure must be examined, since the Plaintiff has insisted that this was the mechanism to regulate the Performance Tests and that the application of the degradation curves was included there.

828. At this point it should be noted that the Performance Tests Procedure was approved by communication CSPPS/CCEII-0411/2019 dated July 2, 2019. Said procedure included an Appendix entitled Main Supplier Performance Tests Procedures, from Siemens. Now, in this regard, it is noted that in this Appendix, which is numbered VIIIA, reference is made to Degradation Curves. In any case, it should be noted that the text of the procedure itself does not include any reference to the application of the Degradation Curves, nor is it an express reference to the application of the aforementioned Appendix. Indeed, in the Performance Tests Procedure approved by CFE, the following is found in paragraph 7.8.1[677]:

> *"In order to be able to determine that the Power Plant complies with the Guaranteed Values, it is necessary to apply the corresponding corrections to the values obtained from the Performance Test; that is to say, take these values obtained to the Summer Design Conditions and verify that said values are equivalent to or better than those guaranteed.*

[676] Appendix Doc.-005.
[677] Appendix C-144.

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> *"In order to verify that the Power Plant is capable of meeting the Guaranteed Values it will be necessary to obtain the correction factors of the Guaranteed Correction Curves, which were delivered in your Proposal/Technical Proposal and are included in Appendix II of this Procedure.*
>
> *"To obtain the correction factors for each variable that intervenes in the performance of the Power Plant (indicated in the Correction Curves) the procedures listed below will be applied, while to determine the total correction factor the methodology indicated in the validation examples included in the TO-2 of the Technical Proposal will be applied.*
>
> *Ambient Temperature/Dry Bulb Temperature*
>
> *a) Relative Humidity*
>
> *b) Atmospheric pressure/barometric pressure*
>
> *c) Heating Power/C/H Ratio*
>
> *d) Power Factor*
>
> *e) Sea Water Temperature*
>
> *f) Any applicable correction, according to the Guaranteed Correction Curves indicated in this procedure"* (emphasis added).

829. The following is also added to the procedure:

> *"APPENDIX II: CORRECTION VALUES, GUARANTEED CURVES, AND EXAMPLES OF CORRECTION FORMULAS*
>
> *IIA-Correction Values of the Contract Document TO-2*
>
> *IIB-Guaranteed Correction Curves of the Contract Document TO-2*
>
> *IIC-Examples of Correction Formulas of the Contract Document TO-2".*

830. The Tribunal emphasizes that in the text of the Procedure itself[678] it was expressly indicated that to verify the Guaranteed Values, the correction factors of the Guaranteed Correction Curves would be applied, which were delivered in

[678] Appendix C-144.

the Proposal/Technical Proposal and are included in Appendix II of this Procedure. In light of the above, it is logical to conclude that if it were the desire of those who drafted the procedure to apply the degradation curves included in the Siemens document, they would have indicated so. To the above it is added that the following is included on the title page of the Siemens document: "*Note 1: reference"*, which raises doubts about the scope that was intended to be given to said document, whose content is the performance tests procedure and not only the application of the Degradation Curves.

831. Thus, although Appendix VIII A was added to the Performance Tests Procedure, which contemplates the application of Degradation Curves, and said Procedure was approved by CFE, for the Tribunal this did not imply a modification of the contractual rule. that prevented the application of Degradation Curves for the following reasons: there was no modification of the Contract as required by Clause 31.5 thereof; by the Second and Third Amending Agreement, the Parties maintained the provisions of the Contract as it was entered into, and consequently, Appendix 13; within the text of the Test Procedure itself, no reference was made to the application of Degradation Curves, and the Appendix was identified as reference.

832. On the other hand, it is pertinent to note that at this point the Parties have discussed what is the concept of a new and clean condition that should be taken into account for performance tests. In this regard, it is pertinent to point out that in the Contract the Parties defined the "*New Clean Condition"* and to that effect stated it "*means the condition of the Power Plant at the beginning of the Performance Tests and in which is included the possible degradation and fouling derived from the first startup of the Units, Commissioning Tests and Operation Tests; which implies that factors for degradation and fouling will not be applied to the values of net capacity and net CTU that result from the Performance Tests*." However, in Appendix VIIIA incorporated into the Performance Tests Procedure, it was established in paragraph 4.1. that the Performance Tests should be performed as quickly as possible after the initial synchronization, when the unit is in New and Clean Condition. Said appendix defines the New and Clean Condition specifying that it is one that has accumulated less than 600 equivalent base hours. The Plaintiff considers that this is the definition that should be applied.

833. In this regard, the first thing that should be noted is that when the Contract defined the "*New and Clean"* condition, it was expressly agreed that degradation or Degradation Curves would not be applied. If, according to the definition of Appendix VIII, the unit in a new and clean condition is that with less than 600 hours of operation, and the degradation curves are not applied to it, it is clear that when the Parties expressly stipulated that they would not apply factors due to degradation or soiling, they were considering the possibility that the unit had more than 600 hours, otherwise it was not necessary to expressly agree that degradation or soiling factors would not be applied, since this derived from the new and clean condition in the manufacturer's terms. In other words, the interpretation that assimilates the new and clean condition of the Contract to that of the manufacturer leads to depriving a part of the contractual stipulation of effects, which is contrary to the criteria indicated in Article 1853 of the CCF, in accordance with which "*If any clause of the Contracts admits different meanings, it must be understood in terms of the most appropriate to produce effect*".

834. To the foregoing, it is worth adding that, as indicated by the Plaintiff, there was a great difference between the hours that the Parties had foreseen and the hours that the turbines were actually in operation. In fact, in its Complaint, the Plaintiff presents the following chart that "*provides the total number of hours that the gas turbines remained in operation"*:

| *Gas Turbines (GT)* | *EBH Forecast* | *Real EBH* |
|---|---|---|
| *GT21* | *1110'7hrs* | *3690hrs* |
| *GT22* | *1111'2hrs* | *3470hrs* |

*(*) EBH refers to "Equivalent Base Hours", in Spanish that is, "las Horas de Fuego Equivalentes." Information taken from DCS.339*
*(*) The EBH Forecast refers to the estimated hours in the Program carried out by the Parties on September 6, 2018"* [679].

835. As can be seen, the Parties had foreseen in the 2018 schedule that the turbines would have 1110.7 and 1111.2 equivalent base hours when tested. On the date that the Parties made this provision, Appendix VIIIA had not been incorporated, therefore the definition of the Contract was applied and the

[679] Complaint, paragraph 237.

Contractor assumed the wear and tear of the hours that were accounted for. In other words, the forecast of the Parties at that time is that the Contractor would assume the wear corresponding to 1110'7 and 1111'2 equivalent base hours. The foregoing because in November 2018, the Second Amending Agreement was signed, in which the contractual rule was maintained. However, if the notion of new and clean from Appendix VIIIA is applied, it is found that, contrary to what the Parties had foreseen in 2018, the turbines would have more than 1110 hours of operation when the Performance Tests were carried out and those that the Contractor had to assume according to the Contract, due to the application of the definition of new and clean in Appendix VIIIA, the Contractor would not assume said hours, which the Tribunal does not find to be in accordance with what the Parties had foreseen.

836. It is pertinent to point out that the Plaintiff has also invoked that the Guide for the preparation of the Performance Tests Procedure[680] states that "*THE PRESENT PERFORMANCE TESTS PROCEDURE: • IS PRESENTED AS INDICATIVE BUT NOT LIMITATIVE... • IS PRESENTED IN A GENERAL MANNER, AND SHOULD BE MODIFIED ACCORDING TO THE TECHNICAL, OPERATIONAL AND CONTRACTUAL SPECIFICATIONS APPLICABLE TO EACH PROJECT (AS INDICATED IN SECTIONS 2, 3, AND IN APPENDIX 13 OF SECTION 6 OF THE BIDDING TERMS, AS WELL AS THAT STIPULATED IN THE TO-2 GUARANTEED VALUES AND TO-4 THERMAL BALANCES OF THE TECHNICAL PROPOSAL)*.

837. In this regard, it is appreciated that, although the procedure contained in the Guide is presented indicatively and can be modified according to the particularities of each Project, in any case reference is made to the fact that it is "*AS INDICATED IN SECTIONS 2, 3, AND APPENDIX 13 OF SECTION 6 OF THE BIDDING TERMS*", that is, that Appendix 13 must be complied with. Consequently, it cannot be affirmed that what was agreed by the Parties can be modified in the Performance Tests Procedure.

838. On the other hand, it has been invoked that the provisions of Appendix VIIIA that were incorporated into the performance tests procedure are a development

[680] Appendix R-028.

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of the ASME codes referred to in Appendix 13.

839. To this end, it is appreciated that Appendix 13 states the following:

> *"The Performance Tests must be carried out in accordance with Guide M, E, J 2.6 and can only take the codes, listed below, according to their latest edition on the date of the test, for which the Contractor must provide for the approval of the Commission 16 (sixteen) weeks before the start of the Performance Tests. The Test Procedure must be approved by the Commission at least 2 (two) weeks before the start of the Tests according to the Program presented by the contractor.*
>
> | | |
> |---|---|
> | *ASME PTC 19.1* | *Calculation of Uncertainties* |
> | *ASME PTC 19.2 to 19.17* | *Measurement uncertainty of Instruments and Apparatus.* |
> | *EPA Methods 1 and 5* | *USA Environmental Protection Agency* |
> | *EPA Methods 6, 7E, 8, and 26* | *USA Environmental Protection Agency* |
> | *ASME PTC 46* | *Overall Plant Performance* |
> | *EPA Method 1 and 2* | *Environmental Association"* |

840. It is noteworthy that in Appendix 13 it was also said:

> *"In case of discrepancy between what is indicated in the aforementioned codes and what is established in this Appendix 13.0 and/or Guide M, E, J 2.6, what is established will prevail in this Appendix and in the Guide. As previously mentioned, 2 (two) weeks in advance, the definitive Procedure, already approved by the Commission, must be delivered"* (emphasis added).

841. As can be seen, the Procedure expressly establishes that if there is a discrepancy between the codes and Appendix 13, the latter will prevail. Therefore, if Appendix 13 establishes that degradation or fouling curves will not be applied, it is clear that they cannot be applied under the pretext that they develop an ASME code.

842. On the other hand, Clause 17.4 has also been invoked by DUNOR, which

provides that "*...The Contractor will not be penalized under this Contract for non-compliance with the Critical Dates related to the synchronization of the Power Plant to the extent that said non-compliance resulted in the Commission not receiving the energy generated in the Tests, unless said non-receipt was caused by the Contractor, and it will be understood that the Contractor has complied with the Critical Dates for the synchronization of the Power Plant*." The Plaintiff then states that it would penalize the Contractor if the degradation curves are not applied.

843. In this regard, it should be noted that, from the perspective of the Contract, the penalties contemplated therein are the penalties provided for in the Contract itself. For this purpose, Clause 12.6 provides

> *"2.6 Contractual Penalties for Delays. If the Provisional Acceptance of the Power Plant occurs after the Scheduled Provisional Acceptance Date corresponding, in accordance with the agreed Execution Program, for reasons attributable to the Contractor, where the delay is not due to an act or omission of the Commission, to an Event of Non-compliance of the Commission or Act of God or Force Majeure, the Contractor must pay the Commission, as a penalty for the delay, an amount calculated by applying the percentages for the periods indicated below, to the portion of the Contract Price attributable to the delayed Power Plant, on the understanding that the maximum aggregate amount payable under this Clause 12.6 with respect to the delay in reaching the Provisional Acceptance will not be greater than the amount of the Performance Bond, in accordance with Appendix 3, paragraph B;"* (emphasis added).

844. Thus understood, a penalty is one thing and the application or not of a Degradation Curve is another. The non-application of a Degradation Curve is not a penalty but a risk assumed by the Contractor, so the indicated argument cannot succeed.

845. Now the question arises as to whether, in any case, the Degradation Curves of Appendix VIIIA of the Performance Tests Procedure should be applied by virtue of the principle that prohibits going back against one's own acts to the detriment of good faith. In other words, since the Performance Tests Procedure incorporated in Appendix VIIIA was approved, not applying the degradation curves would constitute going back against CFE's own acts.

846. In this regard, it is pertinent to point out that the prohibition to return to one's

own acts is based on good faith, which, as Mexican jurisprudence has pointed out,[681] *"…as a general principle of law, good faith is a rule of conduct that demands loyalty and honesty from legal persons that excludes any malicious intent. It implies a duty to act coherently and observe in the future the conduct that one's own acts made foreseeable*". Likewise, it has said that the principle of good faith "*implies that the parties to a contractual relationship must behave in a transparent and coherent manner in such a way that, when one of them, through their behavior, has generated the trust of the other in relation to its future performance, they must not disappoint said trust*".

847. In order for the prohibition on returning to one's own acts to be applied, Mexican jurisprudence has demanded the following requirements: a) A legally previous, relevant and effective conduct. . . that is transcendental, relevant. . . b) A subsequent contradictory behavior that affects the expectations that arise from the previous one. . . This conduct means exercising a claim that in another context is lawful, but is inadmissible because it is contradictory to the first. . . c) The identity of the subject or centers of interest that are linked in both conducts[682]. The UNIDROIT Principles on International Commercial Contracts also refer to this principle in Article 1.8, which states "*A Party may not act in contradiction to an understanding that it has raised in its counterpart and in accordance with which the latter has acted reasonably accordingly and to their disadvantage*" (emphasis added)[683]. In this way, what justifies the application of this doctrine is the betrayal of good faith, of the trust that a person has placed in the actions of one Party, which is later contradicted. The application of this doctrine then always assumes that a conduct of one party has given rise to a particular trust and normally to an action of the other based on the conduct of the first. This is the case, for example, when in the execution of a Contract the Contractor warns that it has deviated from the specifications and the other Party states or makes them understand that this does not generate objection, and later when the Work is finished, they claim sanctions for breach. In this case, the

[681] Doc. C-143, Direct Protection 614/2011 of December 8, 2011, Third Collegiate Court in Civil Matters of the First Circuit. Cited in the Complaint, paragraph 268.
[682] Doc. C-143, Direct Protection 614/2011 of December 8, 2011, Third Collegiate Court in Civil Matters of the First Circuit. Cited in the Complaint, paragraph 268.
[683] Appendix C-141.

prohibition of going back against one's own acts applies, because if the Employer had indicated to the Contractor that it did not accept the breach, the Contractor would have taken said statement into account to adopt the appropriate measures, such as, for example, correcting the defect in construction or seeking an Agreement with the Employer.

848. In the present case, the Tribunal does not find that this situation arises, since the approval of the Performance Tests Procedure, with the inclusion of Appendix VIIIA, did not generate any conduct by the Contractor by reason of said Appendix. Indeed, if the Appendix had not been included, in any case, the Performance Test would have to be carried out in the conditions in which the turbines were found, as it was finally carried out.

849. However, to the extent that the degradation curves are not applicable, the Tribunal must analyze DUNOR's other argument, that is, that the Commission determined the result of the performance tests with a "*preliminary report*", and that the report that has been presented at the beginning of this arbitration by the Plaintiff is the one that must be taken into account to determine the applicable discounts.

850. In this regard, for clarity, it is pertinent to note that in its reply DUNOR states[684] that the discounts made by CFE were made based on Report LAPEM K3323-105-19. It warns that CFE indicates that said penalties were calculated based on the LAPEM Report K3323-101-19, included in the Provisional Acceptance Agreement and not in accordance with the LAPEM Report K3323-105-19[685]. To this end, the Plaintiff points out that Report LAPEM K3323-101-19 is a mere summary of Report LAPEM K3323-105-19.

851. However, the Plaintiff has argued that the Report taken into account by CFE is of a preliminary nature, therefore the result can be reviewed, and in any case said Report is not correct.

[684] Reply, paragraph 355.
[685] CFE's Answer, paragraph 237.

852. In this regard, it should be noted that Expert Cámara, when referring to the report taken into account by CFE, states in their first report the following[686]: "*However, it is necessary to mention that said report was requested directly by the Commission from LAPEM because the Contractor did not submit at any time the Results of the Performance Tests without the application of corrections for the Degradation Curves*."

853. The Tribunal observes that the document that is incorporated into the Provisional Acceptance Agreement as a result of the performance tests is Official Letter No. K3323/101/19, in which reference is made to the attestation of the performance tests and the results. At the top of said document it is indicated: "*Performance Test Report (GT-1, GT-2 and TV) and Guarantees (preliminary)*". In this regard, CFE points out that "*the note that is erroneously identified in the heading as 'Preliminary' is part of a format for the Provisional Acceptance Agreement, prepared by a third party, completely unrelated to who prepared the Report*"[687].

854. In relation to this point, when examining the document, the Tribunal finds that the qualification of "*preliminary"* that was given to the Performance Test Report, was not granted to the Act itself, since it is from the Provisional Acceptance, nor to what extent the Tribunal appreciates any other document incorporated into the aforementioned Act. Likewise, the LAPEM Report is not classified as "*Preliminary"*. The foregoing indicates that the qualification was given to the Report by the person who prepared the Minutes and in principle it was accepted by the Commission and by DUNOR, who signed it. It is pertinent to add that Expert Cámara states that "*at that time the LAPEM Report No. K3323-101-19 of August 14, 2019 requested by the Commission, had a 'preliminary' character since it was awaiting the analysis of the gas, which was being analyzed*"[688] and it was when the analysis was available that LAPEM ratified the results of the Tests[689].

855. To the foregoing it is added that in the Performance Tests Procedure it had

[686] First Report, paragraph 492.
[687] CFE's Rejoinder and Reply, paragraph 380.
[688] First Report, paragraph 500.
[689] First Report, paragraph 501.

been indicated[690] that "*once the Performance Test is finished, and in accordance with what was agreed in the start Minutes of the Performance Test, DUNOR will deliver a preliminary report of the results obtained from the Performance Test*" (emphasis added) and adds *"Once the laboratory analysis of the Fuel is obtained, this data will be used to generate the final Performance Test Report..."*. Thus, the Performance Test Procedure had foreseen the existence of a preliminary report.

856. The foregoing indicates that the Report that was incorporated into the Provisional Acceptance Agreement really had a preliminary nature.

857. However, taking into account what Expert Cámara indicates later, when the chromatographic analysis was available, Report LAPEM K3323-105-19 was issued.[691]. In the text of this report that is in the file, it is not expressly indicated that it is preliminary.[692]. Nor does it appear from its wording that it is preliminary, since the report concludes that the power is less than the guaranteed capacity and the unit term consumption is greater than the guaranteed value.

858. Now, with the Complaint, the Plaintiff submitted Report LAPEM K3323-95A 2019 issued on October 30, 2019 on the Performance Tests. The Defendant considers that this Report cannot be taken into account because this would imply "*overlapping flagrant breaches of contract, since CFE repeatedly requested delivery of reports without considering degradation, which was not addressed.*"[693]. It adds that it is "*unthinkable that a Report delivered almost two years later could be considered valid to apply the discounts to which the Contractor has become a creditor, especially since, from the clarifications made by the Commission, the Contractor lacks technical, factual, and legal support to argue that the LAPEM Report K3323-105-19 of August 14, 2019 is invalid*".

859. In this way, there are two reasons why CFE considers that the report of LAPEM K3323-95A 2019 issued on October 30, 2019 cannot be taken into account, on the one hand, its extemporaneous nature and on the other, that there is no reason to hold that the initial report is invalid.

[690] Doc-144, p. 25.
[691] First Report, paragraph 501.
[692] Appendix R-129.
[693] CFE's Rejoinder and Reply, paragraph 385.

860. Regarding its extemporaneous nature, it should be noted that Appendix 5[694] of the Contract, regarding the Technical Information Required after the signing of the Contract, establishes in its paragraph 5.8 Testing and Commissioning Manual that said Manual must contain, among other documents, the Performance Test reports that must be delivered no later than four (4) weeks after the date of the Provisional Acceptance of the Power Plant, that is, on September 11, 2019 as indicated by Expert Cámara[695]. However, it is clear that the report invoked by DUNOR was not delivered within said period, since the Complaint was attached; a situation that, in principle, could not alter the discount applied as long as it is a fact carried out based on Report K3323-101-19 as stated in Communication 7B/2019/RJMN-00370 of August 23, 2019 of CFE[696] but it can offer important and objective data regarding the conditions in the performance tests of the Power Plant, which is what really matters in relation to its operation.

861. In this regard, the Tribunal considers that the lack of timely delivery of the Report could have had an impact on the Provisional Acceptance of the Power Plant and on its payment obligation, but since it is a report of a technical nature and as it is an official document of the Mexican public administration, classifiable as “Public Documentation”, which contains an act that is presumed to be valid, the Tribunal considers it necessary to weigh it, to conclude if the turbines met the required conditions or not, when the performance test was carried out.

862. For this reason, it is important for the Tribunal to examine the Reports invoked by the Parties, with respect to which none of them have been declared invalid, but rather the preliminary nature of the first and the extemporaneity, but the final nature of the second.

863. In the first place, the Tribunal does not ignore that both reports refer to the Performance Tests of Project 333 (the Second LAPEM Report simply refers to the Combined Cycle Power Plant) Empalme II, carried out in July 2019. And although the second report is dated October 2019, the information generated during the Performance Tests was used as the base information.

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[694] First Expert Cámara Report. Appendix 92.
[695] First Expert Cámara Report, paragraph 507.
[696] Doc. C-012, 7B-2019-RLMN-00370.

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864. If the Report LAPEM-K3323-105-19 of August 14, 2019 is confronted[697] (hereinafter the First LAPEM Report), whose conclusions coincide with K3323-101-19 that was incorporated into the Provisional Acceptance Agreement[698], with the report LAPEM-K3323-095A-19 of October 30, 2019[699] (the Second LAPEM Report) the following is observed: the First LAPEM Report has 27 sheets in the .pdf file while the second has 104 sheets in the .pdf file. Said difference corresponds to a greater extension in the analysis of gases, which in the First LAPEM Report is 18 pages, and in the second, 43 pages. Likewise, the fact that the Second LAPEM Report includes a section on correction curves at different load levels (50%, 75% and 100%) in relation to the following aspects: net capacity vs. atmospheric pressure; net unit heat consumption vs atmospheric pressure; net capacity vs. bulb temperature; net unit term consumption vs bulb temperature; net capacity vs relative humidity; net unit heat consumption vs. relative humidity; net capacity vs. fuel lower calorific value variation; net unit heat consumption vs. variation of lower calorific value; net capacity vs power factor; net unit thermal consumption vs. power factor; net capacity vs. water temperature and net unit heat consumption vs. seawater temperature. In all cases, "*guaranteed and applicable curve in performance tests"* is indicated. These analyses were not expressly included in the First LAPEM Report. It goes without saying that the Performance Test Procedure states "...*the final Report of the Performance Test, like the preliminary report, must have all the calculations made and that support the report presented"*[700]. Therefore, the will of the Parties was that the Report that served as a base contained all the calculations made, in order to verify their results.

865. The first report and the second are prepared by different technicians; however, they have the approval of the same Head of Office and the Approval (authorization in the case of the Second LAPEM Report) of the same Department Head.

866. On the other hand, there is a difference in the reference made to applicable

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[697] SGI-2.
[698] Doc. C-053.
[699] SGI-4.
[700] Appendix C-144, p. 25.

documents. In fact, the First LAPEM Report cites the following:

> *"EMP-UEDF-YYY-OP-01201-0 Performance Tests Procedure of the CC Empalme II Plant*
>
> *EMP-UEDF-YYY-OP-01384 Test procedure for demineralized water consumption CC Empalme II*
>
> *Standards*
>
> *ASME PTC 46*
>
> *AGA 3,5, AND 8*
>
> *LAPEM test procedure*
>
> *K3323201 Procedure for coordinating tests of generating unit equipment"*.

867. For its part, the Second LAPEM Report cites

> *"Standards:*
>
> • *AGA Report No. 3 (2003) Orifice Metering of Natural Gas and Other Related Hydrocarbon Fluids.*
>
> • *AGA Report no. 5 (2009) Natural Gas Energy Measurement.*
>
> • *AGA Report No. 8 (2003) Compressibility Factor of Natural Gas and Other Related Hydrocarbon Gases.*
>
> • *ASME MFC-3M-R1995 Measurement of Fluid Flow in Pipes Using Orifice, Nozzle and Venturi.*
>
> • *ASME PTC 4.4-2008 Gas Turbine Heat Recovery Steam Generators.*
>
> • *ASME PTC 6.2-2004 Steam Turbines in Combined Cycles.*
>
> • *ASME PTC 19.5-2004 Flow Measurement.*
>
> • *ASME PTC 22-2014 Gas Turbines.*
>
> • *ASME PTC 46-1996 Overall Plant Performance.*

*LAPEM testing procedures:*

- *K3323201 To coordinate testing of generating unit equipment and systems.*
- *K3323213 Checks to determine the corrected thermal regime and the corrected power in combined cycle units or in turbogas units.*

*Other documents:*

- *EMP-UEDF-YYY-OP-01201-01_01 Performance Tests Procedure*
- *Design data of the combined cycle"*.

868. However, in the conclusions regarding the results in the First LAPEM Report, it is stated:

| | kW warranty | Corrected test kW | KW difference |
|---|---|---|---|
| Net Capacity | 761 167.00 | 790 513.83 | -653.17 |
| | kJ/kWh guarantee | Corrected test | Difference |
| NWAUTC | 6 146.60 | 6 153.97 | 7.37 |

869. The Second LAPEM Report indicates the following:

| **Description** | **Units** | **Guarantee** | **Corrected** | **Difference** |
|---|---|---|---|---|
| **Net Capacity** | [MW] | 791.167 | 790.397 | -0.770 |
| **Medium Heavy Unit Heat Consumption** | [kJ/kWh] | 6 146.59 | 6 147.30 | 0.71 |
| | | | | |

870. The Second LAPEM Report concludes that "*The Corrected Net Capacity is -0.770 MW below the guaranteed, and the Corrected Medium Heavy Net Unit Thermal Consumption is +0.71 kJ/kWh above what is guaranteed"*. If you look closely, the biggest difference between one report and the other is the net capacity before correction, which results in a smaller difference in the Second LAPEM Report. While in Unitary Thermal Consumption it is the correction that allows the difference to be reduced.

871. The Tribunal finds in relation to the standards cited in the two reports, that the Second LAPEM Report invokes more standards than the first and that the First LAPEM Report does not cite all the standards indicated in the Performance Tests Procedure, unlike the Second LAPEM Report. However, CFE maintains that when referring to the Report to the Performance Tests Procedure, it must be understood that the First LAPEM Report applied all the rules contained therein. In this regard, the Tribunal notes that in any case the First LAPEM Report cites some standards and does not refer to the others indicated in the Performance Tests Procedure, therefore, if it does not cite them, it is not possible to conclude that the other standards were taken into account. On the contrary, the Second LAPEM Report cites others, including all those that were applicable in accordance with the Performance Tests Procedure.

872. Finally, it is worth pointing out that, although Expert Cámara at the hearing indicated that the calculations of the First LAPEM Report had been verified, when asked said "*Yes, if you have two technical reports in a first report, you have results with a standard of only two standards and, later, a second report is issued some time later, but in which the application of 12 standards is contemplated. From a technical point of view, which of the two reports would you ask for?*" indicates that he would have to verify compliance with regulatory requirements and that he would not dismiss the report that does not literally state the additional standards. When asked "*So, would you then not pay attention to either of the two? Which would you apply from a technical point of view?*", he replied: "*From a technical point of view, yes, probably, if you only ask me which one has the best conditions in its structure to be taken into account, the one that indicates the standards, correct*"[701].

[701] Transcript of the 3rd day of Tribunal Hearing 3283 to 3300.

873. On the other hand, it is pertinent to highlight that CFE expert does not question the conclusions of the Second LAPEM Report, but rather its extemporaneity.

874. In this regard, the First SGI Expert Report states that "*if the Arbitral Tribunal declared that it is not appropriate to apply degradation curves, in any case it would have to be concluded that the Commission made excessive discounts to the Contractor*"[702]. After doing the calculations, the Expert points out:

> *"These calculations show that the values stated in Official Letter No. 7B/2019/RJMN-00370, of August 23, 2019, are incorrect even if the Degradation Curves were not applicable, because:*
>
> *"i. The penalty derived from the Demonstrated Net Capacity being less than the Guaranteed Net Capacity should have been US$ 386,376.61 and not US$ 370,048.43, so there is a difference of US$ 16,318.18 in favor of the Commission.*
>
> *"ii. The penalty derived from the Demonstrated Medium Heavy Net Unit Thermal Consumption being greater than the Guaranteed Medium Heavy Net Unit Thermal Consumption should have been US$ 348,586.92 and not US$ 3,623,871.88, so there is a difference of US$ 3,275,284.96 to the detriment of DUNOR".*

875. The Tribunal considers the reasoning of the SGI Expert witness pertinent and adds, furthermore, that the Second LAPEM Report represents the situation in which the Power Plant was in greater technical detail, regardless of its being out of time. The Parties agreed on the possibility of applying discounts in the payment according to the difference shown by the reports both in the Demonstrated Net Capacity and in the Demonstrated Medium Heavy Net Unit Thermal Consumption and the guaranteed quantities. As it is a technical matter, this Tribunal will use the Second LAPEM Report because it offers more information regarding the standards used and agreed upon by the Parties to calculate the guaranteed capacity and consumption of the Power Plant and because it more accurately reflects the real and objective conditions. of the plant at the time of the

[702] First SGI Report, page 24.

performance tests.

876. Due to the foregoing, the Tribunal considers that the Plant did not comply with the guaranteed amounts in the points indicated by Report LAPEM-K3323-095A-19 of October 30, 2019. Therefore, the discount derived from the results of the performance tests must be US$ 348,586.92 (Three hundred forty-eight thousand five hundred eighty-six US dollars 92/100 cy); therefore, CFE made discounts higher than those that corresponded. The value of the discounts made in excess is US$ 3,258,966.78 (Three million two hundred and fifty-eight thousand nine hundred and sixty-six US dollars 78/100 cy) that CFE must pay to DUNOR.

877. It is pertinent to specify that, in the present case, at the time of paying the price and applying the discount, CFE proceeded based on the report it had obtained, since the one presented to it by DUNOR applied the Degradation Curves, which, as already has indicated, were not applicable in accordance with the provisions of the Contract. In this measure, although according to what has been stated, CFE made a discount that was greater than what was appropriate, its conduct with the information it had at that time did not constitute a breach. Due to the foregoing, since there is no reprehensible conduct at that time, it is not appropriate to impose the obligation to assume the financial expenses that would correspond to a late payment.

### 12.1.5 Financial Expenses Associated with Undue Discounts Applied by the Commission, to the Delay in the Payment of the Contract Price

#### 12.1.5.1 Plaintiff's Position

878. The Plaintiff points out that Clause 9.2 of the Contract establishes the terms in which CFE must pay DUNOR said Price. It adds that the Contract expressly establishes the obligation of the Commission to pay the financial expenses incurred by the Contractor if the Commission delays making any payment to which it is obliged, in accordance with Clause 10.2 of the Contract[703].

[703] Complaint Memorial, No. 357-359.

879. It also indicates that the Contract establishes a specific rate – Financial Expense Rate – with which the Parties must indemnify each other *"[i]n the event that any part of the Contract Price, any Termination Value or any other amount payable in accordance with this Contract, is not paid once due*". DUNOR then emphasizes that these expenses are generated up to the date of payment[704].

880. The Plaintiff states that the Commission has unduly discounted a total of US$ 7,054,808.49 (Seven million fifty-four thousand eight hundred and eight US dollars 49/100 cy) from the Contract Price, unilaterally applying the following discounts: i) US$ 3,060,888.18 (Three million sixty thousand eight hundred and eighty-eight US dollars 18/100 cy) for the alleged non-delivery of the Spare Parts, Tools and Special Equipment of the gas turbogenerators, and ii) US$ 3,993,920.31 (Three million nine hundred and ninety-three thousand nine hundred and twenty US dollars 31/100 cy) for the discrepancy between the results obtained in the Performance Tests and the Guaranteed Values in Appendix 13 of the Contract[705].

881. It adds that since Clause 10.2 of the Contract provides that in the event that any amount payable is not paid once due, the Party obliged to pay must cover the financial expenses that it has caused to the other Party.[706].

882. Due to the foregoing, it affirms that the Commission must indemnify DUNOR for the financial damages caused by the undue discounts applied by CFE, from the expiration date of the Contract Price (Clause 9.2 of the Contract) until the date of the reimbursement of discounts (Clause 10.2 of the Contract)[707].

883. Due to the foregoing, it affirms that the Commission must indemnify DUNOR for the financial damages caused by the undue discounts applied by CFE, from the expiration date of the Contract Price (Clause 9.2 of the Contract) until the date of the reimbursement of discounts (Clause 10.2 of the Contract)[708].

884. It mentions that, provisionally as of the date of filing the Complaint, the amount

[704] Complaint Memorial, No. 360.
[705] Complaint Memorial, No. 363.
[706] Complaint Memorial, No. 365.
[707] Complaint Memorial, No. 366.
[708] Complaint Memorial, No. 366.

disbursed by applying the Financial Expense Rate to the items in this section, that is, US$ 7,054,808.49 (Seven million fifty-four thousand eight hundred eight US dollars 49 /100 cy) results in US$ 197,178.06 (One hundred ninety-seven thousand one hundred seventy-eight US dollars 06/100 cy)[709].

885. Regarding the Financial Expenses Associated with the Delay in Payment of the Contract Price, it indicates that the Plaintiff has breached its obligation to pay the Contract Price at the time of the Provisional Acceptance of the Power Plant, in accordance with Clause 6.6 of the Contract[710].

886. It indicates that the Contract Price must be paid within 20 days following the later date between: (i) the Provisional Acceptance Date or (ii) the Scheduled Provisional Acceptance Date. Likewise, if any part of the Price is not paid once due, the Party that has breached its obligation must pay the financial expenses that it has generated to the other Party.

887. It is noted that, since the Provisional Acceptance occurred on August 14, 2019, that is, after the Scheduled Provisional Acceptance Date (scheduled for March 14, 2019), the 20-day term to pay the Contract Price expired on September 3, 2019. However, the Commission did not pay the Contract Price until September 11, 2019, consequently breaching Clauses 9.2 and 10.2 of the Contract[711].

888. It maintains that, in the Response to the Request for Arbitration, CFE excuses its non-compliance in (i) the failure to deliver the Final Performance Tests Report by the Contractor and (ii) in that the invoices issued by Dunor presented administrative and fiscal inconsistencies. In this regard, the Plaintiff expresses the following[712]:

889. **First.** Regarding the alleged failure to deliver the Final Performance Tests Report. Although Clause 18.5 of the Contract provides that, "*in the event that the Performance Tests demonstrate non-compliance by the GNC or the GNUTC, the Commission shall have the right to make the corresponding discounts... in*

[709] Complaint Memorial, No. 367.
[710] Complaint Memorial, No. 368-369.
[711] Complaint Memorial, No. 371.
[712] Complaint Memorial, No. 372.

*accordance with Appendix 13"*, the Defendant was responsible for the fact that the execution of the Tests at the Power Plant was not carried out in accordance with the Test Program initially planned, so that the invocation of said clause does not in any way cover the undue application of discounts to the Contract Price[713]. Likewise, it states that the Performance Tests Procedure delivered by Dunor and approved by CFE expressly provides for the correction factor for degradation in its Appendix VIIIA, Appendix D[714].

890. **Second**. With regard to CFE's excuse that, at the time of presenting the tax receipt to pay the Price, erroneous data from the recipient was found, it is worth noting that Clauses 9.2 and 10.2 of the Contract do not contemplate the modification of the tax data of the invoice as a cause that allows delaying the payment of the Contract Price. Therefore, the Commission cannot rely on this to maintain its position. It adds that, in this sense, the Commission relies on Article 128 of the RLOPSRM, which provides that "*the Contractor will be solely responsible for the invoices presented for payment that comply with the administrative and fiscal requirements"*. However, the aforementioned article also provides that, "*in the event that the invoices delivered by the Contractor present errors or deficiencies, the entity, within three business days following receipt, will indicate in writing to the Contractor the deficiencies that must be corrected"*[715].

891. It adds that on July 1, 2019, Dunor delivered the first draft of the Contract Price invoice to CFE. Subsequently, through various written communications, Dunor returned to deliver various invoices corresponding to the amount of the Contract Price. The recipient of all these invoices was CFE Generación II SPC/ CGI160330KL4. On August 26, 2019, that is, almost a month later, DUNOR again sent various invoices, being the recipient of the same CFE Generación II SPC[716].

892. DUNOR maintains that, despite the fact that the Commission had plenty of time to review the invoices, 2 days before the deadline to pay the Contract Price expired, CFE requested DUNOR to change the tax data of the recipient of the tax receipt. This behavior constitutes a breach of Article 128 of the

[713] Complaint Memorial, No. 372 and 374.
[714] Complaint Memorial, No. 375.
[715] Complaint Memorial, No. 378.
[716] Complaint Memorial, No. 379.

aforementioned RLOPSRM, since CFE did not indicate in writing to DUNOR on time that its invoices had errors. However, and as a sign of its contractual good faith, on September 2, 2019, DUNOR proceeded to cancel the issued invoices and sent the new invoices updating the recipient's data (CFE Generación IV EPS/CGI160330R94). Finally, CFE paid the partial amount of the invoice on September 11, 2019, the contractually established term having expired.[717].

893. In this way, DUNOR has borne a series of financial expenses caused by the delay in the payment of the Contract Price amounting to US$ 368,810.25 (Three hundred and sixty-eight thousand eight hundred and ten US dollars 25/100 cy). In view of which, in accordance with Clause 10.2 of the OPF Contract, DUNOR claims from the Defendant the payment of said financial expenses[718].

894. Regarding the Financial Expenses Associated with the Agreement, DUNOR maintains that on February 17, 2020, it provided the invoice associated with the Minutes, indicating that the Commission had a period of 20 days to pay DUNOR in accordance with Clause 6.1 of the Agreement. Said period ended on March 9, 2020, and the invoice was not paid until March 23, 2020. In other words, the Commission paid the corresponding invoice 14 days late, thereby failing to comply with Section 6.1 of the Agreement. As a consequence of this delay in payment, DUNOR has borne financial expenses amounting to US$ 12,833.31 (Twelve thousand eight hundred thirty-three US dollars 31/100 cy) and which must be paid by the Commission in accordance with Clause 10.2 of the Contract[719].

895. At this point it should be noted that the Plaintiff claims the Damages Derived from the Maintenance of the Performance Guarantee. However, due to the agreement of the Parties in accordance with what was stated by DUNOR on May 13, 2022 and confirmed by CFE, said claim is not included in the litigation.

896. In conclusion, DUNOR states that the Financial Expense Rate must be applied to the following concepts in the following periods, as expressed in its

[717] Complaint Memorial, No. 380.
[718] Complaint Memorial, No. 381.
[719] Complaint Memorial, No. 382.

Closing Submission[720]:

| Damages | Start Date (dies a quo) Computation | Provisional ad quem date | Provisional Quantification to |
|---|---|---|---|
| Delivery of Spare Parts | September 3, 2019 | March 25, 2022 | US$ 304,090[721] |
| Penalties for Performance Tests | | | |
| Delay in payment of the Contract Price | September 3, 2019 | September 11, 2019 | US$ 227,760[722] |
| Non-payment of the Agency Commission | March 8, 2020 | March 25, 2020 | US$ 861.51 |

897. Additionally, DUNOR, in its Reply Memorial, states that CFE does not deny the origin of payment of the Financial Expenses, which amount to a total of US$ 746,976.15 (Seven hundred and forty-six thousand nine hundred and seventy-six US dollars 15/100 cy)[723]. It also indicates that the Commission does not make any defense, neither in substance nor in form, regarding the admissibility of the Plaintiff's claim. The only statement made is that DUNOR "*abandoned the negotiating tables to its detriment and the reconciliation of the amounts was not concluded*." In this regard, DUNOR points out that the circumstances that caused the review and approval process of the costs generated by the application of

[720] Dunor Closing Submission, No. 179.
[721] Doc. C-265.
[722] Doc. C-266.
[723] Reply and Answer to the Counterclaim, No. 445.

Clause 25.5 of the Contract to be interrupted have been accredited, which are not attributable to DUNOR[724].

898. It adds that DUNOR has made its best efforts to try to resolve its disputes with CFE by negotiating them, but time and again DUNOR's efforts collided with the delaying tactics of the Commission that has used and uses any excuse at its disposal to postpone *sine die* the payment of amounts to which it is obliged.[725]

899. It states that the relationship between the alleged abandonment of the negotiating tables and the inapplicability of the Financial Expenses is not clear either. It seems that CFE, without saying so, intends to allude to the fact that the amounts payable would not be due because of this supposed "*abandonment*" of the negotiations. This argument lacks logic since it would mean that the payment of Financial Expenses would only proceed when the Commission gave its approval of the disputed amounts. CFE is perfectly aware that it owes amounts to DUNOR and the fact that there is a dispute over the amount does not weaken CFE's obligation to pay the Financial Expenses generated precisely by its reluctant behavior in payment. The foregoing would encourage conduct such as that of CFE, which, instead of negotiating in good faith, has tried at all times to evade compliance with its obligations by extending the negotiation procedure to an unspeakable length, now also hoping that this conduct will not come accompanied by an order to reimburse DUNOR for the Contractually Provided Financial Expenses[726].

900. Lastly, it indicates that the Commission's position is equally or more clear regarding the Financial Expenses associated with: (i) the undue discounts applied to the Contract Price (due to the alleged non-delivery of the Spare Parts and the non-application of Degradation Curves), and (ii) the delay in the payment of the Contract Price. In these benefits, the origin of the services only is denied, it being pointed out that it is an accessory claim of the main one, thus admitting that said claims will be appropriate in the event that the main ones are, since it does not present any evidence or argument against what is maintained by the

[724] Reply and Answer to the Counterclaim, No. 446.
[725] Reply and Answer to the Counterclaim, No. 447.
[726] Reply and Answer to the Counterclaim, No. 448.

Plaintiff in its Complaint Memorial[727].

#### 12.1.5.2 Defendant's Position

901. For its part, the Commission points out that, in the Process to make the payment of the Contract Price, different events attributable to the Contractor arose that generated the delay of Payment[728].

902. The Commission specifies the different communications that were given between the Parties, where DUNOR mainly requests the issuance of the CAP because it considers that it has complied with the requirements of Clause 18.1 of the Contract.[729].

903. Additionally, CFE states that the Contractor's breach of the Guaranteed Values led to the Commission expressing its rejection of the results of the Preliminary Report delivered, since the Performance Test Procedure approved by the Parties does not contemplate the application of correction due to degradation in Gas Turbines[730].

904. Regarding the payment of the Contract Price, the Commission refers to the correspondence of the Parties and indicates that, after the review of the finance area of CFE by email dated August 16, 2019, it issued comments on the credit notes[731].

905. Subsequently, on August 19, 2019, by Letter No. Ref. DUNOR-CFE-666, the Contractor canceled the 2 Credit Notes that included VAT and replaced them with others in which said observation is corrected[732].

906. Based on the above arguments, the Commission notes that, once the Plaintiff delivered the invoices without any errors, CFE was willing to make the payment of the Contract Price[733].

[727] Reply and Answer to the Counterclaim, No. 449.
[728] Counter-Memorial and Counterclaim, No. 471.
[729] Counter-Memorial and Counterclaim, No. 472-476.
[730] Counter-Memorial and Counterclaim, No. 476.
[731] Counter-Memorial and Counterclaim, No. 488.
[732] Counter-Memorial and Counterclaim, No. 489.
[733] Counter-Memorial and Counterclaim, No. 490.

907. Now, regarding the Financial Expenses Associated with the Agreement, the Commission indicates that this item can only be incurred when it is declared appropriate by the Tribunal. This, while the Commission considers that DUNOR abandoned the negotiating tables to its detriment and did not conclude with the reconciliation of the amounts[734].

908. In relation to the Financial Expenses Associated with assumptions: i) delays in the payment of the Contract Price, and ii) the alleged discounts for non-delivery of the replacement part of the Turbine, the Commission maintains that by declaring the main claim inadmissible, this one, which is accessory, would suffer the same fate.[735].

909. Additionally, the Commission, in its Rejoinder, reiterates that the Plaintiff has not complied with the obligation to deliver to CFE the necessary documents that prove and support the expenses that were accrued. It indicates that DUNOR intends to have it believed that it has complied with the delivery of the information since the submission of its request on June 25, 2019.[736].

910. It also points out with respect to the Financial Expenses associated with the alleged improper discounts applied by the Defendant, that, when the main claim is declared, this, being accessory, suffers the same fate[737]. It clarifies that the Commission does not intend to apply discounts, but to compensate DUNOR for the reasonable expenses in which it was affected, therefore the Plaintiff does not have the right to claim direct and indirect expenses in the execution of delayed works due to causes attributable to the same[738].

[734] Counter-Memorial and Counterclaim, No. 492.
[735] Counter-Memorial and Counterclaim, No. 493.
[736] Counter-Memorial and Counterclaim, No. 465.
[737] Counter-Memorial and Counterclaim, No. 468.
[738] Counter-Memorial and Counterclaim, No. 469.

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### 12.1.5.3 Considerations of the Tribunal

911. In order to decide the claims made by the Plaintiff in terms of financial expenses, the Tribunal considers it pertinent, first, to determine whether there was a late payment of the price of the Contract and what its consequences are; second, if due to the discounts made to the price by the Defendant, which the Tribunal has considered were not appropriate, additional sums must be recognized for financial expenses; third, whether there was a late payment of the amounts agreed by the Parties under the Agreement and whether Financial Expenses should be recognized for the amounts that the Tribunal has concluded should be paid by the Defendant under the Agreement, and finally, whether there is recognition of additional sums by way of compensation and damages proceeds.

#### 12.1.5.3.1 Late payment of the price.

912. In the first place, regarding the late payment of the Contract Price, the Tribunal finds that Clause 9.2 of the same provides the following:

> *"9.2 Payment of the Contract Price. The Securities Catalog details the distribution of the Contract Price that corresponds to the Power Plant. Notwithstanding the provisions of the LOPSRM, the Contract Price will be paid in the manner specified in Clause 10, within 20 (twenty) Days following the later date between (i) the Power Plant's Provisional Acceptance Date, or (ii) the Scheduled Provisional Acceptance Date of the Power Plant, in the event that the Provisional Acceptance of the Power Plant occurred before the Scheduled Provisional Acceptance Date of the Power Plant.*
>
> *"The Commission will pay the corresponding Contract Price once it has received to its satisfaction the Works and Materials of the Power Plant Contract and these are in a position to generate the income that allows the Commission to comply with the obligations assumed. It will be understood that this assumption has been met once the Provisional Acceptance of the Power Plant has been carried out"* (emphasis added).

913. In this way, in accordance with Clause 9.2 of the Contract, the price must be paid within 20 days following the date that is later, between the date of Provisional

Acceptance or the Scheduled Provisional Acceptance Date. At this point it is pertinent to point out that by defining the word “day”, without qualification, the Contract indicates what 1 (one) natural or calendar day is. Therefore, if the Provisional Acceptance occurred on August 14, 2019, the payment was due on September 3, 2019.

914. However, the payment of the price was verified on September 11, 2019, as expressed by DUNOR in the communication Dunor-CFE-770 of October 15, 2019.[739]. This fact is not disputed by the Defendant, who points out that the payment was delayed due to facts attributable to the Contractor.[740].

915. To this end, in its response to the request for arbitration, the Commission indicated that the delay in payment was caused, on the one hand, by the Contractor’s breach of the obligation to deliver the Final Performance Tests Report that would allow the determination of the amount of the discount and contractual penalties applicable to the Contract Price, and on the other hand, for the inconsistencies presented in the Invoice[741].

916. On the other hand, in its Answer[742], the Commission explained that it initially refused to issue the Provisional Acceptance Certificate because there were critical pending issues. Likewise, due to the inappropriateness of considering Degradation Curves in the preliminary Report of the Performance Test. Finally, CFE issued the Provisional Acceptance Certificate and the Contractor delivered three credit notes for discounts that had to be applied to the payment of the price, two of which presented inconsistencies, so once they were corrected, the payment proceeded.[743].

917. The Tribunal then proceeds to examine the different arguments presented by CFE to justify the late payment, taking into consideration that the term for the payment of the price began to run on the Provisional Acceptance Date of the Central, that is, August 14, 2019.

[739] Doc C-18.
[740] Counter-Memorial and Counterclaim, No. 471.
[741] Response to the Request for Arbitration, No. 31.
[742] Counter-Memorial and Counterclaim, paragraphs 471 et seq.
[743] Counter-Memorial and Counterclaim, paragraphs 486 to 490.

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918. On the one hand, Appendix 5 of the Contract regarding the Technical Information Required after the signing of the Contract, establishes in its paragraph 5.8 Testing and Commissioning Manual that said Manual must contain, among other documents, the Performance Test reports and that said Manual must be delivered no later than four (4) weeks after the date of the Provisional Acceptance of the Central, which corresponds to September 11th. However, it appears in the file that CFE by Official Letter No. 742.161/JALV-080/1962 of July 18, 2019[744] rejected the results of the Preliminary Report sent by DUNOR, because the Performance Tests Procedure does not include corrections for Degradation Curves. In said communication, CFE requested to send the Report in accordance with the provisions of the Contract. Finally, the Commission took into account Official Letter LAPEM No. K3323-101-19 of August 14, 2019 requested by the Commission[745].

919. Bearing in mind the foregoing, the first thing that the Tribunal notes is that the discussion about the Power Plant Performance Test Report and the rejection of the report delivered by the Contractor was not relevant from the point of view of the term to pay the price, by virtue of the fact that, although CFE rejected the Report presented by DUNOR, it finally issued the Provisional Acceptance Certificate, which led to the beginning of the term for the payment of the price.

920. On the other hand, regarding the delay in the payment of the price due to the inconsistency or error in the credit notes, because they could not include VAT, the following is found: on August 13, 2019, by Official Letter No. 742.161/JALV-097/19173, CFE informed DUNOR of the amount of the "*Discounts for Delays in the Delivery of Technical Information"*, and indicated that in order to continue with the procedures corresponding to the payment of the Contract Price, the Contractor had to present the respective credit note[746]. It also informed it on August 20, 2019, through Official Letter No. 7B/2019/RJMN-00364174, which, given the Contractor's refusal to deliver the Requested Spare Parts for the Gas Turbines, received a discount for late delivery and a discount for non-delivery of the Spare Parts.

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[744] Appendix R-034.
[745] Answer to the Complaint, paragraph 239.
[746] Appendix R-099.

921. However, by communication dated August 16, 2019, the Commission referred to the credit notes sent by the Contractor and indicated that the discounts for contractual penalties should not include VAT[747]. The Contractor corrected the credit notes dated August 19th taking into account the observations of the Commission[748].

922. As can be seen, between the date on which the corrected credit notes were delivered, August 19, 2019, and the date on which the payment had to be made (September 3, 2019), there was a sufficient period of time to make the payment, for which the correction of the credit notes does not justify the delay in the payment.

923. On the other hand, as indicated, when answering the request for arbitration, the Defendant based the delay in the payment of the invoices on the fact that DUNOR should have corrected the invoices at the request of CFE.

924. However, when comparing the two invoices provided by the Defendant[749], which correspond to the one initially sent by DUNOR to CFE and the one that was subsequently sent to address CFE's observations, it is found that the difference lies in the fact that the first invoice of August 26, 2019 is addressed to CFE GENERACION II EPS, while the second invoice, which is from September 2, 2019, is addressed to CFE GENERACION IV EPS. The corresponding Official Letter indicates that this last invoice is sent as requested and states that the original invoice was cancelled.

925. On the other hand, the Plaintiff points out that it had previously sent several invoices attached to the communications of July 6, July 9, July 15, and July 29, 2019, all addressed to CFE GENERACION II EPS without CFE making any observation in this regard[750].

926. In this regard, the Commission points out that the Plaintiff intends to make it appear that it complied with its obligation to remit the invoices as of July 1, 2019

[747] Appendix R-101.
[748] Appendix R-102.
[749] Appendix 008 and Appendix 009.
[750] **Doc. C-162**, Communication Dunor-CFE-580, of July 6, 2019; **Doc. C-163**, Communication Dunor-CFE-587, of July 9, 2019; **Doc. C-164**, Communication Dunor-CFE-592, of July 15, 2019; **Doc. C-165**, Communication Dunor-CFE-640, of July 29, 2019.

and that CFE unjustifiably delayed in formulating comments and corrections when, in fact, they were still pending solution to multiple issues prior to the determination of the payment of the Contract price and the corresponding discounts.

927. In relation to this issue, it should be remembered that Article 128 of the RLOPSRM provides that "*the Contractor will be solely responsible for the fact that the Invoices presented for payment comply with the administrative and fiscal requirements*". However, it also provides *that "in the event that the Invoices delivered by the Contractor present errors or deficiencies, the entity, within three (3) business days following receipt, will indicate in writing to the Contractor the deficiencies that must be corrected."*

928. Now, to apply this provision, it must be taken into account that the communications dated July 6, 9, 15, and 30, 2019, in which the Contractor requested the issuance of the Provisional Acceptance Certificate and additionally sent the respective invoice, are prior to the Provisional Acceptance dated August 14, 2019[751]. Since the term to pay the price in the present case began to run with the Provisional Acceptance, it is clear to the Tribunal that prior to August 14, 2019 there was no place for CFE to rule on the invoices submitted. Therefore, what must be taken into account are invoices issued after August 14, 2019.

929. To this extent, if the first invoice after Provisional Acceptance was dated August 26, 2019[752], the term to request the correction was 3 business days, that is, until August 29, 2019, which was Thursday. The date on which the correction was requested is not clearly accredited in the file. In any case, the new invoice was presented on September 2nd, so it was possible to pay it on September 3rd, to the extent that the Commission already knew the value and the only correction was the recipient of the invoice. However, CFE made the payment until September 11, 2019, as indicated by the Contractor in a communication dated October 15, 2019, which has not been denied by CFE.[753].

930. To this extent, the Tribunal considers that the financial expenses for the delay

[751] Doc. C-53.
[752] Appendix 006-CFE.
[753] Doc. C-18.

in the payment of the price amounting to US$ 227,760.00 (Two hundred twenty-seven thousand seven hundred and sixty US dollars 00/100 cy) must be recognized, which is the figure that DUNOR indicates in its Closing Submission[754], which is accompanied by the corresponding calculation[755], and that it is lower than the one previously indicated in your Claim document.

#### 12.1.5.3.2 Financial expenses and discounts applied to the price

931. With regard to the financial expenses due to the improper application of discounts to the price, the Tribunal considers the following:

932. As already indicated, Clause 9.2 of the Contract establishes a term for the payment of the Contract Price, and provides in Clause 10.2 for the payment of Financial Expenses in the event that any amount payable in accordance with the Contract is not paid when due.

933. Thus, if the Commission makes discounts to the price that do not correspond to what is provided for in the Contract, the payment made is incomplete, and therefore it must pay the financial expenses established in the Contract on the improperly discounted amount. In the present case, the Tribunal has found that the Commission was right to demand the delivery of the Spare Parts, Tools, and Special Equipment Requested. However, the Tribunal has concluded that the discount applicable in this case could only be that provided for in subparagraph D of Appendix 3 of the Contract and that, in accordance with what was agreed by the Parties, the discount of the Contract Price for Work not executed referred to in Article 231 of the RLOPSRM.

934. Therefore, the discount for work not executed constitutes a part of the unpaid price that must be reimbursed by CFE. However, this Tribunal considers that Clause 10.2 of the Contract must be applied, which provides that *"In the event that any part of the Contract Price… or any other amount payable in accordance with this Contract, is not paid when due, at the request of the Contractor or the Commission, as the case may be, the Commission or the Contractor, as appropriate, must pay financial expenses at the Financial Expense Rate, said*

[754] Closing Submission, No, 179.
[755] Doc. C-266,

*expenses will begin to be generated when the Parties have defined the amount to be paid...".* Therefore, in accordance with this stipulation, in the event that the amount owed is not defined, the financial expenses are incurred as soon as there is an agreement between the Parties or, failing that, when the Tribunal determines it. In this way, the amount that the Tribunal has determined was not appropriate must be paid within thirty days following the notification of this award, and Financial Expenses will be generated after the expiration of said term.

935. On the other hand, in relation to the sums discounted in excess due to the results of the performance tests, the Tribunal has concluded that the payment of financial expenses on them is not appropriate from the date on which the price should have been paid, since CFE proceeded based on the information it had. Since the amount to be paid is established by virtue of this award, Clause 10.2 of the Contract to which reference has already been made must be applied. Thus, the amounts corresponding to the price discounts that the Tribunal has concluded were not applicable must be paid within thirty days following the notification of this award, and Financial Expenses will be generated from the expiration of said period.

#### 12.1.5.3.3 The Financial Expenses and the sums due for the application of Clause 25.5

936. The Tribunal proceeds to rule on the Financial Expenses linked to the Agreement, for which the Tribunal considers it pertinent to distinguish between the cases in which there was an agreement between the Parties on the amount owed, and those in which no agreement was reached.

937. In this regard, the first thing to note is that Clause 6.1 of the Agreement provides:

> *"6.1 PAYMENT TERM.*
>
> *All those Minutes formalized up to the Provisional Acceptance Date of the Power Plant will be paid by the Commission within forty-five (45) days after the issuance of the Provisional Acceptance Certificate.*
>
> *"In the case of pending amounts to be reconciled or agreed upon by the Parties after the Provisional Acceptance of the Power Plant, THE COMMISSION shall*

> *pay THE CONTRACTOR the amounts actually recognized and formalized by means of a Minutes concerning the twenty (20) days following the presentation of the corresponding Invoice.*

938. From this perspective, the Tribunal finds that, according to the Agreement, the fees formalized before the Provisional Acceptance date had to be paid within forty-five days following the issuance of the Provisional Acceptance certificate and those that were formalized later, within of the 20 days following the presentation of the corresponding invoice.

939. In this regard, the Tribunal finds that the Minutes of Acknowledgment of Reimbursement for the Concept of Section 3.1 Financial, Insurance, and Guarantees of the Empalme II Project applies in the process, in accordance with Clause 25.5 of the Contract[756] in which in the agreements section an amount of MXN$ 9,662,588.15 (Nine million six hundred sixty-two thousand five hundred eighty-eight Mexican pesos 15/100 MN) is determined. Therefore, there is an agreement between the Parties on the amount owed, after the Provisional Acceptance of the Power Plant, for which it had to be paid within 20 days of the presentation of the corresponding invoice.

940. However, by communication dated February 17, 2020, DUNOR delivered the invoice corresponding to this bill.[757]. In this way, the term to pay it expired on March 9, 2020. However, said invoice was paid on March 23, 2020, according to the Plaintiff, without the Defendant having disputed the foregoing. Consequently, the invoice was paid 14 days late.

941. Since the Parties did not stipulate rules regarding interest in the Agreement, Clause 10.2 of the Contract must be applied, which provides*: "In the event that... any other amount payable in accordance with this Contract, is not paid once due, at the request of the Contractor or the Commission, as the case may be, the Commission or the Contractor, as appropriate, must pay financial expenses at the Financial Expense Rate, said expenses will begin to be generated when the Parties have defined the amount to be paid…".* Therefore, on the sums not paid within the term established in the Agreement, Financial Expenses must be paid.

[756] Doc. C-31.
[757] Doc. C-32.

942. According to the calculations made by the Plaintiff, without the Defendant having made objections, the amount owed is US$ 12,833.31 (Twelve thousand eight hundred thirty-three US dollars 31/100 cy)[758].

943. On the other hand, the Financial Expenses that should be recognized when the items were not the subject of an agreement between the Parties are still pending to be defined by the Tribunal.

944. At this point, the Tribunal observes that Clause 6.1 of the Agreement establishes a term to pay the "*Minutes formalized up to the Provisional Acceptance Date"*, and another for "*the pending amounts to be reconciled or agreed upon by the Parties after the Provisional Acceptance of the Power Plant" case in which "the amounts effectively recognized and formalized by means of a bill concerning the twenty (20) days following the presentation of the corresponding invoice" are paid.*

945. In this way, the Parties only regulated the case in which the value to be paid results from the agreement of the Parties, reflected in the Minutes. The Tribunal must then specify the applicable rule in those events in which there was no agreement between the Parties, and therefore it is the Tribunal that determines the amounts that must be paid.

946. The first thing that the Tribunal notices is that the rules agreed upon by the Parties determine a particular treatment for the payment of the sums that are agreed upon by the Parties in development of the provisions of the Agreement.

947. When examining the particular rules of the Agreement, it can be seen that the payment term does not run while the negotiation of the Parties is taking place. In fact, the Payment Term always runs from the Agreement Date of the Parties. This implies that financial expenses are not caused until the amounts owed are determined.

948. From another perspective, the Tribunal appreciates that when there is no agreement between the Parties, it must be the Tribunal that determines the amounts owed. If the rule provided for in Clause 6.1 of the Agreement is applied as pertinent, it is found that financial expenses should not be applied before the

[758] Complaint, paragraph 382.

date on which the amounts are determined, in this case by the Tribunal.

949. To the foregoing, it is added that Clause 10.2 of the Agreement provides that "*In the event that... any other amount payable in accordance with this Contract, is not paid once due,... the Commission or the Contractor, as appropriate, must pay financial expenses to the Financial Expense Rate, said expenses will begin to be generated when the Parties have defined the amount to be paid*" (emphasis added). Therefore, it is from the date of the award that the term must be counted to make the payment of the sums owed in development of the Agreement that the Tribunal determines and it is from the expiration of the same that Financial Expenses will be caused at the rate defined in the Contract.

**12.1.6 Other Damages and Losses.**

**12.1.6.1 Plaintiff's position.**

950. In relation to other damages, DUNOR points out that CFE was aware that, due to the complexity and amount of the Contract, the Contractor would necessarily have to resort to financing for the execution of the Project, in accordance with Clause 4.6 of the Contract.[759].

951. It adds that in terms of Clause 4.6 of the Contract, the Contractor was obliged to obtain financing for the execution of the Works and completion of the Project. It points out that the Commission was fully aware that any non-payment or discount of the Contract Price would generate financial damage to DUNOR, such as the payment of commissions or default interest.[760].

952. For such purposes, DUNOR refers to the CCF, which provides that: "*he who is obliged to provide a deed and stops providing it or does not provide it in accordance with the Agreement, will be responsible for damages and losses...*". Due to the foregoing, DUNOR maintains that CFE made improper discounts to the Contractual Price and therefore, must indemnify DUNOR for the damage caused. It adds that the conduct is willful. It emphasizes that DUNOR has to renew the credits with the Project Creditors, therefore, their validity is extended

[759] Complaint Memorial, No. 391.
[760] Complaint Memorial, No. 392.

for the unpaid amounts of the Contractual Price[761].

953. DUNOR warns that the damage suffered is an immediate and direct consequence of CFE's non-compliance with the payment obligation, since from this non-compliance, DUNOR has had to pay with its assets the various commissions and interests that such non-compliance generated. It adds that, once the causal link between the breach and the payment has been established, DUNOR certifies that the amount of compensation to which it is entitled is the following: i) Renewal Commissions and structuring of the Assignment of Rights Agreement in the amount of US$ 343,920.80 (Three hundred and forty-three thousand nine hundred and twenty US dollars 80/100 cy); ii) Agency Commission in the amount of US$ 45,000.00 (Forty-five thousand US dollars 00/100 cy); iii) Credit Commissions in the amount of US$ 7,750.00 (Seven thousand seven hundred and fifty US dollars 00/100 cy); and, iv) Additional interest in the amount of US$ 69,344.04 (Sixty-nine thousand three hundred and forty-four US dollars 04/100 cy)[762].

954. It indicates that all of the above amounts to the value of US$ 466,014.84 (Four hundred sixty-six thousand fourteen US dollars 84/100 cy).

955. In its Reply Memorial, DUNOR states on this claim that the legislation on Public Works does not limit the possibility that CFE is ordered to pay damages.

956. Thus, it maintains that the Defendant erroneously affirms that, being in the presence of an "*administrative contract*" and of a regulated nature, an interpretation "*a contrario sensu*" cannot be validated to incorporate terms and conditions that the Parties did not include. in it and, that this would be contrary to the "*Public Order Law*" that governs the OPF Contract and that we assume refers to the LOPSRM[763].

957. It adds that CFE intends to strengthen its position by indicating that the Federal Civil Code, in its Article 1840, states that the stipulation of the penalty excludes the possibility of claiming damages and losses and, that in the case of the Contract, specific benefits were established for different breaches (such as

[761] Complaint Memorial, No. 396.
[762] Complaint Memorial, No. 397 and 398.
[763] Reply and Answer to the Counterclaim, No. 450.

the payment of non-recoverable expenses, the payment of financial expenses and different breaches); and that, therefore, the benefits that the Parties should owe (as creditors) by virtue of those breaches are contemplated[764].

958. It points out that, although it is true that Article 1 of the LOPSRM indicates that it is of public order, this does not imply that its content should be applied above other legal provisions of the same hierarchical level.[765].

959. It clarifies that the foregoing clearly follows from the content of Article 13 of the LOPSRM, which contemplates the supplementary application of the provisions of common law, namely, the Federal Civil Code and the Federal Code of Civil Procedures. The said regulatory entity recognizes that, despite regulating the contracting of Public Works, it is not complete or total, and therefore, it is valid to resort to other regulatory entities.[766].

960. Additionally, DUNOR maintains that CFE's arguments support the Plaintiff. In this regard, it indicates that, to try to support its position, the Defendant cites a series of provisions of the LOPSRM that regulate damages and concludes that, since its articles do not contemplate the payment of damages by the agencies and entities, it would be demonstrated that individuals who contract with the State do not have the right to claim them[767].

961. It affirms that this argument is wrong, precisely because the wording of the LOPSRM does not consider what happened in the case at hand, that is, that the representatives of the contracting entity (CFE) intentionally breached the content of the Contract and this is precisely the basis of this claim: compensation for an act in violation of the contract that harms the assets of DUNOR[768].

962. Finally, DUNOR states that the fact that the LOPSRM does not contemplate liability for damages by the contracting entities when they breach the Contractual Agreements that bind them does not in any way prevent the supplementary application of the liability that the CCF does contemplate. In addition, the

[764] Reply and Answer to the Counterclaim, No. 451.
[765] Reply and Answer to the Counterclaim, No. 453.
[766] Reply and Answer to the Counterclaim, No. 454.
[767] Reply and Answer to the Counterclaim, No. 457.
[768] Reply and Answer to the Counterclaim, No. 458.

requirements mentioned in the Counter-Memorial (derived from the Contradiction of Thesis that was resolved in jurisprudence 34/2013 of the Second Chamber of the Supreme Tribunal of Justice of the Nation) are fully complied with in the case presented to us, because the issue to be settled - CFE's obligation to indemnify damages for breach of the Contract - is not regulated and, by doing so, it does not in any way contradict the content of the LOPSRM, quite the contrary, the legal vacuum left by the legislator, who did not foresee an act like the one deployed by CFE in the case at hand, is filled. Therefore, it concludes that the Defendant must be ordered to pay compensation for a total value of US$ 159,151.91 (One hundred fifty-nine thousand one hundred fifty-one US dollars 91/100 cy)[769].

#### 12.1.6.2 Defendant's Position

963. For its part, the Defendant maintains that the Parties did not agree to the payment of damages in the Contract, and it would not be valid to incorporate them into it, since it would be contrary to the clause on "Entire Contract", which establishes that: *"This Contract is the complete and exclusive compilation of all the terms and conditions that govern the agreement of the Parties in relation to its object"*, therefore, validating an interpretation of an Administrative Contract "*a contrario sensu"* in such a way incorporating terms and conditions that the Parties did not include in it would violate the Contract and would be contrary to its regulated nature, because in any case if it were valid to make such incorporation by way of interpretation "*contrario sensu"*, such addition would be contrary to the law of public order that governs the Contract (irrevocable) and in accordance with which it must be governed and interpreted[770].

964. It adds that CCF itself states that "*the Contracting Parties may stipulate a certain provision as a penalty in the event that the obligation is not fulfilled or is not fulfilled in the agreed manner. If such a stipulation is made, damages and losses cannot be claimed, in addition."* In the case of the Public Works Contract entered into between the Parties, specific "*benefits*" were established for different breaches, such as: the payment of non-recoverable expenses and the payment of financial expenses; in addition, different cases are expressly contemplated for

[769] Reply and Answer to the Counterclaim, No. 462 and 463.
[770] Counter-Memorial and Counterclaim, No. 494.

non-compliance with the obligations under their responsibility, either economic withholdings or imposing contractual penalties.[771].

965. The Commission specifies that, taking into consideration that the Contract cannot go against what is established in the public order law that governs it, since otherwise any provision that does so would be null, nor should it go beyond what is agreed between them in the Contract itself[772].

966. Likewise, it maintains that the Contract excludes the application of damages as defined in the CCF. This is consistent with the very nature of the Financed Public Works Contract and in accordance with LOPSRM, in which the existence of a self-sufficient and autonomous economic compensation system of the CCF will be illustrated.

967. It mentions that after carrying out an exhaustive review of the concept of damages, it is evident that all the mentions that the LOPSRM and its Regulations make of the concept of damages are made for very specific cases and with respect to the individuals who are the ones who must cover them, but never with respect to the Public Administration[773].

968. It also points out that, taking into account that the acts of the Public Administration are presumed to be in good faith, not referring to the payment of damages by the agencies and entities that bid and hire is consistent with this presumption, and that is why the law (and the Contract) provide express compensation mechanisms for Contractors (and Bidders) to recover the investment[774].

969. The Commission specifies that the supplementary application of the CCF indicated in the LOPSRM and its Regulations is not absolute and must occur within certain limits, without going to the extreme of implementing rights or institutions not regulated in the law that must be replaced, since the truth is that as stated, the Contract, the LOPSRM and its Regulations contemplate various consequences for the compensation of the contractors depending on the nature

[771] Counter-Memorial and Counterclaim, No. 496.
[772] Counter-Memorial and Counterclaim, No. 497.
[773] Counter-Memorial and Counterclaim, No. 499.
[774] Counter-Memorial and Counterclaim, No. 501.

of the facts in question, but not in the way that the Plaintiffs would like.[775].

970. The Defendant recalls that CCF, unlike LOPSRM, is not a law of public order, and that the Code itself states that "*[t]he purpose or determining reason for the will of those who hire, must not be contrary to the laws of public order or good customs",* and therefore its compliance is not above the will of the Parties (except when the Code itself indicates otherwise)[776].

971. It adds that the requirements, therefore, for the supplementation to be applied according to the jurisprudential thesis, are the following[777]:

a) That the legal system to be replaced expressly establishes this possibility, indicating the law or standards that can be applied additionally, or that a system establishes that it applies, totally or partially, in a supplementary manner to other systems;

b) That the law to be replaced does not contemplate the institution or legal issues that are intended to be applied additionally or, even establishing them, does not develop or regulate them deficiently;

c) That this omission or legislative vacuum makes necessary the supplementary application of standards to solve the dispute or the legal problem raised, without it being valid to attend to legal questions that the legislator did not intend to establish in the law to be replaced; and

d) That the additionally applicable standards do not contradict the legal system to be replaced, but that they are consistent with its principles and with the bases that specifically govern the institution in question.

972. It indicates that Article 13 of the LOPSRM mentions that*: "there will be supplementary to this Law and the other provisions derived from it, as appropriate, the Federal Civil Code, the Federal Law of Administrative Procedure and the Code Federal of Civil Procedures"*[778]. However, said supplementary nature, as mentioned above, only applies in certain cases, and given that in the

[775] Counter-Memorial and Counterclaim, No. 503.
[776] Counter-Memorial and Counterclaim, No. 504.
[777] Counter-Memorial and Counterclaim, No. 505.
[778] Counter-Memorial and Counterclaim, No. 506 and 507.

case at hand: (i) the LOPSRM does contemplate the legal issues that are intended to be applied additionally, in a specialized and developed manner; (ii) it would not be valid to address legal issues that the legislator had no intention of establishing in the law to be replaced; and (iii) the standards to be applied additionally are contrary to the LOPSRM, as they are not consistent with its principles and the bases that govern the concepts of compensation provided for in the LOPSRM and its Regulations. Due to all of the foregoing, the supplementary application invoked by the Plaintiffs for the figure of damages would not be valid.

973. Additionally, the Commission cites a jurisprudential thesis in commercial matters and points out that the LOPSRM regulates the principles of compensation for the Contractor in an autonomous and self-sufficient manner, which justifies that it is not necessary to resort to the supplementary application of the CFF[779].

974. It adds that the LOPSRM establishes a mechanism for the Contractor, who provides proof of damages under the concepts of Financial Expenses. It warns that if someone wanted to claim damages against the Commission, they have to demonstrate illegal conduct on the part of the Public Administration and considers that the Tribunal does not have jurisdiction over the Commission to determine whether it acted illegally[780].

975. It points out that the demonstration of damages means proving that obtaining the gain is not based on a simple possibility or a meager probability, but - *a contrario sensu* - on a strong or high probability.[781].

976. It maintains that the Contractor does not demonstrate that it has complied with its obligations in terms of the Contract. It adds that each and every one of the breaches in which it incurred motivates that it suffers from a lack of active legitimacy that prevents it from placing itself in the normative assumption to make the claims that they indicate, a situation that of course is requested to be considered by this H. Arbitral Tribunal to dismiss the claim[782].

[779] Counter-Memorial and Counterclaim, No. 509.
[780] Counter-Memorial and Counterclaim, No. 510 and 513.
[781] Counter-Memorial and Counterclaim, No. 516.
[782] Counter-Memorial and Counterclaim, No. 519.

977. Additionally, it indicates that the damages and losses to be claimed must be indicated and specified. The Plaintiffs do not specify what they consisted of, nor do they show any documentation to prove them, which may leave the Commission defenseless.[783].

978. Likewise, it refers to Article 2110 of the CCF that establishes the following: *"Damages must be the immediate and direct consequence of the failure to comply with the obligation, whether they have been caused or must necessarily be caused"*[784].

979. It indicates that, on the other hand, Clause 27 of the Contract expresses the same concept in its own terms: *"Notwithstanding any provision to the contrary contained in this Contract, neither Party shall be liable for indirect or consequential losses or damages of any kind arising from or in any way related to the compliance or breach of the obligations of the present Contract"*[785].

980. It specifies that it is necessary to determine what is meant by the expression "*immediate and direct consequence*". It points out that doctrine and jurisprudence are particularly valuable in carrying out this exercise. In this regard, it points out that the doctrine considers that the CCF is based on the theory of the proximate cause, therefore, only what immediately in time gives rise to a result is a cause, while the events that contribute to the result more distantly are not causes but conditions[786].

981. CFE also indicates that the Plaintiffs bear the burden of proof, in this case the demonstration of the causal link and that, in the absence of said demonstration, the Arbitral Tribunal will have no other option than to dismiss their argument for lack of grounds.[787].

982. Additionally, the Commission in its Rejoinder indicates that the LOPSRM does limit the length of the sentence. In this regard, it refers to Article 60 of the LOPSRM regarding the early termination of Contracts, which establishes that the

[783] Counter-Memorial and Counterclaim, No. 520.
[784] Counter-Memorial and Counterclaim, No. 525.
[785] Counter-Memorial and Counterclaim, No. 526.
[786] Counter-Memorial and Counterclaim, No. 527 and 528.
[787] Rejoinder and Reply to Counterclaim, No. 477.

Contractor will be reimbursed for "*those non-recoverable expenses incurred, provided they are reasonable*". On the other hand, Article 61 of the same legal system, corresponding to the termination of the Contract, states that, in said case, "*the work carried out will be paid, as well as the non-recoverable expenses, provided they are reasonable*"[788].

983. Therefore, the Commission notes that the argumentation presented by the Plaintiff in the Reply Memorial leads to a biased interpretation of the regulations applicable to the Contract, in the first place; because the legislation that governs the contractual relationship does foresee and limit the legal consequences of the rescission and early termination of the Contract. Second, it maintains that the interpretation made by the Plaintiff regarding Article 1840 of the same Code is completely contradictory.[789].

984. It specifies that said contradiction derives from the fact that DUNOR's claim is based on Article 2104 of the CCF, which is incompatible with Article 1840 of the same Code, knowing that in the event of an early termination or termination of the Contract, the Contractor would only be entitled to receive the services indicated in the LOPSRM. It emphasizes that the Plaintiff insists on claiming services that are not included in the contractual or legal terms applicable to the Contract in order to obtain undue services by way of double reparation[790].

985. Additionally, it states that it should not escape the view of the Arbitral Tribunal that supplementation is a legal figure that indicates referral to a secondary order only when the main standard fails to detail the particularities of a certain issue. In no case should supplementation be used to try to carry out the application of a substantial element that was excluded by the legislator in the drafting of a standard.[791].

986. From the foregoing, the Commission concludes that the claims presented by DUNOR, corresponding to the payment of damages and losses, imply a double compensation and, in addition, are based on considerations and interpretations contrary to what is established by the normative systems applicable to the

[788] Rejoinder and Reply to Counterclaim, No. 478 and 479.
[789] Rejoinder and Reply to Counterclaim, No. 480.
[790] Rejoinder and Reply to Counterclaim, No. 480.
[791] Rejoinder and Reply to Counterclaim, No. 481.

Contract.[792].

987. Finally, it points out that the fact that provisions of the CCF have been used to respond to the Plaintiff's claims does not imply any recognition of the origin of damages and losses in administrative contracts regulated by the LOPSRM. Therefore, it states that the fact that the Defendant has resorted to these precepts must be understood as an exercise that is limited to the right to contest the evidence of the Party.[793]

#### 12.1.6.3 Considerations of the Tribunal

988. DUNOR indicates[794] that in accordance with Clause 4.6 of the Contract, the Contractor was obliged to obtain financing for the execution of the works and completion of the Project, and that the Commission was therefore aware of the obtaining of such financing, both because it was notified of the assignment of the rights to collect the Contract Price, and because it recognized the various commissions for the extension of the credits under the Agreement (related to Clause 25.5 of the Contract). It adds that the Commission was fully aware that any non-payment or discounting of the Contract Price would generate financial damage to DUNOR, such as the payment of various commissions (specifically provided for in Clause 4.6) or default interest.

989. It indicates[795] that it is true that Clause 10.2 of the Contract provides that the delay in the payment of the Contract Price or "*any other amount payable in accordance with this Contract"* generates the obligation of CFE to pay DUNOR the Financial Expense Rate, "*the damages suffered by DUNOR are not explicitly or implicitly excluded, since there is no contractual penalty agreed for the breach in question*." It adds [796] that Article 2104 of the CCF provides that "*[w]hoever is obliged to provide a service and fails to provide it or does not provide it as agreed, shall be liable for damages. . .*".

[792] Rejoinder and Reply to Counterclaim, No. 483.
[793] Rejoinder and Reply to Counterclaim, No. 485 and 486.
[794] Complaint, No. 392.
[795] Complaint, No. 393.
[796] Complaint, No. 395.

990. It indicates additionally[797] that CFE made unfair discounts to the Contractual Price and adds that CFE's conduct deserves to be qualified as fraudulent. It indicates that Article 2106 of the Federal Civil Code establishes that "*the liability arising from intent is enforceable in all obligations. The waiver to enforce it is null and void.*"

991. As a consequence of the foregoing, it claims: (i) Renewal Commissions and structuring of the Assignment of Rights Agreement in the amount of US$ 343,920.80 (Three hundred and forty-three thousand nine hundred and twenty US dollars 80/100 cy); (ii) Agency Commission in the amount of US$45,000 (Forty-five thousand US dollars 00/100 cy); (iii) Credit Commissions in the amount of US$ 7,750 (Seven thousand seven hundred and fifty US dollars 00/100 cy), and (iv) Additional interest in the amount of US$ 69,344.04 (Sixty-nine thousand three hundred and forty-four US dollars 04/100cy).

992. For its part, the Defendant points out that the Parties did not agree in the Contract to pay damages, and it would not be valid to incorporate them into the Contract, since it would be contrary to the "Entire Contract" Clause. It also refers to the Contract rules and the supplementary nature in this matter of the Civil Code and the criteria to apply it.

993. In relation to the foregoing, the Tribunal considers the following:

994. The Parties stipulated the recognition of financial expenses both for the non-payment of the Contract price, and for the non-payment of any other sum due, which includes the sums derived from the application of Clause 25.5 of the Contract.

995. It is clear that the Parties' agreement that CFE must pay a financial expense in the event of non-payment, is based on the assumption that the non-timely payment of such amounts is prejudicial to the creditor, but instead of applying the rules of liability, the Parties agreed on the value to be paid. From this perspective, the agreement to recognize a financial expense for non-payment is equivalent to having stipulated a penalty for non-payment.

996. In this context, since the Parties have agreed on the consequence of non-

[797] Complaint, No. 396.

payment of part of the price or of non-payment of the sums due under Clause 25.5 of the Contract, it is clear that the will of the Parties must be applied. In this regard, it should be recalled that Article 1840 of the Federal Civil Code provides:

> *"Article 1840.- The Contracting Parties may stipulate a certain performance penalty in the event that the obligation is not fulfilled or is not fulfilled in the agreed manner. If such a stipulation is made, damages may not be claimed in addition."*

997. Taking into account the foregoing, the Tribunal considers that in principle it is not appropriate to recognize additional sums as damages to the Plaintiff, when the Contract stipulated the penalty to be paid in the event of non-payment of the price or sums payable by the contractor.

998. However, it is pertinent to note that the Plaintiff invokes Article 2106 of the Federal Civil Code which provides:

> *"Article 2106.- Liability arising from intent is enforceable in all obligations. The waiver to enforce it is null and void. "*

999. Pursuant to this rule, the debtor cannot limit or exclude its liability if it acted with full knowledge that its conduct was contrary to the law. Therefore, an agreement that in any way excludes or limits its liability in this case cannot be effective.

1000. Given all the foregoing, in the present case the Tribunal does not consider from the facts that have been proven in the proceedings that it can be concluded that CFE acted with full knowledge that its conduct was contrary to the law and intent cannot be presumed. For this reason, it concludes that it is not appropriate to award additional compensation for the concepts claimed.

### 12.2 Claims of the Counterclaim.

1001. In its Counterclaim Memorial, the Commission requests the following:

a) That the Arbitral Tribunal order DUNOR to pay to CFE the amount of MXN$9,113,673.45 (Nine million one hundred thirteen thousand six hundred and seventy-three Mexican pesos 45/100 MN), for the purchase and sale of electricity under the Energy Contract, corresponding to the

year 2019.

b) That the Arbitral Tribunal order DUNOR to pay to CFE the financial expenses generated due to the non-payment of the aforementioned amount, for the purchase and sale of electricity under the Energy Contract, corresponding to the year 2019.

### 12.2.1 CFE's position

1002. CFE indicates that in Section 7.2.14.11 of the Tender, it was established that the Contractor would, among other obligations, be responsible for the supply of electrical energy for Construction, Testing and Commissioning[798].

1003. The Commission specifies that in Clause 6.8 on Electricity Supply of the Contract, the Parties stipulated that, if the Contractor so decided, it could enter into a contract with the Commission for the supply of electricity during the construction and Testing stages, under the terms established in the applicable laws, regulations, manuals, and legal provisions in force[799].

1004. It also specifies that when the Contractor's obligation to supply electricity for the construction and testing stages of the Project materialized, the "*Energy Reform"* was already in force, which resulted in the entry into force of the Comisión Federal de Electricidad Law and the Electricity Industry Law[800]. It indicates that according to the regulation, there are only 2 possible scenarios to obtain the high voltage electrical energy necessary for the Tests, which are: i) Register the Power Plant, so that its owner (CFE Generación IV) acquires the status of "*Generator"*, with powers to buy and sell energy in the MEM, or ii) Register the Load Center, a status that is aimed at high consumers (Industrial) who will purchase electricity in the MEM in the long term, which implies compliance with studies and requirements not provided for in the Contract. The Commission points out that there was no other better possibility than for the owner of the Power Plant, which at that time was the Subsidiary Productive Company of the Comisión Federal de Electricidad called CFE Generación IV

[798] Counter-Memorial and Counterclaim, No. 535.
[799] Counter-Memorial and Counterclaim, No. 536.
[800] Counter-Memorial and Counterclaim, No. 537.

(hereinafter SPC IV), to register the Power Plant, so that the latter, in its capacity as "*Generator*", could acquire these powers to purchase and sell Electric Power in the MEM; consequently, once it had acquired the status of "Generator", the SPC IV was able to enter into contracts for the purchase and sale of electricity[801].

1005. In view of the foregoing, it indicates that, in order to comply with its obligation, the Contractor opted to purchase energy through the Commission, and therefore the Energy Purchase and Sale Contract (hereinafter the "Energy Contract") was entered into with the owner of the Power Plant (SPC IV), signed on March 20, 2018[802].

1006. The Commission states that, by Official Letter No. CFE GEN IV-OGE-196/2019, SPC IV made a payment request regarding various invoices corresponding to the year 2019, for the purchase and sale of electricity under the Energy Contract, which Dunor Energía S.A.P.I. de C.V., has not paid, which is why the corresponding financial expenses were generated and continue to be generated[803].

1007. Regarding the foregoing, it maintains that DUNOR stated the existence of certain service interruptions, for which it requested the corresponding failure report and, where appropriate, the amount of the applicable compensation, in order to be able to compensate the debts that DUNOR has for the purchase and sale of electricity under the Energy Contract[804].

1008. Subsequently, by Official Letter No. CFE GEN IV-OGE-216/2019192, the SPC IV rejected the alleged compensation for the interruptions referred to by DUNOR in its letter No. DUNOR-CFE-718, again demanding payment for the overdue invoices for the year 2019. Additionally, through Official Letter No. CFE GEN IV- OGE-138/2020193, SPC IV sent Dunor Energía S.A.P.I. de C.V. the amounts of the updated debts for the purchase and sale of electricity under the Energy Contract, which consider the financial expenses generated up to the date of issuance of the aforementioned letter, for the non-payment of the invoices for

[801] Counter-Memorial and Counterclaim, No. 539 and 540.
[802] Counter-Memorial and Counterclaim, No. 541.
[803] Counter-Memorial and Counterclaim, No. 549.
[804] Counter-Memorial and Counterclaim, No. 551.

the supply of electricity in the year 2019[805].

1009. Subsequently, it indicates that as of July 2020, the total debts owed by Dunor Energía SAPI de CV, for the purchase and sale of electricity under the Energy Contract, amount to $9,113,673.45 (Nine million one hundred thirteen thousand six hundred and seventy-three Mexican pesos 45/100 MN), an amount that must be updated with the financial expenses generated at the actual date of payment[806].

1010. It indicates that despite the payment demands that have been made to DUNOR, the latter has failed to pay the amounts owed for the purchase and sale of electricity under the Energy Contract, as well as the financial expenses generated[807].

1011. In turn, the Commission affirms that it has a legitimate right to make the claim. In this regard, it specifies that the fact that the Energy Contract was entered into with SPC IV does not prevent CFE from making the present claim, since in accordance with Article 6 of the Comisión Federal de Electricidad Law, CFE may carry out its activities, operations or services with the support of its subsidiary production companies, as occurred in the present case[808].

1012. Along these lines, it states that CFE, within its purpose, can carry out the generation activity, in accordance with the Electric Industry Law, as established in article 5 of the Comisión Federal de Electricidad Law and, in accordance with paragraph 6 of the same law, and said activity can be carried out with the support of its subsidiary production companies, as is the case of CFE Generación IV[809].

1013. Therefore, it considers that in terms of Article 60 of the Law of the Federal Electricity Commission itself and the Agreement to create the subsidiary production company of the Comisión Federal de Electricidad, called CFE Generación IV, published in the Official Gazette of the Federation on March 29, 2016, CFE entrusted the supply of electrical energy to SPC IV, so that, in terms

[805] Counter-Memorial and Counterclaim, No. 552-553.
[806] Counter-Memorial and Counterclaim, No. 554.
[807] Counter-Memorial and Counterclaim, No. 555.
[808] Counter-Memorial and Counterclaim, No. 562.
[809] Counter-Memorial and Counterclaim, No. 564.

of Articles 6 and 57 of the Law of the Federal Electricity Commission, it could carry out the electrical energy generation activities that CFE is entrusted with for the fulfillment of its purpose[810].

1014. The Commission specifies that the Energy Contract has its origin in a contractual obligation of DUNOR, derived from the Contract, and that, based on the legal provisions in force, the Plaintiff could not have complied with said obligation if it had not entered into the Energy Contract with SPC IV, since otherwise, DUNOR would have had to obtain its Load Center Registration from the MEM, a status that, as mentioned above, is aimed at high-end consumers (Industrials) who are dedicated to purchasing electricity on a long-term basis, which would have required it to carry out various studies and comply with requirements not provided for in the Contract[811].

1015. Finally, the Commission concludes that the Defendant acknowledges that there is a link between the obligations derived from the Contract and the obligations arising from the Energy Contract and that, at some point in time, the obligations derived from both legal instruments could be offset. It notes that this statement supports the fact that CFE has standing to file this Counterclaim given DUNOR's non-payment[812].

1016. In its Reply Memorial, the Commission reiterates that the Tribunal has jurisdiction over the Counterclaim. It points out that, from an adequate analysis of the Energy Contract, it can be seen that, in terms of its Clause 1.2 "Purpose of the Contract", the Parties stipulated that the purpose of the Energy Contract is to supply the electrical energy to carry out the tests and maintenance of the 313 Empalme II Power Plant Project, which is the obligation of the Purchaser in its capacity as Contractor[813].

1017. It also notes that the Plaintiff acknowledged the debts that are the subject of the claim made by the Commission, as can be seen from Communication No. DUNOR-CFE-718314, in which the Plaintiff stated that it had liquidity problems, arguing that the commissioning tests of the Empalme Power Plant were extended

[810] Counter-Memorial and Counterclaim, No. 565.
[811] Counter-Memorial and Counterclaim, No. 566.
[812] Counter-Memorial and Counterclaim, No. 568.
[813] Rejoinder and Reply to Counterclaim, No. 501.

for reasons not attributable to the Contractor and that CFE had not recognized or settled the extension periods, which included the concept of the electrical energy used for the tests of the CC Empalme II project. The Commission considers that, with said communication, Dunor acknowledges the link between the obligations derived from Contract PIF-039/205 and the obligations arising from the Energy Contract[814].

### 12.2.2 Dunor's position

1018. DUNOR maintains that the Arbitral Tribunal lacks jurisdiction over this claim. To this effect, it indicates that this claim has no basis in the contractual obligations assumed by the Parties in the Contract.[815].

1019. In this regard, it indicates that the Tribunal's Jurisdiction is based on the Contract. For this purpose, it recounts its Request for Arbitration before the London Court of International Arbitration against the Commission under Clause 30.3 of the Contract.[816] and the Answer to the Request for Arbitration, in which the scope of the present arbitration is defined as "*any dispute that arises in relation to the Contract*".[817].

1020. Additionally, DUNOR points out in response to the Commission's argument that the Contract and the Energy Contract are independent, with different parts, object and causes.[818].

1021. DUNOR objects to the Jurisdiction of the Arbitral Tribunal because there is no identity of the Parties. In this regard, it points out that, although DUNOR is a party to both the Energy Contract and the Contract, this is not the case for the Defendant, who is not a party to the Energy Contract (the basis of its claim for payment). In this regard, it should be noted that the Commission and CFE Generación IV are independent companies, with their own legal personality[819].

1022. It states that the organic statute of the Commission establishes that "*the*

[814] Rejoinder and Reply to Counterclaim, No. 517.
[815] Reply and Answer to the Counterclaim, No. 465.
[816] Reply and Answer to the Counterclaim, No. 466.
[817] Reply and Answer to the Counterclaim, No. 467.
[818] Reply and Answer to the Counterclaim, No. 470.
[819] Reply and Answer to the Counterclaim, No. 474.

*Comisión Federal de Electricidad is a productive State enterprise wholly owned by the Federal Government, with its own legal personality and assets and will enjoy technical, operational, and management autonomy*." It adds that the purpose of the Commission is to provide the public service of transmission and distribution of electrical energy and, for this, *"it may carry out the necessary activities, operations or services by itself; with the support of its subsidiary production companies and affiliated companies or through the execution of contracts. . . with individuals or legal entities from the public, private or social, national or international sectors*"[820].

1023. It also indicates that the sixth title of the Commission's statute regulates the relationship between it and its Subsidiary Production Companies ("SPC") and Affiliate Companies ("AC") and establishes that "*it must be conducted in strict compliance with the Law, its Regulations and the Terms for the strict legal separation of the Commission*". It also points out that the organic statute of CFE Generación IV establishes that "*[this] is a Subsidiary Productive Company of the Commission, which has legal personality and its own assets, whose purpose is to generate electricity, as well as to carry out marketing activities, except for the provision of Electricity Supply*"[821].

1024. It also indicates that CFE Generación IV has its own superior and government bodies, and its own Legal Department that is responsible for "*legally representing CFE Generación IV . . before the arbitration bodies. . . Defending the legal interests of CFE Generación IV and representing it in lawsuits, proceedings, and administrative, judicial, or arbitration appeals in which it is a party or has a legal interest*"[822].

1025. Based on the foregoing, DUNOR concludes that the Defendant and CFE Generación IV are independent companies with their own legal personality and assets, each governed by its own organic statute. In no case can it be understood that it is the same legal entity, since their purpose, management and control bodies and legal representation are completely different.[823].

[820] Reply and Answer to the Counterclaim, No. 475.
[821] Reply and Answer to the Counterclaim, No. 476.
[822] Reply and Answer to the Counterclaim, No. 478.
[823] Reply and Answer to the Counterclaim, No. 479.

1026. It maintains that although the Commission argues that the claim could be filed in the present arbitration because Article 6 of the LCFE stipulates that CFE can carry out its activities through its subsidiary production companies, the Commission forgets that it is one thing to "*carry out activities*" through subsidiary companies and quite another that the consent to arbitration given by DUNOR extends to third parties[824].

1027. DUNOR points out that it has never assumed any obligation before the Commission under the Energy Contract, and therefore, cannot be required to make any payment. The Defendant lacks legal standing to claim against DUNOR in the present arbitration under a contract to which it is not a party as if they were the same legal entity[825].

1028. DUNOR explains that the SPC and AC operate in accordance with the provisions of the Electricity Industry Law (EIL), in terms of strict legal separation. In this regard, DUNOR mentions that the Fourth Transitory Provision of the EIL orders CFE to carry out "*the accounting, operational, functional, and legal separation that corresponds to each of the activities of generation, transmission, distribution, and marketing [of energy*]" and provides that the Ministry of Energy and the Energy Regulatory Commission establish the terms under which CFE will carry out said separation. The legal separation must be vertical between the different business lines and horizontal between the same business lines[826].

1029. After indicating that CFE and its SPC are governed in terms of strict legal separation and that they act with total independence, DUNOR maintains that the Defendant and CFE Generación IV cannot, and should not, be considered the same legal entity. It adds that CFE Generación IV was created through the "*Agreement for the creation of the subsidiary productive company of the Comisión Federal de Electricidad"*, dated March 29, 2016 (hereinafter, the "Creation Agreement"), as a company with its own legal personality and patrimony[827].

1030. DUNOR also highlights that the Energy Contract constitutes a valid and

[824] Reply and Answer to the Counterclaim, No. 480.
[825] Reply and Answer to the Counterclaim, No. 482.
[826] Reply and Answer to the Counterclaim, No. 484 and 485.
[827] Reply and Answer to the Counterclaim, No. 489 and 491.

binding obligation exclusively for the Parties that sign it, that is, DUNOR and CFE Generación IV.610. In this sense, Clause 5 of the Energy Contract establishes that "*the relationship between the Parties derives from and consists solely of the rights and obligations established in this Contract*".[828]

1031. It refers to the *pacta sunt servanda* principle included in the CCF to indicate that Contracts bind only their Parties. It states that, even though the Defendant carries out activities through its SPC, the Commission and CFE Generación IV are independent legal entities. The Energy Contract only confers rights and obligations to CFE Generación IV. The Defendant is attempting to exercise rights in this arbitration based on a contract to which it is not even a party. Therefore, it concludes that the Commission does not have legal standing to claim the payment of MXN$9,282,113.54 (Nine million two hundred and eighty-two thousand one hundred and thirteen Mexican pesos 54/100 MN)[829].

1032. In addition to the foregoing, it indicates that, even if the Commission and CFE Generación IV were the same legal entity (*quod non),* the Arbitral Tribunal lacks jurisdiction in relation to the present claim. In this regard, it states that the OPF Contract does not extend its arbitration clause to other contracts[830].

1033. It indicates that the Arbitration Agreement constitutes the cornerstone of the arbitration proceedings. It is also the primary foundation for the power of decision or jurisdiction of any arbitral tribunal. It states that the arbitration agreement is a constitutive legal act since it generates obligations for the Parties and binds them to its specific purpose, which is to submit to arbitration the settlement of disputes to which the arbitration agreement extends its effects.[831].

1034. It adds that, with regard to the purpose of this arbitration, the Arbitration Clause of the Contract refers only to disputes arising in relation to said Contract and does not extend its application to other different contracts[832].

1035. DUNOR states that the intention and will of the Parties is clear regarding the

[828] Reply and Answer to the Counterclaim, No. 493.
[829] Reply and Answer to the Counterclaim, No. 494 and 497.
[830] Reply and Answer to the Counterclaim, No. 498.
[831] Reply and Answer to the Counterclaim, No. 500-501.
[832] Reply and Answer to the Counterclaim, No. 502.

scope of the arbitration agreement, and the Defendant cannot unilaterally extend its scope to disputes arising from a different contract. Moreover, due to the consensual nature of arbitration, the only way to subvert this situation would be through an express agreement between the Parties[833].

1036. Also, DUNOR maintains that the Energy Contract does not have an arbitration clause. Therefore, the Mexican courts are the competent bodies to settle any dispute that derives from it. It indicates that clause 16 of the Energy Contract provides that, "*for all matters related to the interpretation and compliance of this Contract, the applicable law shall be the federal laws of Mexico*"[834]."

1037. DUNOR recalls that it is a fundamental principle of arbitration that only the parties to an arbitration agreement can be bound by it. The principle of party autonomy constitutes the very substrate of arbitration. This is the starting point that must govern the analysis of the jurisdiction of the Arbitral Tribunal.[835]

1038. Therefore, it considers that, for the purpose of identifying the Parties to an arbitration agreement, the determining factor is the unequivocal consent to submit to arbitration. Consent is manifested by the concurrence of the offer and the acceptance as to the thing and the cause that is to constitute the arbitration contract. In general, consent can be expressed or implied. **This is not the case in arbitration,** where the arbitration agreement must "*be in writing, and recorded in a document signed by the Parties*", in accordance with Article 1423 of the Commercial Code[836].

1039. In conclusion, DUNOR states that it is clear and manifest that the claim sought by the Commission based on the Energy Contract falls outside the jurisdiction of the Arbitral Tribunal because (i) in accordance with the applicable legislation, it is necessary that the arbitration agreement be recorded in writing and signed by the parties that enter into it, and (ii) the Energy Contract does not contain an arbitration clause.[837]

[833] Reply and Answer to the Counterclaim, No. 505.
[834] Reply and Answer to the Counterclaim, No. 510.
[835] Reply and Answer to the Counterclaim, No. 512.
[836] Reply and Answer to the Counterclaim, No. 513.
[837] Reply and Answer to the Counterclaim, No. 519.

1040. Additionally, it adds that there is no agreement between the Parties that allows the joint processing of claims under different contracts.[838].

1041. It adds that, even if the Defendant tried to develop a theory that the Contract and the Energy Contract are part of the same transaction, DUNOR states that: i) The Contract stipulates that "*this Contract is the complete and exclusive compilation of all the terms and conditions that govern the agreement of the Parties in relation to the object thereof*". For its part, the Energy Contract provides that "*this Contract constitutes the entire agreement established between the Parties*"; ii) the Energy Contract is not complementary to the Contract and, iii) the Contract and the Energy Contract are completely independent. The former could exist in the absence of the latter and vice versa[839].

1042. Finally, DUNOR points out that the Energy Contract expressly prohibits the assignment of rights. To this effect, it refers to Clause 6 of the Energy Contract, which establishes that neither Party may assign, alienate, encumber or transfer, either totally or partially, the rights and obligations derived from this Contract, except with the written consent of the other Party[840].

1043. In that vein, DUNOR refers to Article 2030 of the CCF, which establishes in its 1st paragraph that "*the creditor may assign its right to a third party without the consent of the debtor, unless the assignment is prohibited by law, it has been agreed not to do so or the nature of the right does not allow it."* And it adds in its 2nd paragraph that "*the debtor cannot allege against the third party that the right could not be assigned because it had been agreed upon, when that agreement is recorded in the title constituting the right"*[841].

1044. It therefore concludes that DUNOR has never provided (and will not provide) its written consent authorizing the assignment or transfer to the Commission of CFE Generación IV's eventual right of to collect the amounts claimed here under the Energy Contract.[842].

[838] Reply and Answer to the Counterclaim, No. 520.
[839] Reply and Answer to the Counterclaim, No. 529.
[840] Reply and Answer to the Counterclaim, No. 533.
[841] Reply and Answer to the Counterclaim, No. 534.
[842] Reply and Answer to the Counterclaim, No. 536.

1045. Based on the foregoing, DUNOR concludes[843]:

- The present arbitration proceeding is based exclusively on the Contract, and not on the Energy Contract.
- The Contract and the Energy Contract are signed by different Parties. In this sense, while the parties to the Contract are DUNOR and the Commission, the parties to the Energy Contract are DUNOR and the company CFE Generación IV; the latter is an independent company with its own legal personality and assets.
- Even if CFE Generación IV and the Commission were the same legal person (*quad non*), the Contract does not allow its arbitration clause to be extended to other contracts.
- The Energy Contract does not contain an arbitration clause. As DUNOR and CFE Generación IV have not consented to submit disputes arising from this contract to arbitration, the Mexican courts and tribunals shall have exclusive jurisdiction.
- There is no agreement between the Parties, nor any contractual clause that allows the joint processing of claims based on different contracts. In any case, the Counterclaim cannot be based on a contract that is not covered by the arbitration agreement.
- Clause 6 of the Energy Contract prohibits the assignment or transfer of rights and obligations derived from said Contract, except with the written consent of the other Party. DUNOR has not provided its consent and anticipates that it will not do so.

1046. On the other hand, DUNOR refers to the date on which the rules governing the electricity sector referred to by the Commission were issued and affirms that when the Parties signed the Contract in October 2015, the Commission was fully aware that, when the time came, it could not be CFE itself that would carry out the activities of purchasing and selling electrical energy, but it would necessarily be an SPC that would have the power to purchase and sell energy. This materialized on March 29, 2016, through the "*Agreement for the creation of the*

[843] Reply and Answer to the Counterclaim, No. 545.

*subsidiary productive company of the Comisión Federal de Electricidad"*[844].

1047. Despite this situation, DUNOR emphasizes that the Commission never introduced any changes to the wording of Clause 6.8 of the Contract, either before or after it was signed.[845].

1048. Additionally, DUNOR points out that updating Clause 6.8 of the Contract is contractually impossible and illegal. In this regard, it states that Clause 31.5 of the Contract provides: *"Any modification or clarification to this Contract must be made by prior written agreement duly signed by each Party to this Contract, in accordance with the provisions of Article 59 of the LOPSRM and Title Three, Chapter Three, Section III of the RLOPSRM, where applicable. The waiver of any provision of the Contract by any Party must be made in writing, duly signed by said Party, making express reference to the right that said Party waives, as well as to the Clause of this Contract by which such right is consigned"*[846].

1049. DUNOR clarifies that, in accordance with said clause, the Defendant could have made the pertinent modifications and clarifications to the Contract prior to its signing, since they had designed said Contract in the Tender phase - or even later, after the creation of CFE Generación IV, in March 2016 and during the signing of the Energy Contract. However, none of this happened. From the literal wording of the transcribed clause, we can deduce, using CFE's words, that the update in kind of Clause 6.8 (i.e., that the payment obligation to CFE Generación IV is *understood* to be made to CFE and becomes an obligation under the Contract required that the Parties had expressly agreed to it in any of the contracts)[847].

1050. It also adds that not only has the Contract not been modified or clarified (in writing and with the prior consent of DUNOR) but also (i) when CFE Generación IV states that: "*The [Energy] Contract constitutes a valid and binding obligation on the Seller [CFE Generación IV], enforceable in accordance with its terms*"; and (ii) signs the Energy Contract in its own name and right, it makes no reference to that DUNOR must understand that, in reality, the Contract is being

[844] Rejoinder to Defendant on Counterclaim, No. 20.
[845] Rejoinder to Defendant on Counterclaim, No. 22.
[846] Rejoinder to Defendant on Counterclaim, No. 24.
[847] Rejoinder to Defendant on Counterclaim, No. 25.

updated in kind and is contracting with the Commission; or that the amounts that DUNOR must pay for the purchase of energy are actually from the Commission and are part of the contractual obligations that DUNOR assumes under the Contract"[848].

### 12.2.3 Considerations of the Tribunal

1051. The jurisdiction of the Tribunal in the present case derives from an arbitration agreement which is contained in Clause 30.3 of the Contract that provides:

> *"30.3 Arbitration. All disputes arising in connection with the present Contract, other than disputes to be settled in accordance with Clause 30.2, shall be decided exclusively and definitively in accordance with the Arbitration Rules of the London Court of International Arbitration by 3 (three) arbitrators; one chosen by each of the Parties; the third arbitrator shall be appointed by the Parties or by the arbitrators already appointed and in the absence of agreement by the London Court of International Arbitration (hereinafter LCIA). The arbitrators shall preferably be familiar with Mexican law. The seat of the arbitration shall be Mexico City, Federal District, and shall be conducted in Spanish. The applicable law governing the merits of the arbitration and, by default, the procedure insofar as the LCIA Arbitration Rules are omitted, shall be as provided in Clause 30.1. As for the procedure, if the Rules of the London Court of International Arbitration are omitted, such Rules shall apply as the Parties or, in the absence of such rules, the Arbitral Tribunal, may determine. The arbitral proceedings shall be confidential and any Person participating therein shall observe confidentiality. The foregoing confidentiality shall be maintained unless a competent authority requires disclosure in accordance with the Applicable Law. It is understood that the Arbitral Tribunal shall accept as binding the determinations -if any- of the Expert regarding technical or administrative aspects within the limits of the mandate of said Expert."* (emphasis added)

1052. To determine the scope of the Tribunal's jurisdiction in relation to the Counterclaim, both the content of the agreement and the parties to the agreement must be taken into account. In fact, the content of the agreement determines the disputes that will be submitted to arbitration, but additionally, the agreement only binds those who are parties to it, so that only disputes between the persons who have entered into it can be submitted to arbitration.

[848] Rejoinder to the Counterclaim, No. 26.

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1053. In this regard, it is noted that according to the text of the agreement, disputes "a*rising in connection with this Contract"* may be submitted to arbitration. The expression "*in relation to"* used in the clause can have a broad meaning, since according to the RAE Dictionary the expression relation means "Connection, correspondence of something with something else", so that the arbitration agreement could be applied to the disputes between the parties which, although not derived from obligations stipulated in the Contract, are related to it.

1054. However, this alone is not sufficient to conclude that the dispute raised in the Counterclaim is covered by the agreement, since it must additionally be determined who is bound by the arbitration agreement, since only those who are parties are bound to submit the respective dispute to arbitration.

1055. At this point it should be remembered that the arbitration agreement is a contract and is therefore subject to the rules of contracts, and in particular to the principle of relative effect. Contracts being the product of the will of the contracting parties, in principle they are binding only on them. In this sense, Article 1796 of the CCF provides that *"Contracts are perfected by mere consent, except those that must take a form established by law. As soon as they are perfected, they bind the contracting parties, not only to comply with what was expressly agreed, but also to the consequences that, according to their nature, are in accordance with good faith, usage or the law" (*emphasis added). Therefore, according to the CCF, the arbitration agreement only binds those who are parties to it and not third parties.

1056. In this same sense, Article 1416 of the Mexican Commercial Code expressly establishes that the arbitration agreement is "*the agreement by which the parties decide to submit to arbitration all or certain disputes that have arisen or may arise between them with respect to a certain legal, contractual or non-contractual relationship*" (emphasis added).

1057. Therefore, in accordance with Mexican law, the arbitration agreement can only refer to disputes that arise between the Parties to the agreement, since they are the ones that have been bound by it. This is how it has been understood by Mexican judicial authorities, as can be seen from the following reference:

*"Instance: Collegiate Circuit Courts of the Tenth Edition*

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*Subject(s): Civil Thesis: I.3o.C.401 C (10a.)*

*Source: Gaceta del Semanario Judicial de la Federación. Book 73, December 2019, Volume II, page 1030*

*Type: Isolated*

*ARBITRATION AGREEMENT. IT INVOLVES ONLY THE PARTIES THAT AGREED TO IT.*

*The consent of the Parties operates at the moment of initiating the arbitration, since it is based on the principle of freedom and disposition of the Parties to choose the way to resolve their disputes. Therefore, the Parties that are not involved in the arbitration agreement will not be able to participate in it. In that sense, when there are contracts in which the parties agreed on an arbitration clause there cannot be an interrelationship with others in which that arbitration commitment was not made, because it is not possible to submit to arbitration those who did not decide to do so. However, the arbitral award is valid, even if there are third parties who contracted with each of the parties who decided to submit to arbitration. Disputes between them and any of the arbitration proceedings shall be resolved in the formal and material jurisdiction.*

*THIRD COLLEGIATE TRIBUNAL IN CIVIL MATTERS OF THE FIRST CIRCUIT.*

*Direct protection 8/2019. M+W High Tech Projects México, S. de R.L. de C.V. April 10, 2019. Unanimous vote. Speaker: Paula Maria Garcia Villegas Sanchez Cordero. Secretary: Montserrat Cesarina Camberos Funes"* (emphasis added).

1058. In this way, a dispute between persons who are not all parties to the arbitration agreement that is invoked cannot be understood to be submitted to arbitration.

1059. To all of the above, it is worth adding that in accordance with Article 1423 of the Mexican Commercial Code, *the "arbitration agreement must be in writing and be recorded in a document signed by the parties or in an exchange of letters, telexes, telegrams, facsimile, or other means of telecommunication that record the agreement, or in an exchange of statements of claim and defense briefs in which the existence of an Agreement is affirmed by one Party without being denied by the other"* (emphasis added).

1060. Therefore, the consent of the Parties to the arbitration agreement, in

accordance with Mexican law, must be in writing.

1061. From this perspective, it can be seen then that the arbitration agreement on which the jurisdiction of this Tribunal is based is included in the Contract entered into between CFE and DUNOR, and therefore it is only understood to refer to disputes between these two parties.

1062. However, the dispute referred to in the Counterclaim refers to the payment of the price due under the Energy Purchase and Sale Contract entered into, as indicated in its text, between Dunor Energía SAPI DE CV and the Productive Company Subsidiary of Comisión Federal de Electricidad, called CFE Generación IV., who is identified as the Seller.

1063. It is pertinent to note that the declarations made in the first part of the Energy Purchase and Sale Contract state that the Seller is a "*Subsidiary Productive Company of the Comisión Federal de Electricidad, with its own legal personality and assets*." The Tribunal emphasizes that the legal personality of CFE Generación IV implies that the latter is the subject of the rights and obligations derived from the corresponding Contract, unless it had contracted as a representative of another person, which is not the case here.

1064. Indeed, it should be noted that, in the Energy Sale Contract, CFE Generación IV does not state that it is acting on behalf of the Comisión Federal de Electricidad. On the contrary, in declaration II.e) the Seller (which according to the heading of the Energy Sale Contract is CFE Generación IV) identifies the natural person who signs the Contract and says that it does so "*in his capacity as Legal Representative*" and that "*he has the necessary and sufficient powers to enter into this Contract and bind it under its terms*", which indicates that the bound party is CFE Generación IV and not another person. Likewise in Statement j. it is indicated that "*The Contract constitutes a valid and binding obligation for the Seller (that is, CFE Generación IV) enforceable in accordance with its terms"* (the phrase in parentheses is not from the original text).

1065. Additionally, and specifically in relation to the price and the method of payment, which is what the Counterclaim refers to, Clause 3.1 of the Energy Purchase and Sale Contract provides "*The price that the Buyer undertakes to pay to the Seller under the terms of this Contract*". In other words, the one who

has the right to payment is the Seller, that is, CFE Generación IV.

1066. Therefore, to the extent that CFE did not participate as a party in the Energy Purchase and Sale Contract, and, therefore, is not the holder of rights and obligations under such Contract, it is clear that the dispute arising from the Energy Purchase and Sale Contract is not covered by the arbitration clause of the Contract.

1067. However, CFE has invoked Clause 6.8 of the Contract and the changes in the electricity law that led to the execution of the Energy Purchase and Sale Contract to justify its legitimacy to present the Counterclaim and invoke the arbitration agreement.

1068. In this regard, it is found that Clause 6.8 of the Contract provides the following:

> *"6.8 Electricity Supply. If so decided, the Contractor may enter into a Contract with the Commission for the supply of electrical energy during the Construction and Testing stages under the terms established in the applicable Laws, Regulations, manuals, and legal provisions in force;*
>
> *The Contractor's requests to the Commission to enter into the contracts must be submitted separately, within 30 (thirty) days for construction, and 60 (sixty) days for Testing, counted from the signing of the Contract.*
>
> *In accordance with the fourth clause of the Public Services Manual regarding electric power, referring to the processing of applications and the conclusion of Contracts for the supply of electric power, they must be carried out in the offices or in the administrative modules of the supplier corresponding to the address where the supply is required.*
>
> *If the Contractor does not carry out with the Commission the contracting of the supply of Electric power for construction and Testing must provide the electrical energy it requires by its own means"* (emphasis added).

1069. As can be seen, the Contractual Clause provides an option for the Contractor to enter into a contract with the Commission for the supply of electrical energy, but at the same time provides that, if it is not entered into with the Commission, the Contractor must by its own means provide the electrical energy it requires, which it obviously must do in accordance with the legal framework for electrical energy in Mexico. In other words, the contractual text does not infer an obligation

for the Contractor to enter into an Energy Purchase and Sale Contract with CFE.

1070. However, in the Energy Purchase and Sale Contract, the following is indicated in paragraph IV of the background section:

> *"IV. In Clause 6.8. Electricity Supply of the Public Works Contract Financed at a Fixed Price, mentioned in paragraph I of this background, the contractor's obligation to execute contracts was established for the supply of electrical energy for the construction and testing stages in the terms established in the applicable Laws, Regulations, manuals, and current legal provisions; in this case, the applicable regulations are the Criteria by which the specific characteristics of the infrastructure required for the Interconnection of Electric Power Plants and Connection of Load Centers are established, therefore, for the purchase of energy, CFE Generación IV is the only one empowered to make the purchase in the Wholesale Electricity Market, but the Contractor is still responsible for paying for the electric power it consumes during the testing of the new Electric Power Plant"* (emphasis added).

1071. As can be seen, what this Clause provides is that the Contractor was obliged to enter into the Contracts for the supply of electrical energy for the construction and testing stages, but at the same time that CFE Generación IV is the only one empowered to make the purchase in the Wholesale Electricity Market.

1072. The Energy Purchase and Sale Contract does not indicate that CFE Generación IV acted on behalf of the Comisión Federal de Electricidad. On the contrary, its text shows that the Energy Purchase and Sale Contract binds CFE Generación IV and DUNOR, and that DUNOR is obliged to pay the price to CFE Generación IV.

1073. On the other hand, as a basis for its position, CFE invokes Article 6 of the Comisión Federal de Electricidad Law, which provides:

> *"Article 6. Comisión Federal de Electricidad may carry out the activities, operations or services necessary for the fulfillment of its object by itself; with the support of its subsidiary productive companies and affiliated companies, or through the execution of contracts, agreements, alliances or associations or any legal act, with natural or legal persons from the public, private or social, national or international sectors, all in terms of the provisions of this Law and other applicable legal provisions*" (emphasis added).

1074. It is clear according to this legal provision that CFE can carry out its activities

directly or it can do so with the support of its productive companies. However, this in no way means that in these cases CFE becomes a party to the contracts entered into by the subsidiary production companies, since to the extent that such companies have legal personality and enter into contracts, the rules must be applied of the law of obligations and contracts, so that the obligations arising from the contracts entered into by said companies in their own name will generate rights and obligations for those that have expressed their willingness to contract.

1075. At this point it should be noted that in accordance with the creation agreement of the subsidiary production company CFE Generación IV[849] said company has its own legal personality and assets (Article 1) and is represented by the General Director (Article 17).

1076. Consequently, although CFE law provides that the Commission can count on the support of the subsidiary production companies, this does not allow us to ignore that in the present case CFE Generación IV has the character of a legal entity different from the Commission with its own representative, who is the Director General, and who is therefore the owner of the rights and obligations that arise in favor of the seller in the Energy Purchase and Sale Contract.

1077. It is also worth noting that Article 64 of the Organic Statute of the Commission establishes that the "*The relationship between the Commission, its subsidiary production companies and affiliated companies must be conducted in strict adherence to the Law, its Regulations and the Terms for the strict legal separation of the Comisión Federal de Electricidad…".* In other words, the provisions that govern the Commission impose a separation between the acts of the productive companies and CFE, so it cannot be considered that the latter is a party to the contracts entered into by the former in their own name.

1078. Furthermore, the fact that the Energy Purchase and Sale Contract is executed in compliance with the obligations derived from the Contract entered into between CFE and DUNOR, does not alter the conclusion, since the reason why an agreement is entered into a Contract is one thing, and who is a party to it and creditors or debtors of the obligations derived from it are another.

[849] Doc C-210.

1079. Therefore, it must be concluded that CFE is not a party to the Energy Purchase and Sale Contract, but only CFE Generación IV and DUNOR are parties to the Energy Purchase Agreement.

1080. For this reason, it cannot be affirmed that there is a conflict between the Parties in the arbitration agreement contained in the Contract, when the dispute referred to is the payment of the price derived from the Energy Purchase and Sale Contract entered into between CFE Generación IV and DUNOR, to which CFE is not a party.

1081. It is worth noting that the Commission has invoked that the non-payment of the price of the Energy Purchase and Sale Contract by DUNOR, would constitute a breach of the Agreement between CFE and DUNOR. The Tribunal does not share this conclusion, since the Contract between CFE and DUNOR contains an obligation to provide the energy during the construction and testing stage, which is different from the obligation to pay the price to the supplier of the energy. In fact, DUNOR fulfilled its obligation to CFE since the energy was available during the construction and testing stage. Another thing is that DUNOR owes the corresponding price to CFE Generación IV.

1082. Finally, it should be noted that in the Rejoinder and Reply to the Counterclaim the Defendant invokes communication No. DUNOR-CFE- 718 of September 12, 2019, which, however, is not on the record, for which reason the Tribunal cannot refer to it.

1083. For all of the foregoing, the Tribunal concludes that it lacks jurisdiction to rule on the Counterclaim, to the extent that the dispute relating to the payment of the price for the Energy Purchase and Sale Contract does not arise between the Parties to the arbitration agreement on which these proceedings are based.

### 12.3 Conclusion

1084. From all of the foregoing, the Tribunal concludes that it must make the following declarations in relation to the claims made by DUNOR in its Complaint:

1. Declare that it has jurisdiction over the Defendant in relation to the claims made in this proceeding;
2. Declare that the Defendant has breached the Contract by failing to pay all the amounts due to the Plaintiff;
3. Order the Defendant to pay DUNOR the amount resulting from the following concepts:

| | |
|---|---|
| Financial Expenses, Insurances, and Guarantees for a total amount of | US$ 487,992.32 |
| Personnel Management and Field Administration Expenses | US$ 7,739,641.51 |
| Administration Expenses and Office Structure | US$ 2,975,708 |
| Third-Party Claims | US$ 4,681,181.31 |
| Undue discount for failure to deliver requested spare parts | US$ 1,393,106.70 |
| Excessive discount for degradation curves | US$ 3,258,966.78 |
| Financial expenses late payments | US$ 227,760 |
| | US$ 20,764,356.62 |

4. All the amounts that the Defendant must pay to DUNOR referred to in paragraph 3 above shall accrue post-award interest according to the Financial Expense Rate, from the expiry of the twenty-day term for the payment of the amounts owed, counted from the date of notification of this Award.

5. Declare that the Tribunal has no jurisdiction over the Counterclaim.

1085. Finally, it should be noted that the Plaintiff requests that when ordering the payment of the amount requested, any applicable taxes be added[850]. The Tribunal understands that said request refers to those sums that Mexican law establishes that must be paid additionally (for example, VAT), therefore, in this context, it considers the request admissible.

## 13 COSTS

### 13.1 Considerations of the Arbitral Tribunal

1086. Pursuant to Article 28.2 of the Arbitration Rules, the Arbitral Tribunal must decide the proportion in which the Parties shall bear the Arbitration Costs, which are determined by the LCIA in terms of Article 28.1 of the Arbitration Rules (the "Costs of Arbitration"). Furthermore, the Arbitral Tribunal has the power to decide in this Award whether all or a proportion of the legal or other costs incurred by a party (the "Legal Costs") in connection with this Arbitration shall be borne by the other party in terms of Article 28.3 of the Arbitration Rules.

#### 13.1.1 Legal Costs

1087. Article 1455 of the Mexican Commercial Code provides:

> *"Article 1455.- Except as provided in the following paragraph, the costs of the arbitration will be borne by the losing party. However, the arbitral tribunal may apportion the elements of these costs between the parties if it decides that the apportionment is reasonable, taking into account the circumstances of the case.*
>
> *"Regarding the cost of representation and legal assistance, the arbitral tribunal shall decide, taking into account the circumstances of the case, which party shall pay said costs or may apportion them between the Parties if it decides that this is reasonable.*
>
> *"When the arbitral tribunal issues an order to conclude the arbitration proceeding or an award on the terms agreed by the parties, it shall set the costs of the arbitration in the text of that order or award.*

[850] Dunor Closing Submission, paragraph 196.

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*"The arbitral tribunal may not charge additional fees for the interpretation, rectification, or completion of its award."*

1088. Thus, Mexican law establishes as a starting point for costs that they are to be borne by the losing party but allows the Tribunal to apportion said costs if reasonable.

1089. Therefore, taking into consideration both the outcome of the proceeding and the conduct of the Parties in the course of the proceedings, the Tribunal concludes that each Party must bear its own costs.

### 13.1.2 Arbitration Costs

1090. The net Arbitration Costs (other than Legal Costs or other costs incurred by the Parties at their own expense) have been determined by the LCIA Court, in accordance with Article 28.1 of the Arbitration Rules, as follows:

| | |
|---|---|
| Registration Fee: | GBP 1,750.00 |
| LCIA Administrative Costs: | GBP 28,477.19 |
| Tribunal Fees and Expenses: | GBP 244,725.00 |
| Total Arbitration Costs: | GBP 274,952.19 |

These fees and expenses are subject to VAT.

1091. Of these costs, Plaintiff has paid GBP 161,759.92, including the Registration Fee, transferred deposits, and accrued interest and Defendant has paid GBP 160,009.92, including transferred deposits and accrued interest. The remaining amount of funds will be returned by the LCIA to the Parties in the proportions in which they were paid, in accordance with Article 28.7 of the Arbitration Rules.

1092. Pursuant to Article 28.2 of the Arbitration Rules, the Arbitral Tribunal declares that each Party shall bear 50% of the net Arbitration Costs.

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## DECISION OF THE ARBITRAL TRIBUNAL

1093. Based on the foregoing, the Arbitral Tribunal adopts the following determinations:

**1:** Declare that it has jurisdiction over the Defendant in relation to the claims made in these proceedings.

**2:** Declare that the Defendant has breached the Contract by not paying all the amounts owed to the Plaintiff.

**3:** Order the Defendant to pay DUNOR the sum of US$ 20,764,356.62 (Twenty million seven hundred sixty-four thousand three hundred fifty-six US dollars 62/100 cy), for the concepts indicated in the reasoning part of this Award, plus any additional taxes that may be applicable.

**4:** Order the Defendant to pay the Plaintiff post-award interest at the Financial Expense Rate determined in the Contract, i.e., LIBOR at 6 (six) months, as quoted by Reuters Services plus 1% (one percentage point) on the amount discounted for unexecuted work, from the expiration of the term of twenty days for the payment of the amounts owed referred to in paragraph 3 above, counted from the date of notification of this Award.

**5:** Declare that the Tribunal has no jurisdiction over the Counterclaim.

**6:** Declare in terms of Legal Costs of the proceeding that each Party shall bear its own costs.

**7:** Declare in terms of Arbitration Costs that each Party shall bear 50% of the net Arbitration Costs.

**8:** Deny the other claims made.

LCIA Arbitration CASE No. 204865

between

DUNOR ENERGÍA, S.A.P.I. DE C.V.

(PLAINTIFF) (Mexico)

vs.

COMISIÓN FEDERAL DE ELECTRICIDAD

(DEFENDANT) (Mexico)

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Seat of the Tribunal: Mexico City (Mexico)
Issued on the 26th day of the month of September 2022.

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*[SIGNATURE]*
ROBERTO HERNANDEZ GARCIA
Co-arbitrator

*[SIGNATURE]*
GUILLERMO ESTRADA ADAN
Co-arbitrator

*[SIGNATURE]*
JUAN PABLO CÁRDENAS MEJÍA
President of the Arbitral Tribunal

LCIA Arbitration CASE No. 204865

between

DUNOR ENERGÍA, S.A.P.I. DE C.V.

(PLAINTIFF) (Mexico)

vs.

COMISIÓN FEDERAL DE ELECTRICIDAD

(DEFENDANT) (Mexico)

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# INDEX

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# Translation Affidavit

Travod International Ltd.
Registration ID: 11281675
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Address: 4th Floor, Centenary House,
1 Centenary Way, Manchester M50 1RF,
United Kingdom
Phone: +44 161 524 1919
Email: welcome@travod.com

Date: 9 December 2022

I, the undersigned, Koren K. Wheatley, translating for TRAVOD Limited in Manchester, UK.

DO SOLEMNLY DECLARE:

1. That **English** is my native language.

2. That I am fully qualified to do translation from **Spanish** into **English** language.

3. That I have accurately and carefully translated the attached document named below from the **Spanish** language into the **English** language.

Documents:
2022.09.27_LAUDO ARBITRAL FINAL (pages 1-126)

4. The attached document is in all respects a true, accurate, and correct translation of copies drawn up in the **Spanish** language, which have been produced to me by TRAVOD.

And I make this SOLEMN DECLARATION conscientiously believing it to be true.

Name/surname Koren Wheatley

Signature Koren K. Wheatley

# Translation Affidavit

Travod International Ltd.
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Address: 4th Floor, Centenary House,
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Date: 12/12/2022

I, the undersigned, Catherine Moir, translating for TRAVOD Limited in Manchester, UK.

DO SOLEMNLY DECLARE:

1. That **English** is my native language.

2. That I am fully qualified to do translation from **Spanish** into **English** language.

3. That I have accurately and carefully translated the attached document named below from the **Spanish** language into the **English** language.

Documents:
2022.09.27_LAUDO ARBITRAL FINAL (pages 201-276)

4. The attached document is in all respects a true, accurate, and correct translation of copies drawn up in the **Spanish** language, which have been produced to me by TRAVOD.

And I make this SOLEMN DECLARATION conscientiously believing it to be true.

Name/surname Catherine Moir

Signature

# Translation Affidavit

Travod International Ltd.
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Date: 09/12/2022

I, the undersigned, Bernard Joseph Gibbons, translating for TRAVOD Limited in Manchester, UK.

DO SOLEMNLY DECLARE:

1. That **English** is my native language.

2. That I am fully qualified to do translation from **Spanish** into **English** language.

3. That I have accurately and carefully translated the attached document named below from the **Spanish** language into the **English** language.

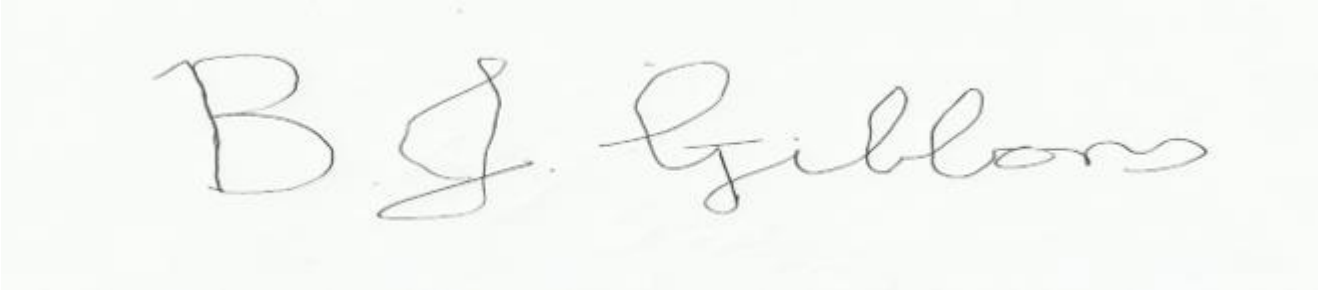
Documents:
2022.09.27_LAUDO ARBITRAL FINAL (pages 127-201 and 276 - 357)

4. The attached document is in all respects a true, accurate, and correct translation of copies drawn up in the **Spanish** language, which have been produced to me by TRAVOD.

And I make this SOLEMN DECLARATION conscientiously believing it to be true.

Name/surname Bernard Joseph Gibbons

Signature



**CORTE DE ARBITRAJE INTERNACIONAL DE LONDRES**

**LCIA CASO No. 204865**

**DUNOR ENERGÍA, S.A.P.I. DE C.V.**
**(DEMANDANTE) (México)**
**V.**
**COMISIÓN FEDERAL DE ELECTRICIDAD**
**(DEMANDADA) (México)**

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# LAUDO ARBITRAL FINAL

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CIUDAD DE MÉXICO (Sede del Arbitraje)

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LAUDO ARBITRAL

Arbitraje LCIA CASO N. 204865

Entre:

**DUNOR ENERGÍA S.A.P.I. DE C.V. (México)**

(la "Demandante")

**v.**

**COMISIÓN FEDERAL DE ELECTRICIDAD (México)**

(la "Demandada")

**CORTE DE ARBITRAJE INTERNACIONAL DE LONDRES**

## 1 DEFINICIONES

1. En el presente Laudo, además de las que expresamente se señalen, se utilizarán las siguientes expresiones con el significado que se indica:

(i) **Acuerdo de Arbitraje**: es el acuerdo contenido en la cláusula 30.3 del Contrato denominado "CONTRATO DE OBRA PÚBLICA FINANCIADA A PRECIO ALZADO NO. PIF -039/2015".

(ii) **Acuerdo:** es el acuerdo entre las Partes sobre la Aplicación de la Cláusula 25.5 para cumplir con el Objeto del Contrato PIF-039/2015, de 17 de septiembre de 2018.

(iii) **Audiencia**: es la Audiencia virtual realizada del 10 al 14 de enero de 2022.

(iv) **CCF:** es el Código Civil Federal de México.

(v) **CENACE**: es el Centro Nacional de Control de Energía.

(vi) **CAP:** es el Certificado de Aceptación Provisional.

(vii) **CCF**: es el Código Civil Federal.

(viii) **CTUNG:** Consumo Térmico Unitario Neto Garantizado.

(ix) **CTUNMP**: Consumo Térmico Unitario Neto Medio Pesado.

(x) **Contestación de CFE o Memorial de Contestación y Reconvención**: es el Memorial de Contestación presentado el 20 de mayo de 2021 por la Comisión Federal de Electricidad a la Demanda presentada por Dunor Energía S.A.P.I. de C.V.

(xi) **Contestación y Réplica de Dunor o Réplica y Contestación Reconvención:** es el Memorial de Réplica a la Demanda Principal y de Contestación a la Demanda Reconvencional presentado el 23 de agosto de 2021 por Dunor Energía S.A.P.I. de C.V. a la Demanda de Reconvención formulada por Comisión Federal de Electricidad.

(xii) **Contrato:** es el Contrato de Obra Pública Financiada a Precio Alzado No. PIF-039/2015 de 23 de octubre de 2015.

(xiii) **Contrato SGF:** es el Contrato de Servicio de Garantías de Funcionamiento de Largo Plazo de los turbogeneradores de Gas celebrado entre CFE y Siemens Innovaciones, S.A. de C.V., de 20 de junio de 2016.

(xiv) **Contrato de Compraventa de Energía:** es el Contrato celebrado entre Dunor Energía S.A.P.I. de C.V. y la CFE Generación IV, suscrito el 20 de marzo de 2018.

(xv) **Primer Convenio Modificatorio:** es el Primer Convenio Modificatorio al Contrato de Obra Pública Financiada a Precio Alzado No. PIF-039/2015, que se celebró el 24 de abril de 2018[1].

[1] Anexo de la Demanda, DOC. C-3.

(xvi) **Segundo Convenio Modificatorio:** es el Segundo Convenio Modificatorio al Contrato de Obra Pública Financiada a Precio Alzado No. PIF-039/2015, que se celebró el 23 de noviembre de 2018[2].

(xvii) **Tercer Convenio Modificatorio:** es el Tercer Convenio Modificatorio al Contrato de Obra Pública Financiada a Precio Alzado No. PIF-039/2015, que se celebró el 21 de octubre de 2019[3].

(xviii) **Convenios Modificatorios:** son el Primer, Segundo y Tercer Convenios Modificatorios celebrados por las Partes.

(xix) **Demanda de Dunor, Demanda o Memorial de Demanda:** es la Demanda presentada por Dunor Energía S.A.P.I. de C.V. el 05 de febrero de 2021 contra Comisión Federal de Electricidad.

(xx) **Contestación y Demanda Reconvencional de CFE, Memorial de Contestación y Reconvención o Contestación de CFE:** es la Contestación a la Demanda y la Demanda Reconvencional presentada por la Comisión Federal de Electricidad el 20 de mayo de 2021 contra Dunor Energía S.A.P.I. de C.V.

(xxi) **Demandante, Contratista, DUNOR o Dunor Energía:** es Dunor Energía S.A.P.I. de C.V.

(xxii) **Demandada, Contratante, CFE o Comisión:** es la Comisión Federal de Electricidad.

(xxiii) **Dúplica de Dunor:** es el Memorial de Dúplica a la Demanda Reconvencional de Dunor Energía S.A.P.I. de C.V. del 12 de diciembre de 2021.

(xxiv) **Dúplica y Réplica a la Reconvención de la CFE o Memorial de Dúplica y Réplica a la Reconvención:** es el Escrito de Dúplica a

[2] Anexo de la Demanda, DOC. C-4.
[3] Anexo de la Demanda, DOC. C-5.

la Demanda de Arbitraje y Réplica a la Demanda Reconvencional de CFE del 27 de octubre de 2021.

(xxv) **Informe sobre Costos Indirectos de EY:** es el Informe de "Costos indirectos incurridos por las oficinas corporativas de DUNOR ENERGÍA S.A.P.I DE C.V.", elaborado por EY en desarrollo del Acuerdo, de fecha 3 de agosto de 2020.

(xxvi) **Primer Informe LAPEM:** es el informe LAPEM-K3323-105-19 con fecha de 14 de agosto de 2019 sobre la Prueba de Desempeño de la Planta.

(xxvii) **Segundo Informe LAPEM:** es el informe LAPEM-K3323-095A-19 sobre la Prueba de Desempeño de la Planta con fecha del 30 de octubre de 2019.

(xxviii) **LCIA:** es la *London Court of International Arbitration* o la Corte de Arbitraje Internacional de Londres.

(xxix) **Licitación**: es la Licitación Pública Internacional -LO-018TOQ054-T32-.

(xxx) **LOPSRM:** es la Ley de Obras Públicas y Servicios Relacionados con las Mismas.

(xxxi) **Memorial de Conclusiones de Dunor**: es el escrito de conclusiones de la Demandante del 4 de abril de 2022.

(xxxii) **Memorial de Conclusiones de CFE:** es el escrito de conclusiones de la Demandada del 4 de abril de 2022.

(xxxiii) **OE:** Oferta Económica.

(xxxiv) **OT:** Oferta Técnica.

(xxxv) **Período de Análisis o Período de Reconocimiento:** período que va del 19 de julio de 2018 al 14 de marzo de 2019, producto de las afectaciones y retrasos sufridos en el Programa de Ejecución.

(xxxvi) **Perito Cámara:** es el Ingeniero Lorenzo José Cámara Anzures que elaboró dos informes periciales que presentó la CFE.

(xxxvii) **Perito DATG, DATG o Perito Moore:** es el perito Roberto Edgar Gallardo López, que elaboró dos informes periciales que presentó la CFE en representación de Moore, De Anda, Torres, Gallardo y Cia.

(xxxviii) **Perito EY**: es el perito Ignacio Cortés Castán que en representación de Ernst & Young elaboró dos informes periciales financieros que fueron presentados por Dunor.

(xxxix) **Perito SGI:** son los peritos Luis Alfonso Moreno Pacheco y Víctor Joaquín Larrazabal Gómez, quienes en representación de Sistemas de Gestión Integrados, S.C., elaboraron dos informes periciales que fueron presentados por DUNOR.

(xl) **Primer Informe Pericial de SGI:** es el informe elaborado por los peritos Luis Alfonso Moreno Pacheco y Víctor Joaquín Larrazabal Gómez, en representación de Sistemas de Gestión Integrados, S.C. que DUNOR acompañó a su Demanda.

(xli) **Segundo Informe Pericial de SGI**: es el informe elaborado por los peritos Luis Alfonso Moreno Pacheco y Víctor Joaquín Larrazabal Gómez, en representación de Sistemas de Gestión Integrados, S.C. que DUNOR acompañó a su Réplica.

(xlii) **Primer Informe Pericial del Perito EY:** es el informe pericial elaborado por perito Ignacio Cortés Castán en representación de Ernst & Young, que la Demandante acompañó a su Demanda.

(xliii) **Segundo Informe Pericial del Perito EY:** es el informe pericial elaborado por el perito Ignacio Cortés Castán en representación de Ernst & Young que la Demandante acompañó a su Réplica.

(xliv) **Primer Informe Pericial del Perito Moore o Pericial DATG**: es el informe pericial elaborado por Roberto Edgar Gallardo López en representación de Moore, De Anda, Torres, Gallardo y Cia, que se acompañó a la Contestación de la CFE.

(xlv) **Segundo Informe Pericial del Perito Moore:** es el informe pericial elaborado por Roberto Edgar Gallardo López en

representación de Moore, De Anda, Torres, Gallardo y Cia, que se acompañó a la Dúplica y la Réplica a la Reconvención presentada por la CFE.

(xlvi) **Primer Informe del Perito Cámara:** es el dictamen elaborado por el Ingeniero Lorenzo José Cámara Anzures que la CFE acompañó a su Contestación.

(xlvii) **Segundo Informe del Perito Cámara:** es el dictamen elaborado por el Ingeniero Lorenzo José Cámara Anzures que la CFE acompañó a su Dúplica y la Réplica a la Reconvención.

(xlviii) **Planta o Central**: es la Central de Ciclo Combinado para la generación de energía eléctrica, denominada 313 CC Empalme II cuya construcción es objeto del Contrato.

(xlix) **Propuesta:** es la Oferta Técnica y la Oferta Económica, presentada a la Comisión por DUNOR, para la adjudicación del Contrato.

(l) **RG87**: es el Reclamo de Garantía 87.

(li) **RLOPSRM:** Reglamento de la Ley de Obras Públicas y Servicios Relacionados con las Mismas.

(lii) **Partes:** son conjuntamente DUNOR y CFE.

(liii) **Reglamento de Arbitraje:** es el Reglamento de Arbitraje de la Corte de Arbitraje Internacional de Londres, vigente a partir del 01 de octubre de 2014.

(liv) **TGs:** son las turbinas de gas o los turbogeneradores de gas.

## 2 NOMBRES COMPLETOS, DESCRIPCIÓN Y DIRECCIÓN DE LAS PARTES

### 2.1 Demandante

2. La Demandante es Dunor Energía S.A.P.I. de C.V. sociedad mercantil de nacionalidad mexicana.

3. La dirección y datos de contacto de esta sociedad son:

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Dunor Energía S.A.P.I. de C.V.
Moliere 13, Piso 8.
Colonia Polanco Chapultepec, Alcaldía Miguel Hidalgo.
Código Postal 11560, Ciudad de México.
Estados Unidos Mexicanos
Tel.: (+52) 55 25 78 48
Fax (+52) 55 25 78 49
Email: garrien@elecnor.com
Diego.desantiago@durofelguera.com

**2.2 Demandada**

La Demandada es la Comisión Federal de Electricidad, una empresa productiva del Estado mexicano, propiedad exclusiva del Gobierno Federal de los Estados Unidos Mexicanos, con personalidad jurídica y patrimonio propios, que goza de autonomía técnica, operativa y de gestión, según lo dispuesto en el artículo 2 de la Ley de la Comisión Federal de Electricidad, publicada el 11 de agosto de 2014.

4. La dirección de dicha Entidad es:

Paseo de la Reforma 164, Piso 11
Colonia Juárez; Alcaldía Cuauhtémoc
Código Postal 06600
Ciudad de México
México

**2.3 Nombres de los Representantes de las Partes en el presente proceso y direcciones a las cuales se remiten las notificaciones y comunicaciones en el presente Arbitraje:**

**2.3.1. Representantes de la Demandante**

5. Los representantes de la Demandante son:

Bernardo M. Cremades, Jr.
José María López Usero

Beatriz Franc Miñana
Carlos Molina Estaven
Daniel Acosta Toledo
Correos electrónicos:
bcr@bcremades.com
jmlopez@bcremades.com
bfranc@bcremades.com
c.molina@bcremades.com
daniel_acosta@me.com

6. La dirección de dichos representantes es:

B. Cremades & Asociados.
Calle Goya, 18 – Planta 2
28001, Madrid
España
Teléfono: (+34) 914-237-200
Fax: (+34) 915-769-794

Daniel Acosta Toledo
Retorno Mayorazgo de Luyando 4-13
Colonia Xoco, Alcaldía Benito Juárez
03330, Ciudad de México
Estados Unidos Mexicanos
Tel.: (+52) 55 56045311
Fax: (+52) 55 56045311

### 2.3.2 Representantes de la Demandada

7. El Representante Legal de la Demandada es:

Alejandro Marín Méndez

8. La dirección de dicho representante es:

Oficina del Abogado General

Paseo de la Reforma 164 Piso 11, Colonia Juárez, Alcaldía Juárez,
Código Postal 06600, Ciudad de México, México

Igualmente, de acuerdo con la solicitud del 1 de septiembre de 2020 de la Demandada, toda notificación o comunicación debe hacerse a las siguientes personas:

Raúl Armando Jiménez Vázquez
Dirección: Paseo de la Reforma no. 164, piso 11, Colonia Juárez, Alcaldía Cuauhtémoc, Ciudad de México, C.P. 06600, México
Número de Teléfono: +52 (55) 5229 4400 Ext 82500
Correo electrónico:
raul.jimenezva@cfe.mx

Rafael Ángel Serrano Figueroa
Dirección: Paseo de la Reforma no. 164, piso 11, Colonia Juárez, Alcaldía Cuauhtemoc, Ciudad de México, C.P. 06600, México
Número de Teléfono: +52 (55) 5229 4400 Ext. 82628
Correo electrónico:
rafael.serrano@cfe.mx

Así como:
Martha Alicia Magdaleno Medina
Número de Teléfono: +52 (55) 5229 4400 Ext 90005
Correo electrónico: martha.magdaleno@cfe.mx
Atenas Sebastián Zepeda
Número de Teléfono: +52 (55) 5229 4400 Ext 82634
Correo electrónico: atenas.sebastian@cfe.mx
Norma Mireles Fragoso
Número de Teléfono: +52 (55) 5229 4400 Ext 82681
Correo electrónico: norma.mirelesf@cfe.mx
Jesús Gerardo Agustín Ortega Téllez
Número de Teléfono: +52 (55) 5229 4400 Ext 82537
Correo electrónico: agustin.ortega@cfe.mx

Carlos Alberto Bejarano Torres
Número de Teléfono: +52 (55) 5229 4400 Ext 82688
Correo electrónico: carlos.bejarano@cfe.mx
Ricardo Andrés Lara Chávez
Número de Teléfono: +52 (55) 5229 4400 Ext 82689
Correo electrónico: ricardo.lara@cfe.mx
Ahuitz Alejandro Sánchez Robles
Número de Teléfono: +52 (55) 5229 4400 Ext 82364
Correo electrónico: alejandro.sanchezr@cfe.mx
Antonio Grayeb Cervantes
Número de Teléfono: +52 (55) 5229 4400 Ext 82661
Correo electrónico: antonio.grayeb@cfe.mx

### 2.4 Notificaciones

9. De conformidad con el numeral 1.1.3, las notificaciones y comunicaciones en el presente proceso arbitral se realizan a los representantes de las Partes indicados en el numeral anterior, a las direcciones de correo electrónico señaladas en el mismo apartado.

## 3 COMPOSICIÓN DEL TRIBUNAL ARBITRAL

10. El Tribunal Arbitral está conformado por:

### 3.1 Coárbitro designado por la Demandante:

11. La Demandante designó como coárbitro al señor Roberto Hernández García.

12. La dirección y datos de contacto del coárbitro Roberto Hernández García son los siguientes:

Febo 29. Col. Crédito Constructor.
03940, Alcaldía Benito Juárez, Ciudad de México
México
Correo electrónico: rhernandez@comad.com.mx

### 3.2 Coárbitro designado por la Demandada:

13. La Demandada designó como coárbitro al señor Guillermo Estrada Adán.

14. La dirección y datos de contacto del coárbitro Guillermo Estrada Adán son:

Reforma 42, Casa 1
Ciudad de México
México
Correo electrónico: guillermo.estrada@unam.mx

### 3.3 Presidente del Tribunal Arbitral

15. Las Partes nombraron como Presidente del Tribunal al señor Juan Pablo Cárdenas Mejía.

16. La dirección y datos de contacto del árbitro Presidente, Juan Pablo Cárdenas Mejía, son:

Avenida Calle 72 No 6-30, Piso 11
Bogotá D.C. Colombia
Teléfono: + 571 2551017 extensión 101
Correo electrónico: jpcm2001@yahoo.com

## 4 ACUERDO DE ARBITRAJE

17. El Acuerdo de Arbitraje consta en la cláusula 30.3 del Contrato. Dicha estipulación dispone lo siguiente:

> *"30.3 Arbitraje. Todas las desavenencias que surjan en relación con el presente Contrato, distintas a las controversias que de conformidad con la Cláusula 30.2, deban ser resueltas, serán decididas exclusivamente y definitivamente de conformidad con el Reglamento de Arbitraje de la Corte Internacional de Arbitraje de Londres (London Court of International Arbitration), por 3 (tres) árbitros; uno elegido por cada una de las Partes; el tercer árbitro será nombrado por las Partes o por los árbitros ya nombrados y a falta de acuerdo por la Corte Internacional de Arbitraje de Londres (London Court of International Arbitration, en adelante LCIA), Los árbitros*

*preferentemente conocerán derecho mexicano. La sede del arbitraje será la ciudad de México, Distrito Federal, y se conducirá en idioma español. La Ley Aplicable al fondo del arbitraje y por supletoriedad al procedimiento en lo que fuere omiso el Reglamento de Arbitraje de la LCIA será la estipulada en la Cláusula 30.1. En cuanto al procedimiento, si el Reglamento de la Corte de Arbitraje Internacional de Londres es omiso, se aplicará las Normas que las Partes o, en su defecto, el Tribunal Arbitral, determinen. El proceso arbitral será confidencial y cualquier Persona que participe en el mismo deberá guardar reserva. La confidencialidad anterior deberá mantenerse siempre y cuando una autoridad competente no exija la publicidad conforme a la Ley Aplicable. Se entiende que el Tribunal Arbitral deberá aceptar como obligatorias las determinaciones -si las hubiere- del Experto respecto de aspectos técnicos o administrativos dentro de los límites del mandato de dicho Experto."*

## 5 DERECHO APLICABLE

18. De conformidad con la cláusula 30.1 del Contrato, *"El presente Contrato se regirá e interpretará de conformidad con la LOPSRM y las demás Leyes Federales de México"*. Sobre el derecho aplicable no hay controversia entre las Partes.

## 6 SEDE DEL ARBITRAJE

19. Según lo pactado en el acuerdo de arbitraje a que se ha hecho referencia, la sede del arbitraje es la Ciudad de México (México).

## 7 IDIOMA DEL ARBITRAJE

20. De acuerdo con la cláusula 30.3 del Contrato, el procedimiento de arbitraje "*se conducirá en idioma español*".

## 8 REGLAS DE PROCEDIMIENTO APLICABLES

21. De acuerdo con lo convenido por las Partes en el Contrato, las reglas de procedimiento aplicables son las contenidas en el Reglamento de Arbitraje de la Corte Internacional de Londres (*London Court of International Arbitration*), en

vigor a partir del 2014, y en las órdenes o directivas procesales que sean emitidas por el Tribunal Arbitral.

## 9 ANTECEDENTES PROCESALES

22. El 25 de agosto de 2020, DUNOR presentó su solicitud de arbitraje, en la cual se designó como árbitro al señor Roberto Hernández García.

23. El 22 de septiembre de 2020, la Comisión Federal de Electricidad presentó su Respuesta a la Solicitud de Arbitraje, mediante la cual designó como árbitro a señor Guillermo Enrique Estrada Adán.

24. Por comunicación del 19 de octubre de 2020, la LCIA informó al señor Juan Pablo Cárdenas que las Partes lo habían designado como presidente del Tribunal.

25. Las personas designadas como árbitros aceptaron sus designaciones.

26. Mediante correo electrónico de fecha 27 de octubre de 2022, la LCIA le informó a las Partes que, de acuerdo con el Artículo 5 del Reglamento de Arbitraje, la Corte de la LCIA nombró a Roberto Hernández García, Guillermo Enrique Estrada Adán y Juan Pablo Cárdenas para formar el Tribunal Arbitral en este arbitraje, presidido por Juan Pablo Cárdenas.

27. Con fecha 23 de noviembre de 2020, previa consulta con las Partes, se expidió la Orden Procesal N° 1, por la cual se adoptó el Calendario Procesal y se tomaron decisiones en relación con la presentación de escritos, pruebas, órdenes procesales, plazos y confidencialidad.

28. Por Orden Procesal N° 2, del 15 de enero de 2021, se prorrogó el plazo para presentar la Demanda de Arbitraje, hasta el 5 de febrero de 2021.

29. Por Orden Procesal N° 3, del 03 febrero de 2021, se modificó el Calendario Procesal.

30. El 5 de febrero de 2021 la Demandante presentó su Memorial de Demanda.

31. El 20 de mayo de 2021 la Demandada presentó su Memorial de Contestación y Demanda de Reconvención.

32. El 31 de mayo de 2021 las Partes presentaron sus solicitudes de exhibición de documentos.

33. El 21 de junio de 2021 las Partes presentaron sus respectivas Réplicas a las Objeciones a las Solicitudes de Exhibición de documentos.

34. El 2 de julio de 2021 el Tribunal profirió la Orden Procesal N° 4 por la cual decidió las solicitudes de exhibición presentadas por cada una de las Partes y objetadas por su contraparte.

35. El 23 de agosto de 2021, la Demandante presentó su Memorial de Réplica a la Demanda Principal y Contestación a la Demanda Reconvencional.

36. Por Orden Procesal N° 5, del 6 de octubre de 2021, se modificó el Calendario Procesal.

37. El 27 de octubre de 2021, la Demandada presentó su Dúplica a la Demanda de Arbitraje y Réplica a la Demanda Reconvencional.

38. El 12 de diciembre de 2021, la Demandante presentó su Dúplica a la Demanda Reconvencional.

39. Por Orden Procesal N° 6, del 17 de diciembre de 2021, el Tribunal determinó que la Audiencia del presente proceso se realizaría en forma virtual y se adoptaron disposiciones sobre la forma en que se desarrollaría la Audiencia.

40. Por correo electrónico, del 29 de diciembre de 2021, el Tribunal señaló que teniendo en cuenta las solicitudes de las Partes, se recibirían las declaraciones de los peritos Luis Alfonso Moreno Pacheco, Víctor Joaquín Larrazábal Gómez, Ignacio Cortés Castán, José Lorenzo Cámara Anzures y Roberto Edgar Gallardo López. En dicha comunicación la Demandante también solicitó se permitiera el interrogatorio del Ing. Gorka Arrien Echeverría. Al respecto, el Tribunal señaló que en las oportunidades probatorias la Demandante no presentó la declaración del Ing. Gorka Arrien Echeverría ni indicó la necesidad de recibir la misma por lo cual, el Tribunal no estimó pertinente en dicho momento recibir la declaración del Ing. Gorka Arrien Echeverria. El Tribunal agregó que, en todo caso, podría posteriormente disponer la recepción de dicha declaración si encontraba que era pertinente para decidir el caso. Se hace notar expresamente que la Demandante

no objetó la decisión del Tribunal en formal alguna sobre este aspecto en particular.

41. La Audiencia se realizó por medios virtuales entre el 10 y el 14 de enero de 2022, la cual fue grabada y la transcripción revisada por las Partes forma parte del expediente.

42. Durante el primer día de la Audiencia del presente proceso, la representación de la Demandante manifestó impugnar la presentación y el Alegato de Apertura de la Demandada por todas las personas que intervinieron y que son ingenieros o contables y no son abogados. Lo anterior, porque considera que lo que está intentando la parte demandada es introducir declaraciones testimoniales y periciales *"por la puerta de atrá*s".

43. Por Orden Procesal N° 7, del 7 de febrero de 2022, el Tribunal determinó negar la petición de la Demandante de privar de efectos los Alegatos de Apertura de la Demandada, sin perjuicio de que, tal y como se aprecia más adelante, dichos alegatos en ningún caso fueron en forma alguna considerados como una prueba o factor determinante para las consideraciones y decisiones contenidas en el presente Laudo.

44. Por correo electrónico del 8 de febrero de 2022, la Demandante acusó recibo de la Orden Procesal N° 7, de 7 de febrero de 2022, indicando que entiende que por error fue fechada en 2021, y formula protesta a los efectos procesales oportunos.

45. Por Orden Procesal N° 8 del 16 de marzo de 2022, el Tribunal aclaró que la fecha de la Orden Procesal N° 7 es del 7 de febrero de 2022 y decidió *"Mantener la Orden Procesal N° 7 aclarando, tal como se expone en el cuerpo de esta Orden Procesal, el alcance y efectos de los Alegatos de Apertura presentados durante la audiencia, que no serán considerados como prueba, en virtud de que no tienen dicha naturaleza".*

46. El 4 de abril de 2022 tanto la Demandante como la Demandada presentaron sus escritos de conclusiones.

47. Por comunicación del 8 de abril de 2022, la Demandante señaló que en la Sección VIII- Petitorios, concretamente en su apartado F, del Escrito de Conclusiones, la Comisión solicita: "*Declare que con motivo de la atención del*

*Reclamo de Garantía No. 87, la Demandada tiene derecho a la renovación inmediata de una Garantía Operativa y que su omisión está amparada por la Garantía de Cumplimiento".* Al respecto señaló la Demandante que el Tribunal no debe conocer de dicho petitorio pues *"Tanto la pretensión mero-declarativa como la constitutiva debieron hacerse valer vía Demanda Reconvencional, en el momento procesal oportuno. En ambos casos CFE solicita del Tribunal Arbitral pronunciamientos concretos. No son, como se pretende de adverso, excepciones materiales o simples defensas."* Agregó que hoy día, no existe ningún reclamo relativo al RG-87, a que se refiere el petitorio.

48. El 4 de mayo de 2022 las dos Partes presentaron sus escritos sobre costas.

49. Por comunicación del 9 de mayo de 2022, la Demandada manifestó dar cumplimiento a la Orden Procesal N° 6 en la forma en que se indica en dicha comunicación.

50. Por comunicación del 13 de mayo de 2022 la Demandante informó *"al Tribunal del acuerdo alcanzado por las Partes, el cual afecta parcialmente a las reclamaciones sometidas al Tribunal Arbitral".* A tal efecto señaló lo siguiente:

> *"El 12 de mayo de 2022, la Comisión y Dunor alcanzaron un acuerdo por escrito cuyo objeto era 'el alcance y costo de las Deficiencias Menores y Reclamos de Garantía pendientes de atender por parte del Contratista'. Asimismo, las Partes acordaron que sería la Demandante quien informaría al Tribunal Arbitral sobre dicho acuerdo, mismo que será confirmado posteriormente por la Comisión. Derivado de lo anterior, las Partes acuerdan excluir de la decisión del Tribunal Arbitral en el Laudo Final los siguientes apartados:*
>
> *a) Sección III.D del Memorial de Demanda, de 5 de febrero de 2021, relativa al*
>
> *"Cierre de las Deficiencias Menores e Incumplimiento del Deber de Reducir la Garantía de Cumplimiento";*
>
> *b) Sección III.E(b)(4) del Memorial de Demanda, "Gastos Financieros Asociados. . . y al Rechazo a Reducir la Garantía de Cumplimiento";*
>
> *c) Párrafo 417, apartado (iv) del Petitorio del Memorial de Demanda;"*

51. Por comunicación del 13 de mayo de 2022 el Tribunal informó a las Partes que esperaba emitir el laudo que pusiera fin al procedimiento arbitral la última semana de julio de 2022.

52. Por correo electrónico del 23 de mayo de 2022, la Demandada se pronunció sobre el escrito de la Demandante del 13 de mayo de 2022 señalando que "*confirma el acuerdo celebrado entre las Partes para que sean excluidos del laudo arbitral aquellos puntos enunciados en la Carta de la Demandante*".

53. El 24 de mayo de 2022, la Demandante presentó un escrito de Observaciones al Escrito sobre Costas de CFE.

54. Por comunicación del 22 de julio de 2022 el Tribunal informó a las Partes: *"El Tribunal desea informales que continúa trabajando en el laudo, pero lamentablemente no es posible terminarlo para la fecha prevista. El Tribunal espera poder terminar el laudo en la semana que termina el 12 de agosto de 2022".*

## 10 LOS ANTECEDENTES DE LA CONTROVERSIA

55. Los antecedentes del presente caso pueden resumirse de la siguiente manera:

56. Como consecuencia de la Licitación el 23 de octubre de 2015, las Partes celebraron el Contrato. Se pactó como precio la suma de USD $396.997.949,52 (Trescientos noventa y seis millones novecientos noventa y siete mil novecientos cuarenta y nueve dólares americanos 52/100 cy.)[4].

57. La Fecha Programada para la Aceptación Provisional de la Central estaba prevista para el 28 de abril de 2018[5].

58. No obstante lo anterior, dicha fecha fue modificada por las Partes a través de la formalización de tres Convenios Modificatorios, cuyo objeto fue prorrogar las Fechas de los Eventos Críticos de la siguiente forma: i). Con el Primer Convenio Modificatorio se prorrogó en 19 días las fechas de Eventos Críticos establecidas en el Anexo 3 del Contrato, incluyendo la fecha de la Aceptación Provisional; ii).

[4] Memorial de Contestación y Reconvención, No. 61
[5] Memorial de Demanda, No. 67.

A través del Segundo Convenio Modificatorio se acordó prorrogar en 93 días estas Fechas de Eventos Críticos establecidas en el Anexo 3 del Contrato, incluyendo la Fecha Programada de Aceptación Provisional; iii). Finalmente, con el Tercer Convenio Modificatorio, las Partes acordaron prorrogar en 208 días la Fecha Programada de Aceptación Provisional, la cual quedó fijada para el 14 de marzo de 2019[6].

59. Las Partes firmaron el Acta de Aceptación Provisional el 14 de agosto de 2019[7].

60. Durante la negociación del Segundo Convenio Modificatorio, la Demandante invocó la aplicación de la Cláusula 25.5. del Contrato, la cual dispone:

> *"En caso de que la Fecha Programada de Aceptación Provisional de la Central originalmente pactada se retrase por un periodo de 60 (sesenta) Días (ya sea, continuos o acumulados) debido a Fuerza Mayor Gubernamental o a los supuestos contemplados en la Cláusula el presente Contrato se dará por terminado automáticamente con respecto a la Obra afectada en la fecha que ocurra 30 (treinta) días después de la expiración de dicho período de 60 (sesenta) Días salvo que dentro dicho periodo de 30 (treinta) Días las Partes lleguen a un acuerdo por escrito sobre términos y condiciones que razonablemente compensarán al Contratista los gastos directamente relacionados con las Obras, razonables y documentados en los que el Contratista pueda incurrir"*

61. En razón a lo anterior, las Partes celebraron el Acuerdo[8], cuyo objeto era acordar los "*términos y condiciones que razonablemente compensarían al Contratista los gastos directamente relacionados con las Obras en los que hubiese incurrido*" como consecuencia de la aplicación de la Cláusula 25.5 del Contrato.

62. El 12 de febrero de 2020 se firmó la Minuta de Reconocimiento de Reembolso por Concepto de Gastos Financieros, Seguros y Garantías del Proyecto[9], en donde las Partes conciliaron parte de los conceptos correspondientes a este rubro. En ese orden de ideas, la Demandada reconoció procedente la suma que asciende a US$ 9'662,588.15 (Nueve millones seiscientos sesenta y dos mil quinientos ochenta y ocho dólares americanos 15/100 cy) de los US$

[6] Memorial de Contestación y Reconvención, No. 63-67.
[7] Anexos de la Demanda, Doc. C-53.
[8] Memorial de Contestación y Reconvención, No. 71.
[9] Anexo de la Demanda, Doc-31.

11’735.667.69 (Once millones setecientos treinta y cinco mil seiscientos sesenta y siete dólares americanos 69/100 cy) que solicitaba la Demandante.

63. Posteriormente, la CFE consideró procedente el reconocimiento de la Comisión de Agencia por un monto de US$ 30.405.41, (Treinta mil cuatrocientos cinco dólares americanos 41/100 cy) la cual sostiene la Demandante no ha sido pagada.

64. Aunque se firmó dicha Minuta, existen discrepancias que se relacionan con: i. los intereses de los créditos con las Partes Relacionadas por un valor de US$419.801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy) (Acuerdo 3 de la Minuta) y ii. gastos administrativos asociados a las novaciones incluyendo las comisiones de Estructuración y Agencia por un valor de US$ 1’361.253.50. (Un millón trescientos sesenta y un mil doscientos cincuenta y tres dólares americanos 50/100 cy) (Acuerdo 4 de la Minuta)[10].

65. Adicionalmente, la Demandante señala, en relación con los gastos de la Gestión de Personal y Administración de Campo, que la Demandada ha venido retrasando los pagos por este concepto.

66. Asimismo, la Demandante sostiene que de acuerdo con el apartado 3.3. del Acuerdo, CFE debía indemnizar a DUNOR por concepto de Gastos de Administración y Estructura de las Oficinas Centrales, por una cuantía que asciende a US$ 2’975.708 (Dos millones novecientos setenta y cinco mil setecientos ocho dólares americanos), y que la Demandante afirma que CFE no reconoce[11].

67. Igualmente, la Demandante solicita el reconocimiento de sumas por concepto de Gastos por Reclamaciones de Terceros de conformidad con el apartado 3.5 del Acuerdo, el cual prevé que CFE debe compensar a DUNOR por los gastos derivados de *“las reclamaciones de suministradores y subcontratistas por el Contratista*”[12]. Agrega que después de haber realizado a solicitud de la CFE la

[10] Réplica y Contestación Reconvención, No. 33-49.
[11] Réplica y Contestación Reconvención, No. 96.
[12] Réplica y Contestación Reconvención, No. 133.

reclasificación de una serie de facturas del apartado 3.2 del Acuerdo al 3.5, hay discrepancia entre las Partes sobre el monto que debe reconocer y pagar la CFE.

68. Por su parte, la Demandada, en su contestación, sostiene que DUNOR reclama las consecuencias económicas producto de su mayor permanencia en el sitio de trabajo por causas no atribuibles a las Partes, y respecto de las cuales la Comisión no ha negado su procedencia, sino que ha señalado que la documentación presentada por la Demandante no cumple con el espíritu del Acuerdo porque incluía i) gastos fuera del periodo de reconocimiento; ii) facturas no liquidadas; iii) gastos que no eran susceptibles de reconocimiento; iv) gastos no razonables; v) gastos sin un soporte documental; y vi) gastos que no estaban directamente relacionados con la parte de obra afectada[13]

69. También ha surgido una discusión entre las Partes relacionada con la obligación de DUNOR de entregar Partes de Repuesto Solicitadas de conformidad con la cláusula 4.1 (p) del Contrato, la cual establece que "*el Contratista tiene la obligación de entregar las Partes de Repuesto, Herramientas y Equipos Especiales conforme a la cláusula 21.5 del Contrato OPF"*. Al respecto, existe un desacuerdo sobre el alcance de esta obligación y su cumplimiento por parte del Contratista.

70. Otra de las controversias que ha surgido entre las Partes es la relacionada con la aplicación de las Curvas de Degradación al Resultado de las Pruebas de Desempeño de la Central. La convocatoria de la Licitación establece la obligación de practicar Pruebas de Servicio, Operación y Desempeño a la Central conforme al Programa de Ejecución y al Anexo 13 del Contrato. Estas pruebas estaban previstas para el 27 de abril de 2018, no obstante, de acuerdo con la cláusula 12.3 (a) y (b) del Contrato, las Partes suscribieron tres Convenios Modificatorios en los que se modificó el Programa de Ejecución del Proyecto - el cual estipulaba que entre la Primera Sincronización de las TGs y la Fecha Programada de Aceptación Provisional transcurriesen 5 meses - y por lo tanto, dichas Pruebas de Desempeño se realizaron 8 meses más tarde de lo previsto inicialmente[14].

[13] Memorial Contestación y Reconvención, No 279.
[14] Memorial de Demanda, No 213.

71. DUNOR sostiene que para el Procedimiento de las Pruebas de Desempeño debían utilizarse las Curvas de Degradación, ya que estas representan factores de corrección que reflejan el deterioro o desgaste que sufren las turbinas por el tiempo de operación adicional[15]. Por el contrario, CFE considera que no se pueden aplicar las Curvas de Degradación en razón de lo expresamente prohibido y dispuesto en el Contrato.

72. Otro de los temas planteados en la Demanda se refiere al Cierre de Deficiencias Menores y Reducción de las Garantías de Cumplimiento. Sin embargo, en escrito del 13 de mayo de 2022 la Demandante informó que se había llegado a un acuerdo con la CFE el cual se refiere al *"alcance y costo de las Deficiencias Menores y Reclamos de Garantía pendientes de atender por parte del Contratista"*, por lo que se excluyó de la Decisión del Tribunal lo relativo a las Deficiencias Menores y el incumplimiento del deber de reducir la garantía de cumplimiento. Lo anterior fue confirmado por la Demandada. Por lo anterior, estas pretensiones han quedado fuera del alcance del presente procedimiento arbitral.

73. Otro aspecto respecto del cual la CFE planteó una controversia es el relativo al pago de la energía eléctrica suministrada para Construcción, Pruebas y Puesta en Servicio de la Central. Con relación a este punto se celebró un contrato por DUNOR con la empresa CFE Generación IV, pero según la CFE, DUNOR adeuda el pago de diversas facturas y reclama su pago.

## 11 LAS PRETENSIONES SOMETIDAS AL TRIBUNAL ARBITRAL

### 11.1 Las pretensiones de la Demandante – DUNOR

74. En su Solicitud de Arbitraje la Demandante solicitó al Tribunal Arbitral que emita un laudo arbitral al amparo de la Cláusula 30 del Contrato en el que:

> *"(i) tenga por presentada esta Solicitud de Arbitraje y. los documentos que la acompañan;*

[15] Réplica y Contestación Reconvención, No. 352.

*"(ii) declare que tiene jurisdicción frente al Demandado;*

*"(iii) declare que el Demandado ha incumplido el Contrato;*

*"(iv)ordene al Demandado a proceder al cierre administrativo de las Deficiencias Menores;*

*"(v) ordene al Demandado a pagar al Demandante una cantidad de al menos US$ 27.047.372,51 más los impuestos que sean de aplicación;*

*"(vi) ordene al Demandado a pagar al Demandante todas las costas y demás gastos legales derivados de este procedimiento de arbitraje;*

*"(vii) ordene que todas las cantidades que deba pagar el Demandado al Demandante devenguen interés pre-laudo y post-laudo (o, subsidiariamente, desde la fecha del eventual laudo condenatorio), salvo las costas y demás gastos legales derivados del presente procedimiento arbitral, las cuales devengarán interés desde la fecha del eventual laudo condenatorio; y*

*"(viii) conceda al Demandante cualquier otro remedio adicional que considere apropiado en Derecho".*

75. En su Demanda, la Demandante DUNOR solicitó que el Tribunal Arbitral emita un laudo arbitral al amparo de la Cláusula 30 del Contrato OPF en el que:

*"(i) tenga por presentado este escrito y los documentos que lo acompañan y, asimismo, por hechas las alegaciones contenidas en el mismo;*

*(ii) declare que tiene jurisdicción frente a la Demandada;*

*(iii) declare que la Demandada ha incumplido el Contrato;*

*(iv) ordene a la Demandada proceder al cierre administrativo de las Deficiencias Menores;*

*(v) ordene a la Demandada a pagar a Dunor una cantidad de al menos US$ 26'249,202.29 más los impuestos que sean de aplicación;*

*(vi) ordene a la Demandada a pagar a Dunor todas las costas y demás gastos legales derivados de este procedimiento de arbitraje;*

*(vii) ordene que todas las cantidades que deba pagar la Demandada a Dunor devenguen intereses pre-laudo y post-laudo (o, subsidiariamente, desde la fecha*

*del eventual laudo condenatorio) conforme a la Tasa de Gastos Financieros, salvo las costas y demás gastos legales derivados del presente procedimiento arbitral, las cuales devengarán interés desde la fecha del eventual laudo condenatorio; y*

*(viii) conceda a la Demandante cualquier otro remedio adicional que considere apropiado en Derecho".*

76. En su Réplica DUNOR solicitó al Tribunal:

*"(i) tenga por presentado este escrito y los documentos que lo acompañan y, asimismo, por hechas las alegaciones contenidas en el mismo;*

*(ii) declare que tiene jurisdicción frente a la Demandada en relación con las reclamaciones formuladas por Dunor al amparo del Contrato OPF;*

*(iii) declare que la Demandada ha incumplido el Contrato y el Acuerdo;*

*(iv) declare que no tiene jurisdicción sobre la Demanda Reconvencional o, subsidiariamente, rechace la Demanda Reconvencional;*

*(v) ordene a la Demandada proceder al cierre administrativo de las Deficiencias Menores y la correspondiente reducción de la Garantía de Cumplimiento;*

*(vi) ordene a la Demandada a pagar a Dunor una cantidad de al menos US$ 26'675,306.49 más los impuestos que sean de aplicación;*

*(vii) ordene a la Demandada a pagar a Dunor todas las costas y demás gastos legales derivados del presente arbitraje;*

*(viii) ordene que todas las cantidades que deba pagar la Demandada a Dunor devenguen intereses pre-laudo y post-laudo (o, subsidiariamente, desde la fecha del eventual laudo condenatorio) conforme a la Tasa de Gastos Financieros, salvo las costas y demás gastos legales derivados de este procedimiento arbitral, las cuales devengarán interés desde la fecha del eventual laudo condenatorio; y*

*(ix) conceda a la Demandante cualquier otro remedio adicional que considere apropiado en Derecho".*

Finalmente, en su Memorial de Conclusiones DUNOR solicitó:

*"(i) tenga por presentado este escrito y los documentos que lo acompañan y, asimismo, por hechas las alegaciones contenidas en el mismo;*

*(ii) en relación con la Demanda principal, declare que tiene jurisdicción frente a la Demandada en relación con las reclamaciones formuladas por Dunor al amparo del Contrato OPF;*

*(iii) declare que la Demandada ha incumplido el Contrato y el Acuerdo;*

*(iv) declare que no tiene jurisdicción sobre la Demanda Reconvencional, basada en contrato distinto al Contrato OPF;*

*(v) ordene a la Demandada proceder al cierre administrativo de las Deficiencias Menores y la correspondiente reducción de la Garantía de Cumplimiento;*

*(vi) ordene a la Demandada a pagar a Dunor una cantidad de al menos US$ 27'505,045.96 más los impuestos que sean de aplicación;*

*(vii) ordene a la Demandada a pagar a Dunor todas las costas y demás gastos legales derivados del presente arbitraje;*

*(viii) ordene que todas las cantidades que deba pagar la Demandada a Dunor devenguen intereses pre-laudo y post-laudo (o, subsidiariamente, desde la fecha del eventual laudo condenatorio) conforme a la Tasa de Gastos Financieros, salvo las costas y demás gastos legales derivados de este procedimiento arbitral, las cuales devengarán interés desde la fecha del eventual laudo condenatorio;*

*(ix) conceda a la Demandante cualquier otro remedio adicional que considere apropiado en Derecho".*

77. Ahora bien, frente a las pretensiones señaladas debe tomarse en cuenta que, por escrito del 13 de mayo de 2022, la Demandante manifestó que las Partes habían llegado a un acuerdo por el cual se excluía de la decisión del Tribunal la Sección III.D del Memorial de Demanda, de 5 de febrero de 2021, relativa al "*Cierre de las Deficiencias Menores e Incumplimiento del Deber de Reducir la Garantía de Cumplimiento*"; la b) Sección III.E(b)(4) del Memorial de Demanda, *"Gastos Financieros Asociados . . . al Rechazo a Reducir la Garantía de Cumplimiento*", y el Párrafo 417, apartado (iv) del Petitorio del Memorial de Demanda. Por correo electrónico del 23 de mayo de 2022, la Demandada confirmó *"el acuerdo celebrado entre las Partes para que sean excluidos del laudo arbitral aquellos puntos enunciados en la Carta de la Demandante"*. Por lo

anterior, estas pretensiones han quedado fuera del alcance del presente procedimiento arbitral.

### 11.2 Las pretensiones de la CFE

78. En su Respuesta a la Solicitud de Arbitraje el Demandando solicitó al Tribunal Arbitral:

> *"a) Se declare el incumplimiento del Contrato por parte de Dunor, en la falta de entrega de las partes de repuesto solicitadas correspondientes,*
>
> *b) Se declare el incumplimiento del Contrato por parte de Dunor en relación con los Valores Garantizados obtenidos de las pruebas de Desempeño.*
>
> *c) En consecuencia, se decrete que los descuentos y penas convencionales aplicados por esta Comisión a la Demandante fueron efectuados de conformidad con el Contrato y no son violatorios del mismo.*
>
> *d) Ordene a Dunor indemnizar a CFE por los daños y perjuicios sufridos con motivo de los incumplimientos en sus obligaciones contractuales.*
>
> *e) Ordenar a Dunor al pago de las cantidades resultantes de los conceptos contenidos en la reconvención.*
>
> *f) Ordene a Dunor al pago de todos los gastos y costas incurridas en el presente procedimiento arbitral;*
>
> *g) Ordene a Dunor al pago de intereses a la Tasa de Gastos Financieros (según la definición del Contrato), respecto de las cantidades señaladas en los incisos anteriores, a partir de la fecha en que se tornen líquidas y exigibles y hasta la fecha en que sean pagadas".*

79. En su Demanda Reconvencional, CFE solicitó:

> *"a) Que el Tribunal Arbitral condene a DUNOR al pago a favor de CFE de la cantidad de $9'113,673.45 (Nueve millones ciento trece mil seiscientos setenta y tres pesos 45/100 M.N.), por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, correspondiente al año 2019.*

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*"b) Que el Tribunal Arbitral condene a DUNOR al pago a favor de CFE de los gastos financieros generados con motivo de la falta de pago de la cantidad antes indicada, por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, correspondiente al año 2019."*

80. En su Dúplica la CFE solicitó al Tribunal:

*"A. Que el Tribunal Arbitral es competente para resolver la presente controversia planteada en el Memorial de Contestación y Demanda de Reconvención y en el presente Memorial.*

*"B. Que condene a DUNOR al pago a favor de la Comisión por la cantidad de $9'113,673.45 (Nueve millones ciento trece mil seiscientos setenta y tres pesos 45/100 M.N.), por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, correspondiente al año 2019.*

*"C. Que condene a DUNOR al pago a favor de la Comisión de los gastos financieros generados con motivo de la falta de pago de la cantidad antes indicada, por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, correspondiente al año 2019"*.

81. Finalmente, en su Memorial de Conclusiones la CFE solicitó:

*"A. Que el Tribunal Arbitral se declare competente para resolver la presente controversia.*

*"B. Sean rechazadas todas las pretensiones de las Demandantes.*

*"C. Se declare que la Comisión ha cumplido con los términos del Contrato en la ejecución de los descuentos realizados por la falta de entrega de las Partes de Repuesto Solicitadas del Turbogenerador de Gas señaladas en la Sección 7.2.11.1. de la Convocatoria y posterior Anexo del Contrato.*

*"D. Se declare la improcedencia de la aplicación de Curvas de Degradación en las Turbinas de Gas y la legalidad y procedencia de los descuentos aplicados por la Comisión frente al incumplimiento de los Valores Garantizados en que incurrió DUNOR.*

*"E. Se declare improcedente la reducción de la Garantía de Cumplimiento.*

*"F. Declare que con motivo de la atención del Reclamo de Garantía No. 87, la Demandada tiene derecho a la renovación inmediata de una Garantía Operativa y que su omisión está amparada por la Garantía de Cumplimiento.*

*"G. Declare que los términos del Acuerdo 25.5 deben ser cumplidos a cabalidad por las Partes y que únicamente deberán ser reconocidos los montos justificados, documentados razonables y directamente relacionados con el Proyecto.*

*"H. Se absuelva a la Comisión del pago de los conceptos de daños y perjuicios reclamados por DUNOR por resultar infundados y no haberse acreditado los elementos para la procedencia de su cobro.*

*"I. Se absuelva a la Comisión del pago de los Gastos Financieros reclamados por DUNOR.*

*"J. Se condene a las Demandantes al pago de la cantidad de $9,113,673.45 (nueve millones ciento trece mil seiscientos setenta y tres pesos 45/100 M.N.) por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía Eléctrica correspondiente al año 2019, así como los respectivos gastos financieros generados a la fecha de su pago.*

*"K. Se condene a las Demandantes al pago de los gastos y costas incurridos por la Demandada relacionados con la defensa legal de la Comisión y tramitación del procedimiento arbitral".*

## 12 CONSIDERACIONES DEL TRIBUNAL ARBITRAL SOBRE LOS ASPECTOS SOMETIDOS A SU CONSIDERACIÓN

82. Teniendo en cuenta lo anterior, procede el Tribunal a analizar las pretensiones formuladas por cada una de las Partes. Para efectos del análisis del Tribunal, a continuación, se expone la posición de las Partes:

### 12.1 Las pretensiones de DUNOR

83. De conformidad con la Demanda y la Réplica presentada por DUNOR, las pretensiones se enmarcan en los siguientes aspectos:

1. **Consecuencias Económicas de la Aplicación de la Cláusula 25.5.**
    1. Gastos Financieros, Seguros, Garantías
    2. Gastos por la Gestión de Personal y Administración de Campo
    3. Gastos de Administración y Estructura de las Oficinas Centrales
    4. Gastos por Reclamaciones de Terceros
2. **Obligación de Entregar las Partes de Repuesto**

3. **Aplicación de Curvas de Degradación a las Pruebas de Desempeño**
4. **Gastos Financieros**
5. **Otros daños y perjuicios**

### 12.1.1 La Jurisdicción del Tribunal

84. Lo primero que encuentra el Tribunal es que la Demandante solicita que se declare que el Tribunal tiene jurisdicción frente a la Demandada.

85. Al respecto, el Tribunal encuentra que la Demandada no ha cuestionado la jurisdicción del Tribunal, por lo que, en armonía con lo solicitado por la Demandante, se declarará que el Tribunal tiene plena jurisdicción frente a la Demandada en relación con las pretensiones formuladas por ambas Partes, salvo las que fueron excluidas por estas últimas de conformidad con el escrito del 13 de mayo de 2022, al que se ha hecho referencia.

### 12.1.2 Incumplimiento en el pago resultante de la Aplicación de la Cláusula 25.5. del Contrato

86. DUNOR sostiene que la Comisión no ha satisfecho íntegramente, ni en plazo, los gastos incurridos por DUNOR de conformidad con el Acuerdo, incumpliendo así la cláusula 25.5 del Contrato y los apartados 3.1, 3.2, 3.3, 3.5 y 6.1 del Acuerdo.

87. En particular, DUNOR se refiere a incumplimientos vinculados con Gastos Financieros, Seguros y Garantías; Gastos por la Gestión de Personal y Administración de Campo; Gastos de Administración y Estructura de las Oficinas Centrales y Gastos por Reclamaciones de Terceros.

88. Para efectos de decidir, considera el Tribunal pertinente hacer unas consideraciones generales, para posteriormente examinar cada uno de los conceptos reclamados.

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### 12.1.2.1 Marco General

89. La cláusula 25.5 del Contrato dispone lo siguiente:

> *"25.5 Terminación en Caso de Retraso en la Fecha Programada de Aceptación Provisional. En caso de que la Fecha Programada de Aceptación Provisional de la Central originalmente pactada se retrase por un periodo de 60 (sesenta) Días (ya sea, continuos o acumulados) debido a Fuerza Mayor Gubernamental o a los supuestos contemplados en la Cláusula el presente Contrato se dará por terminado automáticamente con respecto a la Obra afectada en la fecha que ocurra 30 (treinta) Días después de la expiración de dicho período de 60 (sesenta) Días salvo que dentro dicho periodo de 30 (treinta) Días las Partes lleguen a un acuerdo por escrito sobre términos y condiciones que razonablemente compensarán al Contratista los gastos directamente relacionados con las Obras, razonables y documentados en los que el Contratista pueda incurrir (mismos que incluirán el servicio de la Deuda del Contratista en relación con los Acuerdos Financieros y cualquier financiamiento similar proporcionado por cualquiera de los Participantes o cualquiera de sus Filiales) como consecuencia de cualquier retraso adicional a los 60 (sesenta) Días ocasionado por las razones indicadas en esta Cláusula. En caso de que el presente Contrato sea terminado con respecto a la Central de conformidad con esta Cláusula 25.5, la Comisión pagará al Contratista el Valor de Terminación aplicable dentro de los 30 (treinta) Días siguientes a la fecha de terminación"* (se subraya).

90. De conformidad con esta cláusula, en caso de que se retrase por las causas indicadas en ella, la fecha Programada de Aceptación Provisional por un período de 60 días, las Partes pueden llegar a un acuerdo por escrito sobre términos y condiciones para compensar los gastos que cumplieran con los siguientes requisitos: 1. Que estén directamente relacionados con las obras; 2. Que sean razonables; 3. Que estén documentados; y 4. Que sean consecuencia de cualquier retraso adicional a los 60 días.

91. En desarrollo de lo anterior las Partes celebraron el "*Acuerdo entre las Partes sobre la Aplicación de la Cláusula 25.5 para Cumplir el Objeto del Contrato PIF-039/2015.*"

92. En dicho Acuerdo[16] las Partes incluyeron en el numeral la "*3. DESCRIPCIÓN DE LOS CONCEPTOS A RECONOCER DIRECTAMENTE RELACIONADOS CON LAS OBRAS, RAZONABLES Y DOCUMENTADOS, ASÍ COMO LA DESCRIPCIÓN DE LA DOCUMENTACIÓN QUE EL CONTRATISTA DEBERÁ ENTREGAR PARA ACREDITAR LOS SIGUIENTES RUBROS; NO OBSTANTE, EN SU CASO, SE DEBERÁ ATENDER A LO INDICADO EN EL APARTADO DE LINEAMIENTOS*".

93. Los conceptos incluidos fueron los siguientes:

> *3.1 FINANCIEROS, SEGUROS Y GARANTÍAS.*
>
> *3.2 GASTOS POR LA GESTIÓN DE PERSONAL Y DE ADMINISTRACIÓN DE CAMPO.*
>
> *3.3 COSTOS DE ADMINISTRACIÓN Y ESTRUCTURA DE OFICINAS CENTRALES*
>
> *3.4 …*[17]
>
> *3.5 RECLAMACIONES DE TERCEROS*

94. Respecto de cada uno de estos puntos se fijaron reglas por las Partes, por lo que el Tribunal analizará cada una de ellas para determinar la procedencia de los reclamos del Contratista, como lo han hecho las Partes a lo largo del proceso.

### 12.1.2.2 Gastos Financieros, Seguros y Garantías

#### 12.1.2.2.1 Posición de la Demandante

[16] Doc C-033 Acuerdo Entre las Partes Sobre la Aplicación de la Cláusula 25.5
[17] En este numeral se incluyó la "*METODOLOGÍA PARA QUE LA TERCERÍA A CONTRATAR, ESTÉ EN CONDICIONES DE ACREDITAR LOS GASTOS INDIRECTOS DE OFICINAS CENTRALES CONFORME A LA CLÁUSULA 25.5 DEL CONTRATO PIF-039/2015 DEL PROYECTO 313 CC EMPALME II, CON EL OBJETO DE ADICIONARLO A LOS DEMÁS RUBROS DEL ACUERDO*".

95. En su Demanda, DUNOR señala que, de conformidad con el Apartado 3.1 del Acuerdo, la Comisión se obligó a pagar a DUNOR los Gastos Financieros, Seguros y Garantías incurridos por el Contratista ocasionados por los retrasos en la ejecución del Proyecto no imputables al mismo[18].

96. Señala la Demandada que a partir de la suscripción de la Minuta del 12 de febrero de 2020 (la "*Minuta*"), las Partes acordaron la conciliación de la mayoría de los conceptos correspondientes a este rubro. Así pues, una vez reconocido por parte de CFE el monto de US$ 9'662.558.15 (Nueve millones seiscientos sesenta y dos mil quinientos cincuenta y ocho dólares americanos 15/100 cy) del total de US$ 11'735.667.69 (Once millones setecientos treinta y cinco mil seiscientos sesenta y siete dólares americanos 69/100 cy) solicitado por DUNOR; dicho monto fue pagado con 14 días de retraso, por lo que la Demandante alega que se deben unos gastos financieros que la CFE tiene la obligación de abonar por un monto de US$ 12,833.31[19] (Doce mil ochocientos treinta y tres dólares americanos 31/100 cy).

97. Precisa la Demandante que, de manera posterior, la CFE reconoció un monto de US$ 30,405.41 (Treinta mil cuatrocientos cinco dólares americanos 41/100 cy) por concepto de Comisión de Agencia.

98. Por lo que, las cuestiones controvertidas se limitan a: i) los intereses de los créditos con Partes Relacionadas por un monto de US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy), y ii) las Comisiones de Estructuración y Agencia por un monto de US$ 1'361,253.50 (Un millón trescientos sesenta y un mil doscientos cincuenta y tres dólares americanos 50/100 cy). Lo anterior, resulta en la suma total de US$ 1'781,055.18[20] (Un millón setecientos ochenta y un mil cincuenta y cinco dólares americanos 18/100 cy) de los cuales el Perito EY reconoce la procedencia de la suma de US$ 1'777,576.56 (Un millón setecientos setenta y siete mil quinientos setenta y seis dólares americanos 56/100 cy).[21] En razón de lo anterior, la Demandante señala que el monto total reclamado es de US$ 1'807,981.97 (Un

[18] Demanda, párrafo 76.
[19] Demanda, párrafo 80.
[20] Demanda, párrafo 82.
[21] Demanda, párrafo 83.

millón ochocientos siete mil novecientos ochenta y un dólares americanos 97/100 cy) , que corresponde al monto ya señalado por el Perito EY y US$30,405.41 (Treinta mil cuatrocientos cinco dólares americanos 41/100 cy)[22].

99. Frente al primer rubro solicitado - esto es los intereses de créditos con las Partes - la Demandante sostiene que la CFE presume que el crédito fue utilizado para cubrir Costos Indirectos de Obras Adicionales, concepto que no fue conciliado por falta de soportes de pago de los intereses, lo que supondría que hubo incumplimiento del atributo de "*comprobación*"[23]. Frente a este argumento, DUNOR sostiene que del Informe del Perito EY resulta con toda claridad que la Comisión sí contaba con todos los soportes necesarios para comprobar el pago de intereses por créditos con Partes Relacionadas, esto es: (i) el Contrato de préstamo mercantil otorgado por Duro Felguera y Elecnor a DUNOR, en el que se incluye el interés a pagar respecto a un principal de US$ 6'850,000.00 (Seis millones ochocientos cincuenta mil dólares americanos 00/100 cy); (ii) el comprobante de pago de intereses con Partes Relacionadas incurridos durante el Periodo de Análisis a través de la cuenta en CaixaBank; (iii) el registro contable en el sistema de DUNOR del pago de los intereses a Duro Felguera y Elecnor incurridos en el Periodo de Análisis y, (iv) las facturas emitidas por Duro Felguera y Elecnor correspondientes a los cargos por intereses devengados durante el Periodo de Análisis por el préstamo mercantil[24]. De lo anterior, señala que no es cierto que la Comisión no contó con los soportes necesarios y que, por el contrario, DUNOR ha cumplido con los requisitos de comprobación fijados en el apartado 3.1 del Acuerdo[25]. Por último, agrega que el Perito DATG, al revisar los documentos e información recibida, concluye que sí se cumple con el requisito de comprobación de la totalidad de los US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos uno dólares americanos 68/100 cy) reclamados[26].

100. Adicionalmente, la Demandante señala que la Comisión interpreta de manera incorrecta las manifestaciones de su perito, alegando que el Perito DATG habría

[22] Demanda párrafo 84.
[23] Réplica y Contestación Reconvención, párrafo 33.
[24] Réplica y Contestación Reconvención, párrafos 35 y 36.
[25] Réplica y Contestación Reconvención, párrafo 37.
[26] Réplica y Contestación Reconvención, párrafo 38.

indicado que procede un reembolso al Contratista por un monto de US$ 318,334.72 (Trescientos dieciocho mil trescientos treinta y cuatro dólares americanos 72/100 cy) si se considera la "*Tasa manifestada en la Propuesta Económica*", esto es, USD 6 meses +200 puntos básicos. Sin embargo, una lectura correcta del reporte del Perito DATG revela que éste no cuestiona la razonabilidad del monto de US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy) reclamado por DUNOR. En su lugar el perito se refiere a que, de no cumplirse todas las condiciones para reembolsar esta cantidad, como mínimo, deberían reembolsarse intereses a la tasa original del Contrato, ascendiendo este reconocimiento parcial a US$ 318,334.72 (Trescientos dieciocho mil trescientos treinta y cuatro dólares americanos 72/100 cy)[27].

101. Asimismo, la Demandante sostiene que la Comisión argumenta que DUNOR no habría demostrado haber agotado la financiación incluida en su Oferta Económica por valor de US$ 22'986,181.00 (Veintidós millones novecientos ochenta y seis mil ciento ochenta y uno dólares americanos 00/100 cy), por lo que no se habrían generado gastos financieros adicionales a los inicialmente previstos. Frente a esto, DUNOR sostiene que la Comisión y su perito han establecido un requisito adicional – tener que demostrar haber erogado con carácter previo al Periodo de Análisis la totalidad de gastos financieros – lo que no está contemplado ni en el Acuerdo ni el Contrato[28].

102. Al respecto, DUNOR señala que el Contrato es un contrato de tipo *"Engineering, Procurement and Construction"* (comúnmente conocido como "EPC") a riesgo y ventura del Contratista, en el que se presupuestan entre otras muchas partidas, unos gastos financieros determinados[29].

103. La Demandante precisa entonces que, así como DUNOR asumió el riesgo de que existieran mayores costos a los contemplados en la fase de Licitación, resulta lógico que ésta pueda beneficiarse también de los posibles decrementos sobre los costes presupuestados[30]. A lo anterior, agrega que los gastos

[27] Réplica y Contestación Reconvención, No. 33.
[28] Réplica y Contestación Reconvención, párrafo 39.
[29] Réplica y Contestación Reconvención, No. 41.
[30] Réplica y Contestación Reconvención, párrafo No 43.

financieros presupuestados se refieren exclusivamente a la totalidad del Precio del Contrato y respecto a la duración inicial del mismo (916 días). El Acuerdo, en cambio, es un acto jurídico independiente que cubre un Periodo de Análisis adicional a los 916 días estipulados contractualmente, por lo que no guarda una relación específica con el financiamiento originalmente obtenido[31]. Destaca que la financiación original es distinta de los costos financieros a que se refiere el Acuerdo. Por último, señala que el Perito EY concluye que el monto de US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy) reclamado por DUNOR es independiente al monto del coste financiero incluido en la OE inicial del Contrato y es un concepto definido como un costo reclamable por DUNOR a CFE, de acuerdo con el Acuerdo[32].

104. Además, la Demandante sostiene que tanto el Perito DATG como el Perito EY concluyeron que la tasa de intereses de créditos fue conveniente tanto para DUNOR como para las Partes Relacionadas[33].

105. Agrega DUNOR que la Pericial DATG si bien indica que DUNOR debería demostrar haber excedido el monto de deuda presupuestado en su OE (*quod non*), acepta que si se cumple esa condición, procedería reembolsar a DUNOR la totalidad de los US$ 419,801.00[34] (Cuatrocientos diecinueve mil ochocientos un dólares americanos 00/100 cy). De manera subsidiaria, agrega el Perito DATG que, aún si no se demostrara la erogación de los gastos financieros (US$ 22’986,181.00 (Veintidós millones novecientos ochenta y seis mil ciento ochenta y un dólares americanos 00/100 cy)), procedería reembolsar a la Demandante, al menos US$ 318,334.72 (Trescientos dieciocho mil trescientos treinta y cuatro dólares americanos 72/100 cy)[35].

106. Ahora bien, en cuanto al segundo rubro solicitado, esto es lo que se refiere a las Comisiones de Estructuración y Agencia**,** la Demandante sostiene que la Comisión considera que la suma solicitada por concepto de Comisión de

[31] Réplica y Contestación Reconvención, párrafo No 44.
[32] Réplica y Contestación Reconvención, párrafo No 45.
[33] Réplica y Contestación Reconvención, párrafo No 46.
[34] Réplica y Contestación Reconvención, No. 47 – Doc. – R-38 Dictamen Pericial en Materia de Ingeniería de Costos (De Anda, Torres Gallardo y Cía., Sc), p. 38.
[35] Réplica y Contestación Reconvención, No 47.

Estructuración (US$ 1’361,253.50 – Un millón trescientos sesenta y un mil doscientos cincuenta y tres dólares americanos 50/100 cy) es irrazonable y excesiva por falta de “*evidencia de los estudios, análisis realizados por el Sindicato de Bancos que permitieran identificar el trabajo de reestructuración sustantiva*”, toda vez que, según CFE sólo hubo una ampliación del plazo de vigencia del Contrato de Crédito. En ese sentido, la CFE y su perito consideran que el monto de la Comisión de Estructuración es excesivo porque se tomó como parámetros de cálculos unos similares a los utilizados en la Estructuración del Contrato original, cuando no existió un trabajo similar[36].

107. Sin embargo, agrega la Demandante que el Perito DATG reconoce que el crédito que origina esta Comisión está relacionado en su totalidad con el financiamiento de las Obras, está asociado directamente con los costos del Proyecto, y que asimismo está debidamente documentado. Por lo tanto, DUNOR sostiene que la Comisión de Estructuración está incluida en el ámbito de aplicación del Acuerdo siendo un concepto y una cuantía razonable[37].

108. Respecto de la falta de soporte documental, la Demandante precisa que para DUNOR no fue posible la presentación de la información en tanto que se tratan de documentos de propiedad del banco. Agrega que la Comisión es consciente de esta situación y que compartir dicha información sería ajeno a la práctica bancaria[38].

109. Sobre la misma supuesta irracionabilidad del concepto, la Demandante adiciona que el Perito DATG considera que no sería razonable el pago de la Comisión de Estructuración porque este concepto se integró en los costos originales de la Central. No obstante, como lo señala el Perito EY, el Perito DATG partió de una base parcial, sin haber considerado para la Comisión de Estructuración Original los días de diferimiento del Periodo de Análisis, lo que resulta directamente contradictorio con la postura mantenida por el Perito DATG

[36] Réplica y Contestación Reconvención, No 49.
[37] Réplica y Contestación Reconvención, No 50.
[38] Réplica y Contestación Reconvención, No 51.

en lo relacionado con la segunda novación, respecto de la cual solo reconocieron los días que se encontraban dentro de este Período de Análisis[39].

110. Ahora, respecto de la irrazonabilidad del monto alegada por la CFE, la cual considera que es sustancialmente mayor a la estructuración original, DUNOR sostiene que la CFE ignora tanto el trabajo de análisis que conlleva restructurar una deuda de US$ 396,997,949.00 (Trescientos noventa y seis millones novecientos noventa y siete mil novecientos cuarenta y nueve dólares americanos 00/100 cy), como el incremento de riesgo del crédito que supone la ampliación del periodo de vigencia del mismo. Para esto, DUNOR hace referencia al Segundo Informe del Perito EY para dejar claro que: (i) el reporte del Perito DATG parece estar cuestionando el servicio prestado por seis instituciones bancarias con reconocimiento a nivel mundial; (ii) no se puede analizar la razonabilidad de una comisión de novación comparándola con una comisión de estructuración inicial; (iii) el criterio del Perito DATG no tiene en cuenta el funcionamiento bancario, pues los bancos son soberanos a la hora de negociar comisiones, no siendo práctica bancaria cobrar comisiones aplicando criterios de proporcionalidad y, (iv) la concesión de una novación por US$ 400 millones (primero por 103 y luego por 141 días) genera un riesgo evidente que debe ser resarcido, sea mediante un incremento de tasas o el cobro de comisiones (como aquí es el caso). Por estos motivos, concluye tal y como ha documentado perfectamente el Perito EY, la Comisión de Estructuración es un gasto razonable y compensable bajo el apartado 3.1 del Acuerdo[40].

111. Finalmente, en cuanto a la Comisión de Agencia, DUNOR reitera que, aunque la Demandada ha reconocido su procedencia y no cuestiona su obligación de reembolsar el monto correspondiente, US$ 430,405.41 (Cuatrocientos treinta mil cuatrocientos cinco dólares americanos 41/100 cy), esta ha incumplido su pago bajo el argumento de haberse iniciado el trámite arbitral[41]. Agrega que el monto a reembolsar por concepto de Comisiones de

[39] Réplica y Contestación Reconvención, No 51.
[40] Réplica y Contestación Reconvención, No 52.
[41] Réplica y Contestación Reconvención, No 53.

Estructuración y Agencia asciende a US$ 1’807,981.98[42] (Un millón ochocientos siete mil novecientos ochenta y un dólares americanos 98/100 cy).

#### 12.1.2.2.2 Posición de la Demandada

112. La Demandada coincide con DUNOR en el sentido de considerar que las cuestiones controvertidas versan sobre los intereses de los créditos con las Partes Relacionadas y las Comisiones de Estructuración. Sin embargo, sostiene que su intención no es retrasar el pago resultante de la Aplicación de la Cláusula 25.5 sino que es la Demandante quien se ha negado sistemáticamente a presentar la documentación necesaria que acredite los gastos incurridos, como quedó establecido en la Cláusula[43].

113. En relación con los intereses de Créditos de Partes Relacionadas, la Comisión sostiene que el fin de la Cláusula 25.5 es compensar al Contratista por su mayor permanencia en el Proyecto respecto del tiempo originalmente pactado. Por tanto, la Comisión se comprometió a cubrir los gastos en que pueda incurrir DUNOR y que estén directamente relacionados con las Obras, sean razonables y estén documentados[44].

114. La Comisión expresa que, para evitar el supuesto de duplicar el pago, le solicitó a DUNOR la exhibición de todos los documentos que comprueben que los gastos erogados ascienden a US$ 22’986,181.00 (Veintidós millones novecientos ochenta y seis mil ciento ochenta y un dólares americanos 00/100 cy) a que hace referencia la Demandante en su propuesta económica[45]. Agrega la Comisión que el Contratista no presentó la comprobación en cumplimiento de lo ordenado por el Tribunal en la Orden Procesal 4, sino que se limitó a presentar un archivo en Excel en el cual, de manera improvisada, ajusta los US$ $22’986,181.00[46] (Veintidós millones novecientos ochenta y seis mil ciento ochenta y un dólares americanos 00/100 cy). Para la CFE estos documentos eran fundamentales, ya que, tal como lo señala el Perito Moore, con ellos se

[42] Réplica y Contestación Reconvención, No 55.
[43] Memorial de Dúplica y Réplica a la Reconvención, No 8.
[44] Memorial de Dúplica y Réplica a la Reconvención, No 22.
[45] Memorial de Dúplica y Réplica a la Reconvención, No 23.
[46] Memorial de Dúplica y Réplica a la Reconvención, No 24.

comprobaría que DUNOR agotó el monto de USD $22’986,181.00 (Veintidós millones novecientos ochenta y seis mil ciento ochenta y un dólares americanos 00/100 cy) como COSTO POR FINANCIAMIENTO del Contrato y que el monto reclamado por US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy) efectivamente es consecuencia de las afectaciones que se originaron por su mayor permanencia en el Proyecto[47].

115. En suma, la Comisión concluye que: i) la Demandante no acató lo ordenado por el Tribunal Arbitral en la Orden Procesal 4, de ahí que la Demandada se viera impedida para identificar si el monto pretendido por US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy) en realidad es un costo adicional por financiamiento distinto a los USD $22’986,181.00 (Veintidós millones novecientos ochenta y seis mil ciento ochenta y un dólares americanos 00/100 cy) que está incluido en su Oferta Económica por el periodo originalmente pactado y, ii) en el supuesto sin conceder, que se llegara a considerar condenar a su representada por concepto de intereses del crédito entre partes relacionadas, el monto de acuerdo al principio de razonabilidad debería considerar la tasa de la OE de la Demandante establecida en el Contrato (3.05% anual), y que representa un monto de US$ 318,334.72 (Trescientos dieciocho mil trescientos treinta y cuatro dólares americanos 72/100 cy)[48].

116. Precisa la CFE en relación con la Tasa de Interés Aplicable, que la Demandante tergiversa lo señalado por el Perito Moore cuando dice que el perito de CFE realiza su propio análisis de Precios de Transferencia y concluye, como lo hizo el Perito EY, que la tasa de interés de estos créditos fue “*conveniente tanto para DUNOR como para las Partes Relacionadas*”, pues es incorrecto el alcance que le pretende otorgar a esta manifestación. A tal efecto, la Comisión aclara que el Perito Moore señala que la tasa utilizada por la Demandante y el Perito EY está dentro de los rangos establecidos; sin embargo, en su opinión, la tasa que se debe cuantificar es la pactada por las partes en el Contrato, porque

[47] Memorial de Dúplica y Réplica a la Reconvención, No 25.
[48] Memorial de Dúplica y Réplica a la Reconvención, No 33.

es la que se tiene como referencia y entonces encuentra razonabilidad en su aplicación[49].

117. Ahora bien, respecto de las Comisiones de Estructuración y Agencia, cuyo valor pretendido por la Demandante asciende a US$ 1’361,253.50 (Un millón trescientos sesenta y un mil doscientos cincuenta y tres dólares americanos 50/100 cy), la Demandada sostiene que no se acreditó el atributo de “*razonable*”, al no contar con los documentos o los elementos de evaluación que den cuenta de los elementos de riesgos con los que DUNOR justifica su monto. En síntesis, la Comisión considera que el monto no es razonable porque de la evidencia documental presentada en la conciliación y la presentada en este arbitraje, no se encontró evidencia de los estudios, análisis y conclusiones realizados por el Sindicato de Bancos, que permitieran identificar el trabajo de reestructuración sustantiva del financiamiento del proyecto, ya que únicamente se reconoce una ampliación en el plazo de vigencia del Contrato de Crédito y no la modificación del costo del riesgo[50].

118. La CFE agrega que no es justificable que la Novación sea superior en más de cuatro veces por día a la Comisión de Estructuración original y, además, el Segundo Informe Pericial de EY sigue sin aportar elementos que brinden certeza sobre el cobro pretendido[51].

119. Así pues, concluye que el único monto que CFE debe reembolsar a DUNOR es el costo administrativo asociados a la novación por un monto de US$ 37,785.23 (Treinta y siete mil setecientos ochenta y cinco dólares americanos 23/100 cy).

120. En lo concerniente a la Comisión de Agencia, la Demandada reconoce que se concilió el concepto por la cantidad de US$ 30,405.41 (Treinta mil cuatrocientos cinco dólares americanos 41/100 cy), sin embargo, señala que no se ha formalizado la minuta correspondiente de conformidad con el “Acuerdo 25.5”, derivado de que la Demandante optó por acudir al trámite arbitral[52].

[49] Memorial de Dúplica y Réplica a la Reconvención, No 29-30.
[50] Memorial de Contestación y Reconvención, No 291.
[51] Memorial de Dúplica y Réplica a la Reconvención, No 44.
[52] Memorial de Dúplica y Réplica a la Reconvención, No 45.

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**12.1.2.2.3 Consideraciones del Tribunal**

121. En relación con este rubro, obra en el proceso el documento denominado *"Minuta de Reconocimiento de Reembolso por Concepto de Gastos Financieros, Seguros y Garantías del Proyecto",* de conformidad con la cláusula 25.5 del Contrato del 12 de febrero de 2020[53]. En dicha Minuta consta que la Comisión revisó la suma solicitada por el Demandante y consideró procedente la suma de USD $9'662,588.15 (Nueve millones seiscientos sesenta y dos mil quinientos ochenta y ocho dólares americanos 15/100 cy).

122. Así mismo en dicho acuerdo se manifiesta que *"las Partes acuerdan que este monto será evaluado una vez se concluya el análisis de los 'Costos Indirectos de Obras Adicionales'*". Así mismo se acordó que el "*Contratista se compromete, a la brevedad a aportar elementos adicionales sobre los conceptos denominados 'Comisión de Estructuración' y 'Comisión de Agencia'. Al respecto, deja a salvo todos sus derechos en caso de que CFE, una vez revisada la información, mantenga su postura actual*".

123. Es pertinente señalar que la Demandante manifiesta que la Demandada posteriormente reconoció como procedente un importe adicional de US$ 30,405.41[54].(Treinta mil cuatrocientos cinco dólares americanos 41/100 cy)[55], pero que "*las partes no han formalizado la minuta correspondiente de conformidad al Acuerdo 25.5, derivado de que la Demandante optó por acudir a este procedimiento arbitral*[56]*.*

124. De esta manera, dentro de los conceptos correspondientes a este *item* quedaron pendientes los relativos a intereses de las partes relacionadas, y la "*Comisión de Estructuración*".

125. Por lo que se refiere a los intereses de las partes relacionadas, es pertinente señalar que en el Acuerdo se expresó:

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[53] Anexo C-031 de la Demandante.
[54] Demanda, párrafo 79.
[55] Contestación de CFE, párrafo 295.
[56] Contestación de CFE, párrafo 297.

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*"… 3. DESCRIPCIÓN DE LOS CONCEPTOS A RECONOCER DIRECTAMENTE RELACIONADOS CON LAS OBRAS, RAZONABLES Y DOCUMENTADOS, ASÍ COMO LA DESCRIPCIÓN DE LA DOCUMENTACIÓN QUE EL CONTRATISTA DEBERÁ ENTREGAR PARA ACREDITAR LOS SIGUIENTES RUBROS; NO OBSTANTE, EN SU CASO, SE DEBERÁ ATENDER A LO INDICADO EN EL APARTADO DE LINEAMIENTOS.*

*3.1. FINANCIEROS, SEGUROS Y GARANTÍAS*

*• Costos del Servicio de la Deuda, consecuencia de la prórroga para cumplir el Objeto del Contrato. Estos costos serán, de forma enunciativa mas no limitativa, los siguientes:*

*➢ Comisión de estructuración;*

*➢ Comisión de Disponibilidad;*

*➢ Comisión de agencia;*

*➢ Intereses ordinarios;*

*➢ Intereses de retraso;*

*➢ Withholding Tax;*

*➢ Contratación del fideicomiso;*

*➢ Honorarios por servicios legales;*

*➢ Comisiones por avales. Contraprestación de mercado por operaciones de negociación y renegociación de créditos con instituciones financieras.*

*…"*

126. Como se puede apreciar, las Partes acordaron reconocer los intereses ordinarios y los intereses de retraso, para lo cual debían cumplir los requisitos establecidos en la cláusula 25.5 del Contrato.

127. De esta manera para que proceda el reconocimiento de los intereses es necesario que los mismos tengan relación directa con las obras. Ahora bien, según expresa el Perito EY en su primer informe, los Intereses con Partes

Relacionadas *"reclamados derivan de los intereses devengados conforme al capital adeudado y los términos establecidos en el Contrato de préstamo mercantil otorgado por Duro Felguera y Elecnor a favor de Dunor Energía del 29 de septiembre de 2016, donde cada uno de los prestamistas otorgó la cantidad de $ 6,850,000 USD"*. Agrega que este contrato expone que el interés de Dunor Energía es el de obtener financiación para las actividades de su objeto social[57]. De esta manera, como quiera que Dunor es "*la empresa de propósito específico constituida para la ejecución del proyecto CC Empalme II*" [58], es claro para el Tribunal que el contrato de préstamo tuvo por objeto obtener la financiación para la ejecución del proyecto EMPALME II, por lo cual se acredita que está directamente relacionado con el Proyecto, como lo señala el Perito Moore[59].

128. En cuanto al requisito de la razonabilidad del gasto, el Perito EY se refiere al memorándum "*Revisión de la razonabilidad de la contraprestación pactada entre Dunor Energía S.A.P.I de C.V. con Dunor Felguera S.A. y Elecnor S.A."* del 6 de noviembre de 2019 y señala que en el mismo se expresa que "*Dunor Energía devengó una tasa de interés menor que aquellas que devengaron compañías comparables en operaciones similares*"[60].

129. En relación con dicho memorándum (Anexo EY-17, por error el Perito Moore lo identifica como Anexo 31), el Perito Moore indica que dicho documento señala que *"… después de realizar un análisis del comportamiento del mercado, a través de la emisión de bonos que tuvieran características similares a las del préstamo intercompañía antes descrito, así como las características contempladas en el LISR antes citada, mismo que se muestra a continuación, es posible concluir que la tasa pactada en el financiamiento mencionado es razonable y resulta consistente con el principio de plena competencia…".*

130. Sin embargo, el Perito Moore señala que el memorándum "*no puede ser tomado como referencia, porque, como se señala en el mismo, esta firma seleccionó el denominado 'Método de Evaluación' porque identificó que DUNOR 'no realizó financiamientos con terceros independientes (instituciones*

[57] Primer Informe Pericial del perito EY, página 15.
[58] Primer Informe Moore, página 36.
[59] Primer Informe Moore, página 36.
[60] Primer Informe de EY, página 16.

*financieras) que pudieran compararse (o ajustar su comparabilidad) a los términos y condiciones del crédito en cuestión'… Sin embargo, como fue de nuestro conocimiento, sí se mantuvo un financiamiento con un tercero (el Contrato de Crédito)*"[61].

131. Por otra parte, el Perito Moore señala que la tasa de interés del contrato "*incluye la Tasa Libor a SEIS MESES + un spread de 2%. La cual consideramos fue una tasa conveniente tanto para DUNOR como para las Partes Relacionadas involucradas*"[62]

132. Igualmente manifiesta el Perito Moore que realizó una evaluación de precios de transferencia teniendo en cuenta la información del sitio de la Federal Reserve de USA y el índice de riesgo país y concluye[63] "*la tasa de mercado construida para el financiamiento entre DUNOR y sus Partes Relacionadas (LIBOR a SEIS meses + 2%) se ubica en los rangos establecidos en los promedios mensuales de los ejercicios 2018-2019, a efectos de cumplir con la legislación mexicana en materia de precios de transferencia*".

133. A juicio del Tribunal los elementos señalados por el Perito Moore, esto es, la conveniencia de la tasa, en criterio de dicho perito, y el hecho de que la misma se ubica en los rangos establecidos para cumplir con la legislación en materia de precios de transferencia confirman la razonabilidad de la tasa de los intereses pactados.

134. Ahora bien, por otra parte, el Perito Moore señaló que[64] "de conformidad con la normatividad aplicable en México, consideramos que la primera evidencia de razonabilidad del caso debió ser que DUNOR haya demostrado que, durante el período original, erogó el monto determinado como Financiamiento del Proyecto, que ascendió a 22,986,181.00 USD y fue integrado al Precio Alzado del Contrato, el cual es de nuestro entendimiento que ya fue cubierto por CFE por un monto de 396,997,949.52 USD." Agrega que ello es "*con el fin de determinar que existe un costo adicional (en este caso financiero) al originalmente previsto*

[61] Primer Informe de Moore, página 38.
[62] Primer Informe de Moore, página 38.
[63] Primer Informe de Moore, página 40.
[64] Primer Informe de Moore, página 40.

*en la propuesta económica (22,986,181.00 USD) y con esto asegurar que cualquier desembolso adicional es razonable por no contar con los recursos económicos suficientes para hacer frente al Contrato*".

135. Por su parte la CFE expresa[65] que el Contratista no presentó en su memorial, anexos y prueba pericial un análisis que le permita identificar si el Costo Financiero mostrado en su OE por US$ 22'986,181.00 (Veintidós millones novecientos ochenta y seis mil ciento ochenta y un dólares americanos 00/100 cy) fue agotado en su totalidad para demostrar que el diferimiento, responsabilidad de CFE, le generó gastos financieros adicionales a los previstos. Por lo que, por el momento señala la Demandada que no es razonable que CFE reembolse este monto hasta que no evalúe el estado de este monto original.

136. En relación con lo anterior, considera el Tribunal, en primer lugar, que de conformidad con la cláusula 25.5 en caso de un retraso por un período superior a 60 días, las Partes pueden llegar a un acuerdo para compensar al Contratista los gastos en que puedan incurrir por cualquier retraso adicional a los 60 días. En el Acuerdo celebrado entre las Partes, se previó que dentro de los costos se incluirán los "*Costos del Servicio de la Deuda consecuencia de la prórroga para cumplir el Objeto del Contrato*" y allí se incluyeron los intereses.

137. Desde esta perspectiva, para el Tribunal no hay duda que el término del retraso que fue reconocido por el Acuerdo implica un costo financiero, pues dentro de dicho plazo se generan intereses adicionales.

138. Ahora bien, la Comisión y el Perito Moore señalan que debería demostrarse un "costo adicional (en este caso financiero) al originalmente previsto en la propuesta económica (22,986,181.00 USD)".

139. Al respecto advierte el Tribunal que el Contrato no previó que para determinar el monto del reconocimiento a que tendría derecho el Contratista debería compararse el costo estimado al presentar su oferta contra el costo efectivo de la obra, como lo sugiere la Demandada.

140. En efecto, lo que prevé la cláusula 25.5 es que lo que las Partes deben acordar es el reconocimiento de "*los gastos directamente relacionados con las*

[65] Contestación de CFE, párrafo 288.

*Obras, razonables y documentados en los que el Contratista pueda incurrir … como consecuencia de cualquier retraso adicional*". Por consiguiente, lo que se debe establecer no es si el costo es adicional a los costos estimados al presentar la oferta, si no si el costo es adicional a lo que habría erogado el contratista de no haberse presentado el retraso.

141. Lo anterior se confirma si se examina el Acuerdo, pues en los diferentes rubros que se reconocen no se toma en consideración el valor que el respectivo rubro pudo haber tenido en la propuesta de DUNOR.

142. Lo anterior es lógico si se tiene en cuenta que el Contrato es a precio alzado, por lo que el Contratista asume los riesgos de los mayores costos, e igualmente se beneficia de los ahorros que logre hacer.

143. Desde esta perspectiva, considera el Tribunal que es claro que de no haberse presentado el retraso que se reconoció en el Acuerdo no se hubieran generado los intereses, por lo que los mismos deben ser reconocidos.

144. No sobra señalar que el Perito Moore después de expresar[66] que "*al no contar con esta información, no nos es posible determinar por este medio si DUNOR realmente tuvo un costo adicional*", en todo caso indica que hay dos alternativas para determinar el monto a reembolsar:

> *"(1) Pagar el monto solicitado por DUNOR por 419,801.68 USD, al encontrarse dentro del rango del estudio de precios de transferencia, realizado por nuestra firma para este tipo de operaciones, de conformidad con los lineamientos de la OCDE, una vez que DUNOR haya demostrado que excedió el monto presentado en la Oferta Económica como Costo del Financiamiento; o*
>
> *"(2) Ajustar el monto solicitado por DUNOR a la tasa de interés de la Oferta Económica (3.05%) y con esto llegar a un monto de reembolso de 318,334.72 USD, toda vez que DUNOR no pueda integrar el costo financiero original devengado y pagado para el Proyecto en un monto de 22,986,181.00 USD".*

145. Como se puede apreciar, finalmente el Perito Moore considera como una alternativa que se reconozcan los intereses a la tasa de interés de la OE. En relación con esta alternativa advierte el Tribunal que la misma no resulta de la

[66] Primer Informe de Moore, página 40.

cláusula 25.5 ni del Acuerdo. Lo que prevé el Acuerdo es que se deben reconocer los gastos razonables y, como ya se vio de las consideraciones de los peritos, resulta que el costo es razonable.

146. Por lo que se refiere al requisito de la documentación que exige la cláusula, el Perito EY señala que los intereses con Partes Relacionadas incurridos (devengados) durante el Período de Análisis ascienden a USD $419,801.68[67] (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy). Añade el perito[68] que el pago de los intereses fue realizado el 14 de octubre de 2019 a través de la cuenta del banco Caixa Bank. Así mismo se refiere al registro contable en el sistema de Dunor Energía que evidencia el pago de los intereses. Finalmente señala las facturas emitidas por Duro Felguera y Elecnor correspondiente a los cargos por concepto de intereses devengados durante el período de análisis.

147. Ahora bien, sobre dichos intereses la Demandada sostuvo en su contestación que no se concilió porque no se identificaron todos los soportes de pago de los intereses. Señala que el informe del Perito EY tampoco acompañó soporte alguno por lo que se incumpliría el atributo de la comprobación[69].

148. Al respecto encuentra el Tribunal que en el Acuerdo entre las Partes se previó[70]:

> *"Para acreditar lo correspondiente para este concepto, EL CONTRATISTA entregará a LA COMISIÓN, sujeto al cumplimiento de las estipulaciones sobre confidencialidad que incluyan los contratos:*
>
> *"Contrato principal del financiamiento en donde se pueda acreditar las condiciones financieras pactadas.*
>
> *"Comprobante de Pago de los conceptos reclamados donde se verifiquen los cargos realizados.*

[67] Primer Informe de EY, página 16.
[68] Primer Informe de EY, página 17.
[69] Contestación de CFE, párrafo 287.
[70] Acuerdo, página 5.

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*" Documento bancario conforme a la conciliación de avances físicos), y/o certificados emitidos por la entidad bancaría o aseguradora.*

*" Los movimientos contables relacionados con los reclamos extraídos del sistema contable que se utilice (SAP o Similar). de considerarlo necesario, se podrá acudir a las oficinas de El contratista para la verificación de los registros contables.*

*" Cualquier documento que, en defecto de los anteriores, demuestre fehacientemente los costos de los conceptos anteriores."*

149. Encuentra el Tribunal que en el Dictamen del Perito EY se hace referencia a los documentos en los cuales se fundó, como son el contrato de préstamo[71] y los comprobantes de pago de intereses[72], que además figuran como anexos del dictamen. Por lo anterior se encuentra acreditada la existencia del préstamo y el pago de los intereses. Así mismo observa que el Perito Moore verificó la existencia del Contrato. De este modo está acreditada la documentación a la que se refiere la cláusula 25.5.

150. En cuanto se refiere a la comisión de estructuración considera el Tribunal lo siguiente:

151. Encuentra el Tribunal que las comisiones cobradas tienen relación directa con el Proyecto. En efecto el Perito EY señala que[73] "*La Comisión de Estructuración corresponde a un gasto directamente relacionado con el Proyecto, conforme al Contrato de cesión de derechos de crédito; donde la empresa Cedente es Dunor Energía, constituida con el único objeto de construir y operar un único proyecto, en este caso la Central*".

152. Por otra parte, en cuanto a su documentación, encuentra el Tribunal que la Demandante presentó un certificado expedido por BNP PARIBAS en el que se certifican las comisiones de estructuración/novación entre el 17 de mayo de 2016 y el 30 de septiembre de 2020[74].

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[71] Primer Informe de EY página 16.
[72] Primer Informe de EY, página 17.
[73] Primer Informe de EY, página 14.
[74] Doc. EY-10.

153. Con base en dicho certificado en el dictamen del Perito EY se señala el valor de las comisiones de estructuración de la siguiente forma[75]:

"Cuadro 4. Comisiones de Estructuración del contrato de cesión de crédito

Cifras expresadas en USD

| Fecha Certificado por BNP Paribas | Fecha Inicial | Fecha Final | Días | Importe Certificado por BNP Paribas |
|---|---|---|---|---|
| 18-may-16 | 17-may-16 | 15-nov-18 | 913 | $ 1,587,991.80 |
| 16-nov-18 | 16-nov-18 | 26-feb-19 | 103 | 992,494.87 |
| 16-nov-18 | 27-feb-19 | 18-jul-19 | 142 | |
| | | | | 1,389,492.82 |
| | 17-may-16 | 18-jul-19 | 1158 | |

Fuente: Certificado emitido por el banco BNP Paribas del 02 de febrero de 2021".

154. Así mismo el Perito EY calcula el valor de la Comisión de Estructuración cobrada por el banco BNP Paribas correspondiente al Periodo de Análisis, el cual asciende a $ 1,357,774.88 USD según el siguiente detalle[76]:

"Cuadro 5. Cuantificación de la Comisión de Estructuración durante el Periodo de Análisis Cifras expresadas en USD

| Fecha Inicial | Fecha Final | Días | 19-jul-18 al 14-mar-19 |
|---|---|---|---|
| 19-jul-18 | 15-nov-18 | 120 | $ 208,717.43 |
| 16-nov-18 | 26-feb-19 | 103 | 992,494.87 |
| 27-feb-19 | 14-mar-19 | 16 | 156,562.57 |
| | | 239 | 1,357,774.88 |

Fuente: EY con base en Certificado emitido por el banco BNP Paribas del 02 de febrero de 2021".

[75] Primer Informe de EY, página 14.
[76] Primer Informe de EY, página 15.

155. En relación con dicho monto el Perito EY señala que[77] "*No tuvimos a la vista el registro en los libros contables del pago de las comisiones de estructuración; sin embargo, a nuestro criterio consideramos suficiente para determinar que la "Comisión de estructuración" está directamente relacionada con la obra y es razonable para su compensación con base en lo dispuesto en el Contrato de cesión de derechos de crédito y el Certificado del Banco BNP Paribas que acredita que el importe total de las comisiones devengadas dicho contrato se encuentran pagada*s".

156. Ahora bien, la Demandada señala que el monto no fue reconocido por falta del cumplimiento del atributo de "*Razonabilidad"* porque de la evidencia documental presentada en la conciliación y en este arbitraje, no se encontró evidencia de los estudios, análisis y conclusiones realizados por el Sindicato de Bancos, que permitieran identificar el trabajo de reestructuración sustantiva del financiamiento del proyecto, ya que únicamente se reconoce una ampliación en el plazo de vigencia del Contrato de Crédito[78].

157. Agrega la Demandada que la Demandante tomó parámetros de cálculos similares a los utilizados en la Estructuración del Contrato original, cuando no existió un trabajo de análisis similar para el caso de la Comisión por Novación (Reestructuración). Tan es así que, al no identificarse un riesgo mayor, la tasa de interés original se mantuvo de acuerdo a lo convenido en el Contrato Original[79].

158. Advierte la Demandada[80] que como se señala en el Dictamen pericial, el costo diario que cubre la vigencia de las comisiones de Novación (Reestructuración) superan en más de 4 veces el costo diario de la Comisión de Estructuración Original.

[77] Primer Informe de EY, página 15.
[78] Contestación de CFE, párrafo 291.
[79] Contestación de CFE, párrafo 292.
[80] Contestación de CFE, párrafo 293.

159. Por su parte la Demandante señala que no puede presentar los estudios elaborados, como lo solicitó la Demandada, porque son de los Bancos[81]. Así mismo agrega que la Demandada ignora el trabajo que supone reestructurar una deuda así como el incremento de riesgo que supone la ampliación[82]. También señala que los bancos son soberanos a la hora de negociar las comisiones[83].

160. Por su parte el Perito Moore distingue entre la Comisión de Estructuración Original y la Comisión Primera Novación y Comisión Segunda Novación. Por lo que se refiere a la Comisión de Estructuración Original señala que aun cuando sólo se pretende cobrar una parte relacionada al diferimiento inicial por un monto de US$ 208,717.43 (Doscientos ocho mil setecientos diecisiete dólares americanos 43/100 cy), ésta ya se encontraba dentro de los costos iniciales de DUNOR, por lo que este monto no se encuentra en lo estipulado en la Cláusula 25.5[84].

161. Por otra parte en cuanto a las comisiones restantes señala[85] que "*el monto pagado por DUNOR a las Instituciones Financieras en las DOS Comisiones en cuestión superan en más de CUATRO veces el monto diario pagado en la Comisión de Estructuración. Sobre esto, evaluamos la documentación que nos fue entregada por CFE y no identificamos algún riesgo exorbitante que nos hiciera pensar en un cambio drástico del costo financiero*".

162. Agrega el Perito Moore que "*Las Comisiones de Novación, pretendidas para reembolso, en sí no son producto de alguna reestructuración crediticia; es decir, no existen cambios de condiciones en el Contrato de Crédito, más que el plazo del mismo. Por lo que no encontramos un trabajo adicional realizado por estas Instituciones Financieras (más que el riesgo asumido por el diferimiento y ciertos costos administrativos) que pudiera avalar un costo superior en más de CUATRO veces (por día) al original*".

[81] Contestación y Réplica de Dunor, párrafo 51.
[82] Contestación y Réplica de Dunor, párrafo 52.
[83] Contestación y Réplica de Dunor, párrafo 52.
[84] Primer Informe de Moore, página 24.
[85] Primer Informe de Moore, página 25.

163. Expresa igualmente el Perito Moore que[86] "*En el caso de que los costos de estas comisiones tuvieran como soporte los riesgos adicionales del Proyecto originados por los diversos diferimientos (conocidos por las Partes y plasmados en los Convenios Modificatorios del Contrato), no identificamos que éstos hayan afectado el costo financiero principal del Proyecto. Por lo que, si dichos riesgos no fueron repercutidos en los costos financieros principales del Contrato de Crédito (la tasa de interés), mucho menos debieron ser repercutidos en las comisiones de éste*".

164. Advierte que las Comisiones de Reestructuración más la de Estructuración Original son exactamente el 1% (uno por ciento) del Monto Principal a financiar, cuando sólo hubo UNA estructuración y las otras fueron únicamente ampliaciones de plazo[87].

165. Señala el Perito Moore[88] que aun cuando la tasa aplicable de las Comisiones de novación fue reduciéndose (.40% del Contrato Original, .25% de la Primera y .35% de la Segunda – 1% en Total) considera que al no haber identificado Reestructuraciones en el Crédito Original y sólo haber existido ampliaciones en el plazo de repago del crédito con riesgos similares a los originales (ej. la tasa del crédito se mantuvo similar) los montos que DUNOR pretende reclamar a CFE no son razonables en cuanto a su monto, esto porque:

A. Las comisiones de Novación representan un 50% (cincuenta por ciento) más de lo cobrado en la Estructuración Original, donde realmente se concentró el esfuerzo legal, financiero y técnico de las Instituciones Financieras, y

B. En un análisis de las coberturas de la vigencia del crédito de dichas comisiones, las de Novación y/o Reestructuración superan, en un promedio diario, en más de CUATRO veces la Comisión de Estructuración Original[89].

C. Concluye entonces lo siguiente[90]:

[86] Primer Informe de Moore, página 25.
[87] Primer Informe de Moore, página 25.
[88] Primer Informe de Moore, página 25.
[89] Primer informe de Moore, página 25.
[90] Primer Informe de Moore, página 30.

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*"1. La Comisión parcial asociada a la Comisión de Estructuración Original por un monto de 208,717.43 USD no debe ser reconocida por CFE, porque este monto no debe entenderse como un costo adicional generado por el diferimiento del Proyecto, imputable a esta Empresa Productiva del Estado Mexicano. Ya que el mismo se integró dentro de los Costos Originales contemplados por DUNOR y, con o sin diferimiento, hubieran sido o fueron erogados por esta empresa contratista y como parte del contrato de obra pagados por la CFE, es decir, la pretensión de DUNOR duplicaría el pago del mismo concepto.*

*"2. Las DOS Comisiones Restantes por un monto de 992,494.87 USD y un monto parcial de 157,672 USD se identifican como directamente asociadas al Proyecto y con la documentación correspondiente. Sin embargo, no pueden ser cubiertas por CFE derivado de no presentar un costo razonable. Esto porque:*

*"a) El costo diario que cubre la vigencia de estas comisiones supera en más de cuatro veces el costo diario de la Comisión de Estructuración Original.*

*"b) Las Comisiones de Novación reclamadas superan, en su conjunto, un 50% más que la Comisión de Estructuración Original.*

*"c) No se ubica algún servicio adicional por parte de las Instituciones Financieras involucradas en el Acuerdo Financiero, que permita identificar algún trabajo de reestructuración o modificación sustantiva del financiamiento del Proyecto y sólo se reconoce un cambio de la vigencia del Contrato de Crédito. Sobre esto, no encontramos evidencia de los estudios, análisis y conclusiones realizados por el Sindicato de Bancos, para ampliar el mismo; y por el contrario, solo ubicamos los cobros de las comisiones, analizadas en este apartado, asociadas al monto del principal (el monto del Contrato), lo cual consideramos que genera un monto no razonable. Esto, porque se toman los parámetros de cálculo similares a los utilizados en la Estructuración del Contrato, cuando no existió un trabajo similar para el caso de la Comisión por novación (Reestructuración).*

*"d) Se resalta que, en el caso de que las instituciones financieras hubieran identificado un riesgo exorbitante o importante del Proyecto, este riesgo debió haberse plasmado en la tasa de interés del Acuerdo Financiero y no sólo en estos costos accesorios.*

*"e) Por todo lo mencionado, el único monto que se podría pagar de este concepto son todos los costos administrativos asociados a la novación del período de vigencia del Contrato de Crédito; tales como: Honorarios Legales y Honorarios Notariales por un monto de 37,785.23 USD, siempre y cuando se identifique el cumplimiento de atributos de la Cláusula 25.5 del Contrato (directos, razonables y comprobables)"*

166. Por su parte el Perito EY se refiere al informe del Perito Moore y señala lo que considera unas inconsistencias en este último. En particular el Perito EY manifiesta que no está de acuerdo con el Perito Moore en relación con lo afirmado por el Perito EY sobre la comisión parcial asociada a la comisión de estructuración. A tal efecto señala[91]:

> *"Podemos estar en parte de acuerdo con el C.P. Gallardo en que este monto no debe entenderse como un costo adicional generado por el diferimiento del Proyecto; es decir, estamos parcialmente de acuerdo en que este monto hubiera sido erogado por Dunor Energía como parte del Contrato, pero el C.P. Gallardo parte de una hipótesis parcial, se basa en el criterio de no considerar para la Comisión de Estructuración Original el Periodo de Análisis que va desde el 19 de julio de 2018 hasta el 14 de marzo de 2019."*

167. Agrega el Perito EY que[92]

> *"Observamos como del total de los días de la estructuración original (913), para calcular el reclamo sólo consideramos 120 días (desde el 19 de julio de 2018, primer día del Periodo de Análisis, hasta el15 de noviembre de 2018, fecha final de este crédito original). Es decir, pareciera que el C.P. Gallardo no considera que el Acuerdo contempla estos días de diferimiento para compensar a Dunor Energía. Así las cosas, nos hacemos esta pregunta: ¿Si para la Comisión de Estructuración Original no contempla que entran dentro del Periodo de Análisis, entonces, por qué no aplica el mismo criterio para la Segunda Novación? Aplicando el mismo criterio, en lugar de considerar 16 días de esta segunda novación por importe $ 156,562.57 USD, habría que considerar los 142 días totales, lo que daría como resultado un importe a reclamar de $ 1,389,492.82 USD".*

168. En cuanto a la afirmación del Perito Moore de que el costo diario de las comisiones supera en más de cuatro veces el costo diario de la comisión original señala[93] que:

> *"no se puede analizar la razonabilidad de una Comisión de Novación basada en un criterio de proporcionalidad y mucho menos comparar una Comisión de Estructuración inicial con unas comisiones de novación futuras. Pareciera que el*

[91] Segundo Informe de EY, página 11.
[92] Segundo Informe de EY, página 11.
[93] Segundo Informe de EY, página 12.

*Perito de Moore no tiene en cuenta el funcionamiento bancario al momento de negociar las comisiones. Los bancos son soberanos para pactar las condiciones, es decir, no trabajan con criterios predeterminados (a modo de aranceles) al cobrar sus comisiones de novación y/o estructuración. Los bancos no tienen ninguna obligación de cobrar las comisiones de forma proporcional, no es una práctica bancaria el cobrar comisiones de novación aplicando criterios de proporcionalidad".*

169. Agrega que:[94]

*"conceder una novación a un contrato de crédito (aprox. $ 400 M de USD) genera a los bancos financiadores un riesgo evidente, riesgo que debe ser mitigado cobrando a sus clientes, ya sea vía incremento de tasas, vía de cobro de comisiones (como el caso que nos ocupa) o una mezcla de ambos. Estos riesgos no deben ser medidos, ni analizados de manera proporcional a la financiación inicial, ni mucho menos comparándolo por día. Los riesgos son analizados por los bancos midiendo diferentes particularidades, como son: (i) el riesgo o deterioro del negocio; (ii) el consumo de capital del crédito; (iii) el costo de movilizar recursos dentro de su organización; es decir, tienen que hacer un trabajo de análisis detallado del tipo de operación, para lo cual, deben movilizar un equipo multidisciplinario de expertos que analicen y estudien los diferentes riesgos y/o aspectos de tipo legal, operativo y comercial antes de decidir si se concede o no la novación y, en caso afirmativo, su coste. Citamos a modo de ejemplo: (i) el equipo de riesgo de crédito, riesgo de liquidez, riesgos operativos, riesgos de mercado; (ii) equipo legal para analizar contingencias de tipo jurídico y (iii) el equipo comercial que analiza los riesgos desde una óptica de cliente, equipo de "Compliance"."*

170. Por otra parte, se refiere el Perito EY a la afirmación del Perito Moore de que no se ubica ningún servicio adicional por parte de las Instituciones Financieras, y señala[95]:

*"Pareciera que Moore está cuestionando o dudando del servicio prestado por los bancos involucrados (seis instituciones bancarias con reconocimiento a nivel mundial) para cobrar esta comisión. Podemos discutir con los expertos si los porcentajes cobrados y/o el monto de la comisión son de mercado o no, si son o no elevados, o que la negociación está bien o mal hecha (ver séptima inconsistencia). Pero lo que no podemos dudar, ni discutir, desde nuestra opinión, es que conceder una novación a un contrato de crédito por un importe*

[94] Segundo Informe de EY, página 12.
[95] Segundo Informe de EY, página 12.

*de casi $ 400 M de USD genera a los bancos financiadores un riesgo evidente (ver cuarta inconsistencia); riesgo que será mitigado cobrando a sus clientes, ya sea vía incremento de tasas, ya sea vía de cobro de comisiones, o una mezcla de ambos".*

171. Señala asimismo que[96]

*"El C.P. Gallardo se limita a concluir sobre ciertos temas sin mostrar evidencia alguna. Por lo tanto, nos seguimos preguntando: ¿A qué parámetros similares se refiere? ¿ha preguntado, analizado o indagado el trabajo realizado por los seis bancos para el cobro de estas comisiones de novación? Para nosotros, la certificación de BNP Paribas es evidencia suficiente para concluir que estas comisiones de novación cobradas a Dunor Energía fueron las negociadas y acordadas entre las Partes y obedecen al monto que los bancos entendieron como razonables para asumir los evidentes riesgos que les generaban las novaciones del crédito".*

172. Agrega el Perito EY[97]:

*"El C.P. Gallardo concluye que se trata de un "monto no razonable". Reiteramos que no aporta evidencia alguna: ¿Qué pruebas, evidencias, experiencia, tiene el C.P. Gallardo para concluir que Dunor Energía negoció mal y/o las comisiones de novación están fuera de lo razonable en el mercado? o dicho de otra manera, ¿cuánto sería para el C.P. Gallardo un monto razonable? ¿Es para el C.P. Gallardo excesiva y está fuera del mercado una comisión del 0.25% y del 0.35% para la primera y segunda novación respectivamente?"*

*" Para nosotros y nuevamente haciendo alusión al certificado de BNP Paribas, sí vemos razonable el monto de estas comisiones - no podemos pensar que una empresa como Dunor Energía y/o sus accionistas (Duro Felguera, Elecnor y Elecnor México) quieran pagar más de lo necesario. Asimismo, y aunado al punto anterior, el rango, medido en términos de percentiles, se situaría entre un 0.60% y un 1.14%, y por lo tanto las comisiones pagadas por Dunor Energía sí serían razonables".*

173. Sobre el particular el Tribunal reconoce que la cláusula 25.5 del Contrato establece que se deben reconocer al Contratista "*los gastos directamente*

[96] Segundo Informe de EY, página 14.
[97] Segundo Informe de EY, página 14.

*relacionados con las Obras, razonables y documentados en los que el Contratista pueda incurrir*" en el período al que se refiere dicha cláusula.

174. Ahora bien, en cuanto a la Comisión de Estructuración considera el Tribunal que la misma no se ve afectada por el hecho de la extensión de la duración del Contrato, por lo que no forma parte de los "*gastos directamente relacionados con las Obras, razonables y documentados en los que el Contratista pueda incurrir…como consecuencia de cualquier retraso adicional*". No sobra destacar que la Comisión de Estructuración se distingue claramente del servicio de la deuda y que ella no cambia por razón del retraso.

175. Por otra parte, en cuanto a las dos comisiones adicionales, debe observarse que la cláusula 25.5 no establece excepciones a la regla general de que los gastos deben ser razonables para ser reconocidos. Ahora bien, lo razonable es, según la definición del Diccionario de la Lengua Española de la Real Academia, lo que es "*Adecuado, conforme a razón*", o que es "*Proporcionado o no exagerado*". Lo anterior indica que para concluir que una comisión es razonable es necesario determinar que la misma es adecuada, proporcional o no exagerada.

176. Partiendo de lo anterior, lo que debe establecerse es quien debe acreditar la razonabilidad del costo. Es claro que quien reclama el reconocimiento de un derecho, le corresponde acreditar los supuestos que dan lugar a dicho derecho. En el presente caso le corresponde al Contratista acreditar que las sumas que reclama cumplen las condiciones previstas en el Contrato y en el Acuerdo, y por ello él debe acreditar su razonabilidad. No es entonces aceptable el argumento del perito de la Demandante que sostiene que es el perito de la Demandada quien debe demostrar que el costo no es razonable.

177. Ahora bien, en el presente caso, encuentra el Tribunal que la razonabilidad de las comisiones que se reclaman se funda para los peritos de la Demandante en el hecho de que las mismas fueron fijadas por los bancos, y que ellos son soberanos al fijar dichas comisiones, y de otra parte, que el Contratista es el más interesado en que dichas comisiones sean razonables.

178. Desde esta perspectiva considera el Tribunal que la razonabilidad de un gasto no puede derivar simplemente del hecho de que el tercero que lo cobra lo

fijó en ese monto, pues entonces se vaciaría de contenido tal requisito, pues en el fondo bastaría que estuviera acreditado que se determinó por el acreedor, para que se pudiera recobrar dicho valor. Si el acuerdo exige que el gasto sea razonable es necesario establecer dicho carácter.

179. Por la misma razón no es suficiente que el deudor haya pagado, porque ello solo acredita que el aceptó la obligación pero no que el monto de la misma sea razonable.

180. Por lo demás, tampoco está acreditado que no sea posible establecer la razonabilidad, pues ello podría haberse acreditado a través de otras pruebas. La eventual dificultad de prueba en principio no releva de la carga de la misma.

181. Por tal razón concluye el Tribunal que no es procedente reconocer la suma solicitada por la Demandante por las comisiones de estructuración y novación. En todo caso debe señalarse que su Primer Informe el Perito Moore expresa que[98] "*el único monto que se podría pagar de este concepto son todos los costos administrativos asociados a la novación del período de vigencia del Contrato de Crédito; tales como: Honorarios Legales y Honorarios Notariales por un monto de 37,785.23 USD (Treinta y siete mil setecientos ochenta y cinco dólares americanos 23/100 cy), siempre y cuando se identifique el cumplimiento de atributos de la Cláusula 25.5 del Contrato*". El Tribunal encuentra que dichos gastos son reconocidos por el Perito EY. El Tribunal considera que dichos gastos son razonables, están acreditados y son causados por la prórroga por lo que se reconocerán.

182. Teniendo en cuenta todo lo anterior el Tribunal concluye por los conceptos a que se refiere el presente acápite se reconocerán las siguientes sumas: US$ 419,801.68 (Cuatrocientos diecinueve mil ochocientos un dólares americanos 68/100 cy) por intereses de créditos con Partes Relacionadas; US$ 30,405.41 (Treinta mil cuatrocientos cinco dólares americanos 41/100 cy) por Comisión de Agencia y US$ 37,785.23 (Treinta y siete mil setecientos ochenta y cinco dólares americanos 23/100 cy) por honorarios legales y notariales. Esto es, un total de

[98] Primer Informe del Perito Moore, página 30.

US$ 487,992.32 (Cuatrocientos ochenta y siete mil novecientos noventa y dos dólares americanos 32/100 cy).

#### 12.1.2.3 Gastos de Gestión de Personal y Administración de Campo

##### 12.1.2.3.1 Posición de la Demandante

183. De conformidad con el apartado 3.2 del Acuerdo, la Demandada se obligó a resarcir a DUNOR los gastos por Gestión de Personal y Administración de Campo, en que ésta hubiera incurrido por retrasos imputables a CFE. En el Memorial de Demanda, DUNOR sostiene que esta obligación no ha sido satisfecha y por tanto, la CFE debía pagar un total de US $7'836,863.81[99] (Siete millones ochocientos treinta y seis mil ochocientos sesenta y tres dólares americanos 81/100 cy).

184. DUNOR señala que la Comisión nunca suspendió los trabajos de la Central mientras se intentaban solucionar los problemas que impidieron dar cumplimiento a la Fecha Programada de Aceptación Provisional inicialmente pactada, situación que obligó a la Demandante a mantener personal, maquinaria y equipo en el Sitio, ocasionándole cuantiosos gastos que no tiene la obligación de soportar[100].

185. DUNOR señala que entregó toda la documentación expresamente prevista en el apartado 3.2 del Acuerdo que acredita fehacientemente los gastos incurridos. Así lo confirma también el Perito EY al afirmar que *"(i) los gastos presentados han sido incurridos durante el Periodo de Análisis, (ii) dichos gastos están directamente relacionados con el Proyecto y corresponden al apartado 3.2 del Acuerdo y (iii) son razonables y cuentan con la documentación soporte requerida".* Agrega DUNOR que la solicitud continua de información por parte de CFE excede lo pactado en el Acuerdo y ralentiza severamente el proceso de revisión de facturas, generando retrasos innecesarios en el reconocimiento de gastos a DUNOR[101].

[99] Memorial de Demanda, No 85.
[100] Memorial de Demanda, No 86.
[101] Memorial de Demanda, No 94.

186. Agrega DUNOR que la Comisión se ha negado a pagar los gastos con los siguientes argumentos: (i) Las facturas se presentaron "*revueltas*", la documentación de soporte de las facturas estaba incompleta y algunas facturas de gastos no eran procedentes. (ii) La cláusula 3.2 del Acuerdo únicamente contempla los conceptos que pueden ser reconocidos, sin especificar que, en caso de ser procedentes, se deba reconocer el 100% de su costo. Por ello, dado que la ejecución del Proyecto sufrió atrasos imputables a DUNOR, en opinión de CFE, procede aplicar una "*metodología específica*" para que cada Parte cubra el costo proporcional que le corresponda, conforme al apartado 5 del Acuerdo[102].

187. DUNOR señala que los gastos por Gestión de Personal y Administración de Campo incurridos durante el Periodo de Análisis ascienden a US$ 8'448,761.46 (Ocho millones cuatrocientos cuarenta y ocho mil setecientos sesenta y un dólares americanos 46/100 cy). De dichos gastos tras su oportuna revisión, mediante Oficio RGROS-174/20, de 31 de julio de 2020, la Demandada reconoció como compensables un total de US$ 7'130,383.43 (Siete millones ciento treinta mil trescientos ochenta y tres dólares americanos 43/100 cy). No obstante, conforme al análisis financiero realizado por el Perito EY, US$ 7'836,863.81 (Siete millones ochocientos treinta y seis mil ochocientos sesenta y tres dólares americanos 81/100 cy) cumplen con los requisitos del apartado 3.2 del Acuerdo y deben ser rembolsados a DUNOR[103]. Asimismo, advierte que el Perito EY acredita que un monto adicional de US$ 179,846.27 (Ciento setenta y nueve mil ochocientos cuarenta y seis dólares americanos 27/100 cy) cumple con todos los requisitos del apartado 3.2 del Acuerdo, quedando únicamente pendiente el pago por parte del Contratista. Pese a lo anterior, agrega que algunas de las facturas correspondientes a este rubro continúan en periodo de revisión, y CFE sigue sin cumplir con su obligación de revisarlas y conciliarlas en el plazo[104].

188. Al respecto, DUNOR considera que el importe reconocido por CFE se basa única y exclusivamente en las cédulas anexas al Oficio RGROS-174/20. Sin embargo, tal y como lo indica el Perito EY, no existe un acuerdo formal de que

[102] Memorial de Demanda, No. 92.
[103] Memorial de Demanda, No. 90.
[104] Memorial de Demanda, No. 90.

los montos determinados como procedentes hayan sido aceptados por DUNOR. La Demandante agrega que, el Informe del Perito Cámara presentado en este proceso, tampoco realizó ningún análisis de por qué los gastos no reconocidos por la Comisión no cumplían con los requisitos del Acuerdo[105].

189. DUNOR expresa que, por el contrario, el Perito EY analizó detenidamente cada una de las partidas controvertidas entre los peritos, corroborando y ratificando las conclusiones del Primer Informe del Perito EY, en las que identificó la existencia de: (i) un monto de US$ 4'598,313.38 (Cuatro millones quinientos noventa y ocho mil trescientos trece dólares americanos 38/100 cy) conciliado entre las Partes, (ii) un monto de US$ 3'238,550.43 (Tres millones doscientos treinta y ocho mil quinientos cincuenta dólares americanos 43/100 cy) que cumplen con todos los requisitos del Acuerdo y deben ser compensados, (iii) un monto de US$ 133,905.48 (Ciento treinta y tres mil novecientos cinco dólares americanos 48/100 cy) que cumple con todos los requisitos del Acuerdo para ser compensable, pero que no ha sido todavía liquidado, (iv) un monto US$ 45,940.79 (Cuarenta y cinco mil novecientos cuarenta dólares americanos 79/100 cy) por concepto de retenciones de calidad que cumplen con todos los requisitos del Acuerdo que no han sido todavía reembolsados a los subcontratistas y, (v) US$ 341,114.35 (Trescientos cuarenta y un mil ciento catorce dólares americanos 35/100 cy) que no serían compensables[106].

190. DUNOR aclara que únicamente se encuentra en disputa un 11% del total reclamado, pues el otro 89% restante, a pesar de su reconocimiento por parte de la Comisión, todavía no ha sido pagado. DUNOR considera que esto se debe a que CFE basa sus argumentos en un análisis factura a factura, de los gastos a reembolsar por el apartado 3.2 del Acuerdo, bajo la asunción también errónea, de que DUNOR reclama US$ 8'448,761.46 (Ocho millones cuatrocientos cuarenta y ocho mil setecientos sesenta y un dólares americanos 46/100 cy) y no US$ 8'016,710.08[107] (Ocho millones dieciséis mil setecientos diez dólares americanos 08/100 cy).

[105] Réplica y Contestación Reconvención, No 57.
[106] Réplica y Contestación Reconvención, No. 58.
[107] Réplica y Contestación Reconvención, No. 60 .

191. Se refiere DUNOR a los análisis realizados por CFE en su Contestación y Demanda Reconvencional en los que presentó una serie de ejemplos de facturas que a su decir, probarían que los citados gastos no cumplían con los requisitos del Acuerdo para ser reembolsables. Agrega que la gran mayoría de las alegaciones de CFE van dirigidas a impugnar la procedencia de gastos que DUNOR no reclama y que no forman parte de esta controversia[108]. A tal efecto señala que el hecho de que una determinada factura, escogida exprofeso por CFE, fuera reembolsable o no, no afecta la procedencia de otras facturas, por lo que resulta claro que la Comisión basa su reclamo en una metodología sumamente deficiente[109]. Agrega que los "*ejemplos*" tampoco apoyan la posición de CFE, pues corresponden, en su mayoría, a gastos no controvertidos. Expresa que pareciera, de hecho, que el Memorial de Contestación se redactó sin tener en cuenta ni el Informe del Perito EY ni lo realmente reclamado por DUNOR en este arbitraje[110].

192. Se refiere DUNOR al rubro de gastos fuera del periodo de reconocimiento y señala que CFE presenta una tabla de facturas que no estarían comprendidas en el Periodo de Análisis. Precisa la Demandante que estas facturas ya fueron conciliadas por las Partes a través del Oficio RGROS-174/20, y señala que sobre ellas DUNOR no está reclamando importe alguno, y por tanto, no existe controversia[111].

193. En relación con las facturas no liquidadas, DUNOR trae a colación el Primer Informe del Perito EY, explicando que el monto de US$ 141,175.52 (Ciento cuarenta y un mil ciento setenta y cinco dólares americanos 52/100 cy) pendiente de pago debe desdoblarse así: i) un monto de US$ 133,905.48 (Ciento treinta y tres mil novecientos cinco dólares americanos 48/100 cy) que corresponde a gastos que cumplen todos los requisitos del Acuerdo para ser reembolsados y ii) el monto restante de US$ 7,270.07 (Siete mil doscientos setenta dólares americanos 07/100 cy) corresponde a cantidades que el Perito EY determinó

[108] Memorial de Réplica y Contestación de Dunor, No 60.
[109] Memorial de Réplica y Contestación de Dunor, No 63.
[110] Memorial de Réplica y Contestación de Dunor, No 64.
[111] Memorial de Réplica y Contestación de Dunor, No 65.

como no procedentes y que, en consecuencia, no han sido reclamadas por DUNOR en el presente arbitraje[112].

194. Ahora, respecto de gastos no susceptibles de reconocimiento, la Demandante señala que la Comisión alega que i) se hicieron ajustes a los montos de algunas facturas por incluir conceptos no relacionados con el objeto del Acuerdo como suministro de consumibles o mano de obra para instalaciones provisionales. Sin embargo, DUNOR aclara que estos son rubros que se incluyeron dentro del apartado 3.5 y no dentro de esta sección. ii) La Tasa de Depreciación Anual de la Ley de Impuesto Sobre la Renta consideraría porcentajes de depreciación diferentes y menores a los señalados por DUNOR, procediendo ajustes. Al respecto señala DUNOR que tal y como revela el Informe del Perito EY, las Partes coinciden en que la depreciación procedente asciende a un monto de US$ 4,900.90 (Cuatro mil novecientos nueve dólares americanos 90/100 cy), por lo que, tampoco hay controversia sobre este monto. iii) La factura No. 000118 por el "*Servicio de Recolección y Limpieza de Grúa Titán para el Retiro de Materiales*" no sería procedente por formar parte del costo de la Central. El Perito EY coincide con esta conclusión, por lo que no se trata de un importe reclamado por DUNOR en el marco de este arbitraje. iv) La factura No. 1910000082 corresponde a servicios realizados para atender determinados fallos y daños presentados en el Proyecto, no tratándose de gastos procedentes al estar el Contratista obligado a realizar estas reparaciones a su sola costa. De nuevo, el Perito EY coincide con este criterio por lo que tampoco es un importe reclamado por DUNOR[113].

195. Frente a los gastos no razonables, señala la Demandante que CFE argumenta que: i) el monto reclamado por DUNOR por energía eléctrica para oficinas de obra durante el Periodo de Análisis por MXN$ 606,374.32 (Seiscientos seis mil trescientos setenta y cuatro pesos mexicanos 32/100 M.N.) no corresponde a un consumo mensual razonable de una oficina de campo. Agrega que CFE se basa en la capacidad instalada para estimar lo que considera un "*gasto razonable*" por este concepto. No obstante, el Perito EY determinó la procedencia y razonabilidad de un monto de US$ 30,672,97

[112] Memorial de Réplica y Contestación de Dunor, No 66.
[113] Réplica y Contestación de Reconvención, No. 67.

(Treinta mil seiscientos setenta y dos dólares americanos 97/100 cy) por ese concepto, soportado en cálculos basados en cifras reales de oficina de campo. ii) La Comisión se refiere a gastos de personal a cargo de la empresa "*Entre el Ángel y la Diana, S.A*" sobre la cual la Comisión reconoce un total de US$ 756,231.13 (Setecientos cincuenta y seis mil doscientos treinta y un dólares americanos 13/100 cy) de los US$ 840,761.44 (Ochocientos cuarenta mil setecientos sesenta y un dólares americanos 44/100 cy) reclamados por DUNOR. Agrega la Demandante que, según CFE, el monto restante corresponde a importes que la Demandante "*dolosamente pretende que la Comisión cubra [y que se refieren a] la totalidad de prestaciones de toda la antigüedad del tiempo trabajado en la obra (liquidaciones, vacaciones, etc.)*". Sin embargo, de conformidad con el criterio del Perito EY, estas prestaciones entran dentro del concepto de "*Prestaciones a que obliga la Ley Federal del Trabajo*" referenciado en el Acuerdo y que tuvieron lugar dentro del Periodo de Análisis. Además, señala la Demandante que debe tenerse en cuenta que, si bien existen algunos gastos dentro del Periodo de Análisis que pudieran no tener su origen en la prórroga, existen otros que sí fueron derivados de la prórroga y que, en cambio, quedaron fuera del periodo acordado. Así, tanto el Perito EY como DUNOR coinciden en que se trata de gastos procedentes, ya que corresponden a un concepto de gasto acordado para reembolso y que tuvo lugar en el Periodo de Análisis. Adicionalmente debe tenerse en cuenta que, según los cálculos del Perito EY y las cédulas de gasto, el importe reconocido como procedente por parte de CFE a julio de 2020 era de US$ 768,941.30 (Setecientos sesenta y ocho mil novecientos cuarenta y un dólares americanos 30/100 cy) y no de US$ 756,231.13.[114] (Setecientos cincuenta y seis mil doscientos treinta y un dólares americanos 13/100 cy).

196. Señala DUNOR que la Demandada alega que diversas facturas correspondientes a "*Servicios profesionales, realización de reclamación de gastos indirectos incurridos por Dunor*" no serían razonables por no ser un servicio que brinde valor directo al Proyecto. Al respecto señala la Demandante que el Acuerdo lo que pretende es compensar, esto es, mantener al Contratista indemne por retrasos superiores a 60 días debido a Fuerza Mayor

[114] Réplica y Contestación Reconvención, No 68.

Gubernamental o por culpa de la Comisión. Sentado esto, resulta claro que no se estaría compensando al Contratista si tuviera que asumir los gastos necesarios para hacer aplicable el propio Acuerdo. Señala que, a diferencia de lo sostenido por la Demandada, no se trata así de gastos "*exclusivamente en beneficio de la Demandante*", sino de gastos con origen y causa en la aplicación del Acuerdo que, (i) se incardinan en el apartado 3.2 del mismo; (ii) corresponden al Periodo de Análisis y, (iii) cumplen con todos los requisitos para ser reembolsables.

197. Por último, la Demandante señala que CFE se refiere a la factura No. C46345, y que esta última afirma que se reclama por este concepto un importe mayor al de la factura. Al respecto señala DUNOR que el diferencial entre el monto reclamado y el que figura en la factura no fue reconocido como procedente por el Perito EY y, en consecuencia, no es reclamado por DUNOR en el presente arbitraje[115].

198. En cuanto a los gastos sin soporte documental, la Demandante aduce que la Comisión se refiere a dos situaciones en particular: i) La improcedencia de la factura No. 256610027818 presentada por Clifford Chance por honorarios, siendo éste un gasto no reclamado por DUNOR y, ii) la improcedencia de facturas por un monto de US$ 141,175.52 (Ciento cuarenta y un mil ciento setenta y cinco dólares americanos 52/100 cy) que no contarían con soporte documental. A su vez, este monto está compuesto por dos facturas: una de Multiservicios Suzgo, por importe de US$ 140,000.00 (Ciento cuarenta mil dólares americanos 00/100 cy) y otra de García Sotos y Asociados por US$ 1,175.52 (Mil ciento setenta y cinco dólares americanos 52/100 cy). Al respecto señala DUNOR que el Perito EY determinó que ninguno de estos dos montos era procedente, por lo que no se encuentran entre los reclamados en el presente arbitraje.

199. La Demandante señala que la Comisión se ha referido a unos supuestos atrasos en la revisión de los gastos de personal por no incluirse información sobre el origen de los topes de los salarios. Resalta que, tal y como recoge la propia CFE, se trata de información confidencial, pues se refieren a contratos de

[115] Réplica y Contestación Reconvención, No 68.

prestación de servicios entre DUNOR y terceros. A tal efecto, se refiere al apartado 3.2 del Acuerdo y señala que este apartado no exige dicho documento. Agrega que, a pesar de ello, DUNOR, en buena fe, realizó importantes esfuerzos para lograr un acuerdo con las partes involucradas y remitió a la Comisión un tabulador de salarios[116].

200. Posteriormente, la Demandante se refiere a la Reclasificación de Información entre apartados del Acuerdo, señalando que, bajo ese epígrafe, la Comisión no indica los casos que no incumplirían los requisitos del Acuerdo, sino que solamente trata de justificar el enorme retraso que acumula en la revisión de facturas en la reclasificación de montos del apartado 3.2 al apartado 3.5 del Acuerdo. Agrega que CFE sostiene que la reclasificación de montos por concepto de seguros del apartado 3.2 al apartado 3.1 del Acuerdo habría retrasado la revisión de facturas, siendo, según la Comisión "*un ejemplo representativo de cómo DUNOR deliberadamente estuvo retrasando la solución final de su reclamo*". Para DUNOR, lo anterior sencillamente carece de sentido porque: i) en primer lugar, DUNOR, estando en una situación financiera delicada era la primera interesada en la solución del reclamo, y ii) una revisión completa de los comunicados intercambiados entre las Partes demuestra que DUNOR, tras solicitársele la reclasificación, atendió diligentemente a los comentarios de CFE, siendo la propia Comisión la que decidió volver a reclasificar los seguros mencionados del apartado 3.1 al apartado 3.2 del Acuerdo, en las reuniones de 23 y 24 de enero de 2020[117].

201. DUNOR indica que, pese a que entregó a CFE los documentos que soportaban los costos que reclama, dando cumplimiento a lo indicado en el Acuerdo, la Comisión ha incumplido sistemáticamente los plazos previstos para la revisión de las facturas. Agrega que, tras el primer envío de documentación a la Comisión, ésta tardó hasta 4 meses en contestar. Esta situación es contraria al apartado 5 del Acuerdo, el cual establece que CFE dispondrá del mismo plazo que DUNOR - esto es, un mes - para realizar la "*revisión y conciliación*" de la documentación[118]. Esto, ha impedido el acceder de DUNOR al financiamiento,

[116] Réplica y Contestación Reconvención, No. 70.
[117] Réplica y Contestación Reconvención, No. 72-74.
[118] Memorial de Demanda, No. 89.

por lo que ha generado dificultad en la obtención de recursos para hacer frente a los requerimientos de la obra[119].

202. La Demandante considera que el objetivo de las manifestaciones de la Comisión no es poner en duda las cuantías reclamadas por DUNOR, sino que la CFE pretende justificar sus retrasos en dos maneras: i) la primera, escogiendo meticulosamente los ejemplos que cita, la CFE pretende probar que en un principio se incluyeron algunas facturas no procedentes y/o sin soporte entre las reclamadas por DUNOR. Lo que olvida mencionar la Comisión es que el objetivo del procedimiento de revisión y conciliación de facturas previsto en el Acuerdo es, precisamente, filtrar y destilar esas facturas presentadas en unos plazos determinados conforme al Acuerdo. Considera que nada de lo explicado por la Comisión justifica en modo alguno el flagrante incumplimiento de los plazos previstos en el Acuerdo, menos aún cuando, como reconoce CFE, en algunos casos se sobrepasan los plazos previstos contractualmente para la revisión hasta por un múltiplo de 10 (la revisión se hizo en 10 meses en vez de 1). ii) La segunda, la Comisión trata de justificar sus retrasos en que la Demandante habría hecho un total de 6 "*ampliaciones durante el proceso de revisión y conciliación*", sin embargo, no debe olvidarse que: a) el Acuerdo establece un procedimiento de entrega y conciliación de facturas mes a mes, por lo que la entrega escalonada de información es conforme al mismo y, b) la propia Comisión abusó de este hecho para añadir comentarios a facturas que ya habían sido aprobadas en revisiones anteriores. Por lo tanto, DUNOR concluye que nada de lo descrito por CFE excusa en modo alguno el retraso que ésta acumula en la revisión de facturas[120].

203. DUNOR sostiene que la "*metodología especifica de CFE*" es improcedente. La Demandante reitera que la Comisión no ordenó la suspensión temporal porque "*las Partes estaban realizando sus mejores esfuerzos para la conclusión del proyecto y el Contratista continuaba ejecutando Obras en alcance del Contrato*". Agrega que, durante casi un año el Proyecto estuvo parado debido a causas imputables solo a CFE. Durante todo ese tiempo, DUNOR no pudo

[119] Réplica y Contestación Reconvención, No. 56.
[120] Réplica y Contestación Reconvención, No 76-79.

desmovilizar siquiera parte de sus recursos en obra. Esto impidió a DUNOR usar sus recursos de manera eficiente[121].

204. Agrega la Demandante que para tratar de aprovechar (al menos en parte) los recursos que la Comisión le obligó a mantener en obra, DUNOR estuvo realizando algunas tareas para el Proyecto. CFE pretende ahora usar esta circunstancia, por ella misma creada, para argumentar la aplicabilidad de una "*metodología específica*" conforme al apartado 5 del Acuerdo. En concreto, la Comisión pretende aplicar a las facturas presentadas por DUNOR un porcentaje de descuento - determinado unilateralmente -, para tratar de compensar los gastos que supuestamente DUNOR imputa a estos trabajos, pero que sin embargo no forman parte del Acuerdo[122].

205. Señala la Demandante que la alegación de CFE carece de toda lógica porque la deducción unilateral que pretende imponer CFE no tiene base en el texto del Acuerdo[123].

206. Destaca que DUNOR no entregó a CFE todas sus facturas, sino únicamente aquellas que eran resultado de la prórroga de la Fecha Programada de Aceptación Provisional. DUNOR afirma que no reclama los gastos relacionados con las Obras, es decir, incluidos en el Precio Original de la Central, en los que se incurrió durante el Periodo de Análisis. Por ello señala que si se aplicara arguyendo el porcentaje de descuento que pretende aplicar la Comisión: (1) habría todo un conjunto de facturas que no se habrían reclamado ni habrían sido reconocidas por no tener origen en la prórroga acordada y, (2) sobre las facturas reclamadas, se aplicaría además un porcentaje de descuento por haberse realizado en el Periodo de Análisis trabajos en las Obras. Señala que los trabajos realizados por DUNOR durante el Periodo de Análisis que caen fuera del alcance del Acuerdo, están siendo utilizados por la Comisión como excusa para tratar de rebajar unilateralmente las cantidades que CFE adeuda a DUNOR. Agrega que admitir el planteamiento de la Comisión supondría que, lejos de compensar a DUNOR "*los gastos razonables en los que se vio afectado*", se le estaría produciendo un importantísimo perjuicio económico sobre la base de la

[121] Réplica y Contestación Reconvención, No 81 y 82.
[122] Réplica y Contestación Reconvención, No 83.
[123]Réplica y Contestación Reconvención, No 84.

aplicación injustificada y caprichosa de un porcentaje de reconocimiento, que, dados los requisitos del Acuerdo y del Contrato, no tiene razón de ser[124].

207. La Demandante concluye que CFE solo está retrasando el pago de los montos adeudados de conformidad con el apartado 3.2 del Acuerdo y por tanto, el Tribunal debe condenar al pago de US$8’016,710.08 (Ocho millones dieciocho mil setecientos diez dólares americanos 08/100 cy).

#### 12.1.2.3.2 Posición de la Demandada

208. La Demandada señala que derivado de las firmas de los Convenios Modificatorios nunca existió una suspensión de actividades del Proyecto, ya que las afectaciones que se dieron y prorrogaron las Fechas de Eventos Críticos no ameritaban la paralización total de los trabajos. Agrega que, incluso DUNOR seguía ejecutándolos en el periodo de reconocimiento (del 19 de julio de 2018 al 14 de marzo de 2019) establecido en el Acuerdo. Sostiene que la Demandante estuvo reportando Obra que aportó avance y costo al Proyecto. Al respecto, señala que no todos los gastos erogados por la ejecución de los trabajos durante el periodo de reconocimiento deben ser amparados por el Acuerdo, pues se trata de trabajos que estaban dentro del Precio del Contrato y que no son originados por su mayor permanencia en el Proyecto[125].

209. Adicionalmente, sostiene que los reclamos presentados por la Demandante, bajo el amparo del Acuerdo, exhibían falta de orden, mala clasificación de los apartados 3.2 y 3.5, falta de evidencia e irracionabilidad en muchos gastos. Esto impidió que la Comisión pudiera hacer una revisión eficiente, expedita y clara de los documentos. Señala que existen diferentes irregularidades repetitivas como son las siguientes: i) no hay soporte sobre el reclamo del personal de la persona moral Entre el Ángel y La Diana, S.A. de C.V, debiendo reclamar solo la parte proporcional de las prestaciones; ii) la negativa a reclasificar las facturas relativas al punto 3.2 al 3.5 del Acuerdo; iii) comprobantes de pago equivalentes

[124] Réplica y Contestación Reconvención, No 88.
[125] Memorial de Dúplica y Réplica , No 48.

al 17% del importe reclamando, los cuales fueron entregados 16 meses después de la primera entrega de información; iv) las facturas referentes a seguros fueron reclasificadas del apartado 3.2 al 3.1 del Acuerdo, situación que fue atendida 11 meses después; y por último, v) retraso en la entrega de evidencia del tabulador y/o salarios del personal de las oficinas de DUNOR[126].

210. De lo anterior, la Comisión destaca que este tipo de situaciones ocasionadas por la Demandante provocaron que la Comisión tardara cuatro meses en contestar la reclamación inicial, ya que desde el 15 de febrero de 2019, se notificaron los incumplimientos de la información que presentaba el Contratista. Igualmente se refiere a la minuta de reunión de fecha 4 y 5 de abril de 2019, que prueba hasta cuando se estuvo en aptitud de concluir con la revisión[127].

211. Frente a la posición sustentada por DUNOR de carecer de recursos para hacer frente a los requerimientos de la obra por el incumplimiento de la Comisión, la Demandada sostiene que es falso ya que, como se demuestra en las cedulas de avance conciliadas entre las Partes, el Contratista realizó un avance de obra considerable, por lo que no se desprende que estas circunstancias le hubieran causado una afectación, careciendo su argumento de soporte probatorio[128].

212. Señala que le parece contradictorio a la CFE que la Demandante por un lado manifieste en el Memorial de Réplica que desconoce que las Partes hayan pactado reconocer el monto de US$ 7´130,383.43 (Siete millones ciento treinta mil trescientos ochenta y tres dólares americanos 43/100 cy), ya que señala "*no existe un acuerdo formal de que los montos determinados como procedentes por CFE según el Oficio RGOS-174/20 hayan sido aceptados por DUNOR*", y por otro lado en el numeral 59 del Memorial de Réplica indique que CFE "*reconoce adeudarlo, sigue sin pagarlo*". En este punto señala que para proceder al pago se requiere el soporte necesario como lo es la minuta acordada, y agrega que ha sido la necedad e intransigencia de la Demandante de buscar el TODO o NADA, lo que ha impedido a la Comisión cubrir con las obligaciones que no ha

[126] Memorial de Dúplica y Réplica a la Reconvención, No 49.
[127] Memorial de Dúplica y Réplica a la Reconvención, No 50.
[128] Memorial de Dúplica y Réplica a la Reconvención, No 51.

desconocido[129]. Señala que la Comisión envió a DUNOR una Minuta de Reconocimiento por el concepto de oficinas locales y de campo, y que DUNOR decidió no firmarla al no complacer sus expectativas, por lo que no se pudo proceder al pago.

213. También, recuerda que la Comisión nunca ha desconocido el monto previamente conciliado por US$ 7´130,383.43 (Siete millones ciento treinta mil trescientos ochenta y tres dólares americanos 43/100 cy), cantidad que incluso es ratificada como procedente por el Perito Cámara, en su Primer Dictamen Pericial como en el Informe Complementario[130].

214. Reitera la Demandada que DUNOR actúa de manera maliciosa ya que en los puntos 59 y 60 de su Réplica señala que: i) la Comisión dedicó un número excesivo de páginas en razón a esta controversia. Precisa la Comisión que esto es sorpresivo ya que se realizó la explicación detallada de cómo las Partes fueron conciliando cada una de las afectaciones respecto de las cuales al Contratista le correspondía ser pagado, para que el Tribunal Arbitral tenga los elementos necesarios para determinar que el actuar de la Comisión es correcto y procedente de conformidad con el Acuerdo y el Contrato. ii) La Comisión erróneamente señala un monto diferente al que pretende la Demandante. Al respecto advierte la Comisión que esto es falso, ya que la Demandada tuvo que identificar cuál es el monto pretendido, porque primeramente se desprende del Memorial de Demanda que el monto del Periodo de Análisis asciende a US$ 8´448,761.46 (Ocho millones cuatrocientos cuarenta y ocho mil setecientos sesenta y un dólares americanos 46/100 cy) y más adelante se indica que DUNOR ha incurrido en gastos por Gestión de Personal y Administración de Campo que ascienden a un total de US$ 8´016,710.08 (Ocho millones dieciséis mil setecientos diez dólares americanos 08/100 cy). Además, existe un tercer monto que determina el Perito EY en su Primer Dictamen Pericial por US$ 7´836,863.81 (Siete millones ochocientos treinta y seis mil ochocientos sesenta y tres dólares americanos). Agrega la CFE que lo que llama la atención y que no debe pasar desapercibido por el Tribunal Arbitral es que el Perito EY en su Dictamen complementario ya no concluye un monto que deba ser pagado a la

[129] Memorial de Dúplica y Réplica a la Reconvención, No 54.
[130] Memorial de Dúplica y Réplica a la Reconvención, No 57.

Demandante y se limita a señalar que no está de acuerdo con la metodología realizada por el Perito Cámara, por lo que finalmente la Demandante se vio obligada a señalar el segundo monto como definitivo[131].

215. Bajo el título "*Dunor sólo reclama gastos reembolsables*", la CFE señala que la Demandante conoce cómo se analizaron una a una las facturas presentadas tanto en el Memorial de Demanda como en el Dictamen Pericial presentado por el Perito EY, y por el que se arribó al monto que se reclama y hoy afirma que no son parte de lo reclamado en este arbitraje. Entonces se pregunta ¿cuál es el objetivo de que su perito las adjuntara y las refiriera en su Dictamen?[132].

216. En cuanto a los gastos fuera del período de reconocimiento, la Comisión precisa que los ejemplos expuestos en el Memorial de Contestación son para que el Tribunal Arbitral verifique cómo se realizó el proceso de conciliación de las facturas presentadas por el Contratista y por qué se desecharon, tal y como quedó asentado en el RGROS-174/20. No obstante, la Demandante volvió a presentar estas facturas como anexo a su demanda[133].

217. Respecto de las facturas no liquidadas, señala la Comisión que el monto determinado de US$ 133,905.48 (Ciento treinta y tres mil novecientos cinco dólares americanos 48/100 cy) corresponden a facturas de Elecnor de México S.A. de C.V., consideradas por la Comisión como no procedentes porque no han sido pagadas y en consecuencia, no podrían ser reembolsadas. Agrega que así fue observado por el Perito EY. Por lo tanto, el monto anterior carece de soporte documental que justifique su procedencia, por lo que se debe absolver a la CFE de pagar dichas prestaciones[134].

218. En relación con los gastos no susceptibles de reconocimiento por no estar en el alcance de acuerdo, la Demandada señala que durante la reunión realizada los días 02 y 03 de octubre de 2019, las Partes conciliaron las facturas presentadas donde se detectaron gastos que no son susceptibles de reconocimiento por diferentes razones tales como: i) ser un suministro o traslado

[131] Memorial de Dúplica y Réplica a la Reconvención, No 58.
[132] Memorial de Dúplica y Réplica a la Reconvención No
[133] Memorial de Dúplica y Réplica a la Reconvención, No 65-66.
[134] Memorial de Dúplica y Réplica a la Reconvención, No 68-69.

de materiales; ii) el pago de trabajos de obra civil; iii) almacén que a la fecha de reclamación ya no estaba en obra; iv) instalaciones eléctricas provisionales que ya no estaban en Sitio en el periodo de reconocimiento de la reclamación; v) instalaciones eléctricas permanentes que corresponden al alcance del Contrato y, vi) tarjetas de control de acceso de personal que no demostró que se encontraba en Sitio en el Periodo de Reclamación. Adicional a lo anterior, la CFE señala que se hicieron ajustes a los montos de algunas facturas porque incluían conceptos que no estaban directamente relacionados con el alcance del Acuerdo[135].

219. Respecto de los gastos no razonables, se refiere a los gastos de energía eléctrica y al efecto la Comisión sostiene que conforme al Acuerdo, apartado 3.2 "*Gastos por la Gestión de Personal y de Administración de Campo*", fracción V inciso f), solo son aplicables los gastos por consumo de oficinas. Precisa que la Comisión realizó una inspección física en el Sitio, observando que el Contratista únicamente tenía contratado un servicio de energía eléctrica con la CFE Distribución, con un solo medidor de luz y de este se alimentaban las oficinas y la obra; por lo tanto, existía un solo recibo que registraba el consumo de energía eléctrica utilizado en las oficinas de campo, así como el consumo en ejecución del desarrollo de la obra y pruebas de puesta en marcha. A tal efecto destaca que los consumos de energía eléctrica de los años 2016 y 2017 no excedían de los MXN$ 57,902.00 (Cincuenta y siete mil novecientos dos pesos mexicanos 00/100 M.N.) mensuales por concepto de consumo (28,248 kWh a un precio promedio de 2.0498 $/kW), y a partir de mayo del 2017 se incrementaron sustancialmente por el orden de los MXN$ 279,462.29 (Doscientos setenta y nueve mil cuatrocientos sesenta y dos pesos 29/100 cy) mensuales (151,618 kWh a un precio promedio de 1.8432 $ / kW), cuando DUNOR inició actividades de pruebas[136].

220. Agrega la Comisión que con la finalidad de reconocer lo justo y razonable, determinó los consumos de oficinas, comedor y enfermería, estimados de acuerdo a la carga máxima del equipo e instalaciones de la Demandante, mismas que fueron verificadas en Sitio, sin incluir las instalaciones de

[135] Memorial de Contestación y Reconvención, No 311 y 312.
[136] Memorial de Dúplica y Réplica a la Reconvención, No 72.

Subcontratistas que también estaban consumiendo del mismo medidor de luz. Lo anterior, se puede evidenciar del recibo de luz del mes de diciembre 2017 con la tabla y gráfica de historial de consumos desde enero 2017 a enero 2018[137].

221. A este respecto la CFE argumenta que el Perito EY realizó un cálculo que no tiene sustento alguno, para lo cual señala: a) la carga instalada en las oficinas, comedor, enfermería, etc., no pueden generar estos consumos de energía eléctrica facturados y reclamados, y b) DUNOR declara que no hubo actividades relacionadas con la obra en los meses que tomó el Perito EY para su cálculo. Advierte la Comisión que tanto el consumo de energía de la obra como de las oficinas, provienen del mismo medidor de energía y en el periodo de tiempo que considera en el cálculo sí se incluyen actividades desarrolladas en la obra hasta la fecha de Aceptación Provisional del Proyecto, que fue el 14 de agosto de 2019, pues se registraron trabajos de obra pendientes por atender, las cuales consisten en 658 Deficiencias Menores y posteriormente 95 Reclamos de Garantía, que hoy no se han atendido en su totalidad, por lo que resulta falso lo señalado por el Perito EY, donde indica que en dicho periodo del mes de mayo de 2019 a marzo de 2020 no había actividades relacionadas con las obras[138]. Adicionalmente agrega una tabla comparativa de los gastos de oficina de los proyectos Empalme I y Empalme II.

222. La Comisión expresa que el monto razonable a reconocer por este concepto es de US$ 17,981.00 (Diecisiete mil novecientos ochenta y un dólares americanos 00/100 cy) como máximo, lo cual es acorde a la carga instalada por el consumo de oficinas e instalaciones provisionales y no el monto de US$ 30,672.97 (Treinta mil seiscientos setenta y dos dólares americanos 97/100 cy) determinado por el Perito EY, que no está basado en cifras reales de los equipos instalados en las oficinas de campo y que considera consumos de energía eléctrica de obra, con lo cual se estaría pagando doble ya que es parte del precio del Contrato[139].

[137] Memorial de Dúplica y Réplica a la Reconvención, No 73.
[138] Memorial de Dúplica y Réplica a la Reconvención, No. 74.
[139] Memorial de Dúplica y Réplica a la Reconvención, No. 77.

223. En relación con el importe reclamado del personal de la sociedad Entre el Ángel y La Diana S.A. de C.V., señala la Comisión que a la fecha DUNOR sigue sin soportar documentalmente su pretensión, ya que solo le asistía reclamar la parte proporcional de las prestaciones como lo indica el Acuerdo Punto 4 Inciso b)[140].

224. Adicionalmente, la Demandada aclara que la controversia no radica en si son aplicables o no las prestaciones, pues el Acuerdo así lo contempla, pero lo que se debe de reconocer es la parte proporcional de los sueldos y prestaciones, pues DUNOR pretende que la Comisión absorba todos los gastos laborales que corresponden como patrón, por prestaciones que no pertenecen al periodo de reconocimiento, por lo que el Tribunal Arbitral debe considerar que la metodología usada por la Demandada es justa y razonable al no contar con la información que debió ser proporcionada por la Demandante[141].

225. En cuanto a los Gastos sin un soporte documental, la Comisión expresa que existen diferentes reclamaciones que la CFE no considera procedentes debido a que no se exhibió soporte documental. Ejemplo de lo anterior es el cobro de la factura de la empresa “CLIFFORD CHANGE SLP” por concepto de “*honorarios profesionales de prestación de servicios jurídicos*”. La CFE sostiene que no se presentaron las evidencias que sustenten que los servicios prestados por esta empresa están relacionados con los conceptos descritos en el Acuerdo[142].

226. Respecto al atraso en la revisión de gastos de personal, la Comisión aclara que se debió a que la información con la que se pretendía soportar el concepto no era de un tercero, sino a que se trataba de los salarios del personal directivo, técnico y administrativo de las propias empresas que forman el Consorcio de la hoy Demandante, hecho que se negaba aceptar, ocasionando un retraso en la conciliación de los importes[143].

227. Se refiere al Acuerdo en cuanto el mismo establece que se puede excluir de la información a proveer para obtener el reconocimiento “*información sensible*

[140] Memorial de Dúplica y Réplica a la Reconvención, No. 78.
[141] Memorial de Dúplica y Réplica a la Reconvención, No 79 y 80.
[142] Memorial de Contestación de CFE, No 329-338.
[143] Memorial de Dúplica y Réplica a la Reconvención, No 84.

*(que) no afecte en la acreditación y determinación del importe reclamado*". Advierte que en este caso la información era necesaria para la acreditación de los gastos, por lo que solo hasta el momento de contar con la información, se realizaron los ajustes correspondientes llegando a un monto conciliado justo y razonable[144].

228. Asimismo, sostiene, respecto de la reclasificación de información entre apartados del Acuerdo**,** que es falso lo señalado por la Demandante en su Memorial de Réplica.[145] Afirma que la verdad de los hechos es que por la mala organización en que presentaron los documentos relativos a las afectaciones señaladas en el Acuerdo por el Contratista, la Comisión propuso la reclasificación de estos gastos del 3.2 al 3.5, toda vez que no cumplían con los supuestos enunciados en el apartado 3.2, ya que en este únicamente deben incluirse los costos indirectos de la obra. Señala que fue hasta que después de varios meses que DUNOR entendió este hecho y que finalmente en la minuta del 20 y 21 noviembre del 2019 en su numeral 1 se acordó su reclasificación sin conceder su procedencia en el apartado 3.5[146]. Por lo anterior, la Comisión señala que cumplió cabalmente el Acuerdo, realizando la reclasificación de las facturas del apartado del 3.2 al apartado 3.5 y que es, no como lo señala la Demandante, una actuación para justificar el atraso en la revisión[147].

229. Referente al tema de reclasificación por el concepto de seguros, la Demandada expresa que desde el 8 de febrero de 2019 solicitó la reclasificación de facturas para el caso de seguros y sólo hasta el 15 de noviembre DUNOR aceptó dicha reclasificación[148]. Agrega que la Demandante manifiesta que la Comisión decidió en la reunión del 23 y 24 de enero de 2020, volver a reclasificar los seguros mencionados del apartado 3.1 al apartado 3.2 del Acuerdo 25.5. Advierte que esto es falso, como se puede corroborar en el anexo de la Minuta antes citada, el cual no presentó DUNOR. También, agrega que las facturas

[144] Memorial de Dúplica y Réplica a la Reconvención, No 85.
[145] Réplica y Contestación Reconvención, No 71.
[146] Memorial de Dúplica y Réplica a la Reconvención, No 87.
[147] Memorial de Dúplica y Réplica a la Reconvención, No 86 - 88.
[148] Memorial de Dúplica y Réplica a la Reconvención, No 90.

fueron retiradas por el Contratista del punto 3.2 del Acuerdo y no se volvieron a incluir en esta reclamación[149].

230. Por todo lo anterior, la Comisión manifiesta que los retrasos en los que incurrió en la revisión de facturas son justificados, pues fueron imputables a la Demandante[150].

231. En cuanto a la improcedencia de la "*metodología específica*" de CFE a la que se refiere la Demandante, la Comisión señala que propuso esta metodología, toda vez que es justo y razonable que aquellos gastos que en una parte proporcional aportan al desarrollo del Proyecto y que están en el alcance del contrato principal sean responsabilidad del Contratista, ya que fueron utilizados para avanzar en las obligaciones contractuales. A manera de ejemplo, señala que se está reclamando la totalidad del monto correspondiente al Superintendente de Construcción, debiendo ser sólo la parte proporcional afectada de lo facturado por el personal durante el período de reconocimiento, que fue del 19 de julio del 2018 al 14 de marzo del 2019, ya que este monto forma parte de los costos indirectos de la obra, y el Superintendente participó en la supervisión y administración de los recursos para ejecutar el porcentaje de avance real que tuvo el Proyecto durante dicho periodo[151]. Asimismo, señala que durante el período en cita, el Contratista presentaba atrasos en parte de la Obra, ya que atendía pendientes de construcción. La metodología propuesta por la Comisión busca evitar un abuso por parte de la Demandante al pretender que se le pague el total de los gastos reclamados con base en el Acuerdo y que también le sean pagados en el alcance del Contrato, teniendo como consecuencia que DUNOR obtenga un doble beneficio, ya que como se puede observar en las cedulas de avance el Contratista siguió ejecutando trabajos del Contrato [152]. Agrega que la propuesta de la Comisión permitiría de manera justa y razonable que DUNOR cubra la parte proporcional de sus gastos indirectos que le corresponden por las ejecución de las obras durante el periodo de reconocimiento, de tal manera que del importe de US$ 7,130,383.43 (Siete

[149] Memorial de Dúplica y Réplica a la Reconvención, No 91.
[150] Memorial de Dúplica y Réplica a la Reconvención, No 97.
[151] Memorial de Dúplica y Réplica a la Reconvención, No 98 y 99.
[152] Memorial de Dúplica y Réplica a la Reconvención, No 101.

millones ciento treinta mil trescientos ochenta y tres dólares americanos 43/100 cy) conciliado por las Partes, de los gastos correspondientes al Acuerdo de la Cláusula 25.5 en su apartado 3.2 Gastos por la Gestión de Personal y de Administración de Oficinas Locales y de Campo, y una vez aplicada la metodología específica, le sea solo reconocido al Contratista un importe de US$ 6'127,824.10 (Seis millones ciento veintisiete mil ochocientos veinticuatro dólares americanos 10/100 cy), lo cual desglosa en la Tabla que incorpora en su Memorial de Dúplica que se funda en el Anexo R-111[153].

**12.1.2.3.3 Consideraciones del Tribunal**

232. Señala la Demandante[154] que de conformidad con el apartado 3.2 del Acuerdo, la Demandada se obligó a resarcir a DUNOR los gastos por la Gestión de Personal y Administración de Campo, en que hubiera incurrido DUNOR por los retrasos imputables a CFE. Agrega que dichos gastos ascienden a US$ 7'836,863.81 (Siete millones ochocientos treinta y seis mil ochocientos sesenta y tres dólares americanos 81/100 cy) y no han sido pagados.

233. Advierte la Demandante[155] que la Comisión nunca suspendió los trabajos en la Central mientras se trataban de solucionar los problemas que impidieron dar cumplimiento a la Fecha Programada de Aceptación Provisional inicialmente pactada, lo que obligó a DUNOR a mantener movilizado en el Sitio de la obra al personal, maquinaria y equipos, ocasionándole cuantiosos gastos que no tiene obligación de soportar.

234. Agrega[156] que pese a que DUNOR entregó a CFE los documentos acreditativos de este rubro, de conformidad con lo indicado en el Acuerdo, la primera contestación de la Comisión no se recibió hasta el 20 de mayo de 2019, esto es, aproximadamente 4 meses después de enviar DUNOR la información requerida, lo que es contrario al apartado 5 del Acuerdo, el cual

[153] Memorial de Dúplica y Réplica a la Reconvención, No 102.
[154] Demanda, párrafo 85.
[155] Demanda, párrafo 86.
[156] Demanda, párrafo 89.

establece que CFE dispondrá del mismo plazo que DUNOR (esto es, un mes) para realizar la "*revisión y conciliación*" de la documentación.

235. En relación con estos gastos encuentra el Tribunal lo siguiente:

236. El Acuerdo establece los gastos que se pueden reconocer por estos conceptos y a tal efecto se refiere a: honorarios, sueldos y prestaciones; depreciación, mantenimiento y renta; servicios, fletes y acarreos, y gastos de oficina, capacitación y adiestramiento, y seguridad. Adicionalmente, en dicho Acuerdo se precisaron los documentos que deberían ser entregados por el Contratista a la Comisión.

237. Ahora bien, el Perito EY señaló en su dictamen que al revisar obtuvo una suma total de Gastos por la Gestión de Personal y de Administración de Campo de MXN$ 8'448,761.46 (Ocho millones cuatrocientos cuarenta y ocho mil setecientos sesenta y un pesos mexicanos 46/100 M.N.)[157].

238. Señala el Perito EY[158] que en el oficio RGROS-174/20 la Comisión reconoció un monto total de MXN$ 7'130,383.43 (Siete millones ciento treinta mil trescientos ochenta y tres pesos mexicanos 43/100 cy), como resultado de la revisión de la CFE.

239. De esta manera, el Perito EY señala que existe una diferencia de US$ 1'318,378.03 (Un millón trescientos dieciocho mil trescientos setenta y ocho pesos mexicanos 03/100 cy) entre lo reclamado por DUNOR y lo reconocido por CFE. Agrega que esta diferencia obedece a dos razones[159]:

i. Gastos por un total de MXN$ 549,298.51 (Quinientos cuarenta y nueve mil doscientos noventa y ocho pesos mexicanos 51/100 M.N.) que la Comisión determinó que no eran procedentes.

ii. Gastos por un total de US$ 3'301,148.88 (Tres millones trescientos un mil ciento cuarenta y ocho dólares americanos 88/100 cy) donde la Comisión sólo determinó procedente una parte de lo reclamado, esto

[157] Primer Informe Pericial de EY, p 21.
[158] Primer Informe Pericial de EY, p 21.
[159] Primer Informe Pericial de EY, p 22 y 23.

es la suma de US$ 2’353,070.05 (Dos millones trescientos cincuenta y tres mil setenta dólares americanos 05/100 cy) por lo que la diferencia no reconocida es de US$ 769,078.83 (Setecientos sesenta y nueve mil setenta y ocho dólares americanos 83/100 cy).

240. Por lo anterior señala el Perito EY que existe un total de gastos de US$ 3’850,447.39 (Tres millones ochocientos cincuenta mil cuatrocientos cuarenta y siete dólares americanos 39/100 cy) no conciliados por las Partes, que son los que examina en detalle el perito[160]. Aclara el Tribunal que dicha cifra incluye la suma de MXN$ 2’353,070.05 (Dos millones trescientos cincuenta y tres mil setenta pesos mexicanos 05/100 M.N.), que la Comisión aceptó en el numeral ii.

241. El Perito EY procedió a realizar el análisis correspondiente y verificó[161] que

> *“Los gastos presentados hayan sido incurridos (devengados) durante el Periodo de Análisis.*
>
> *“Los gastos reclamados están directamente relacionados con el Proyecto y corresponden a conceptos definidos en alguno de los siete rubros dispuestos en el apartado 3.2 del Acuerdo.*
>
> *“Los gastos son razonables y cuentan con la documentación soporte requerida en el apartado 3.2 del Acuerdo que acredita que fueron efectivamente incurridos por el Contratista, para tal fin, en este punto verificamos, de manera enunciativa más no limitativa:*
>
> *“Exista evidencia de la prestación del servicio y recepción de los bienes, como por ejemplo: las bitácoras de horas trabajadas, listas de asistencia autorizadas, pagos de las prestaciones laborales a las entidades de gobierno correspondientes, comprobantes de los gastos por viáticos (facturas, notas de remisión, tickets, etc.), informes, reportes o comunicaciones de los servicios de consultoría, sellos de recepción y/o entrega de mercancía.*
>
> *“Los gastos incurridos y facturados correspondan a las horas, servicios, personal, tarifas, etc., establecidas con los subcontratistas y proveedores en los contratos*

[160] Primer Informe Pericial EY, p 23.
[161] Primer Informe de EY, p 26.

*celebrados por Dunor Energía o en las ordenes de pedido previamente autorizadas.*

*"La factura corresponde a la evidencia de los servicios y/o bienes recibidos.*

*"El comprobante del pago correspondiente al gasto, en los casos donde el pago incorporó varias facturas, verificamos la integración del pago total realizado.*

*"El registro contable correspondiente al pago del gasto".*

242. Por lo anterior señaló[162] que se encuentra establecido "*un importe total de $ 3,238,550.43 USD de gastos que cumplen con los requisitos señalados en el apartado 3.2 del Acuerdo (puntos i, ii y iii anteriores) para ser acreditados como gastos directamente relacionados con las Obras, razonables y documentados*".

243. Así mismo manifestó[163] que "*un total de $ 90,936.34 USD que cumplen con las especificaciones señaladas para ser acreditados como gastos directamente relacionados con las Obras, razonables y documentados, e incurridos durante el Periodo de Análisis. Sin embargo, debido al tipo de gasto (servicios de personal que laboró directamente en la obra y que extendieron y/o incurrieron en trabajos durante el Periodo de Análisis, así como otros gastos asociados a los trabajos de la Obra), corresponden a Gastos por Reclamación de Terceros, por lo cual deben compensarse en el apartado 3.5 del Acuerdo*". Agrega que "*estos gastos cumplen con la documentación y características analizadas del punto iii mencionado anteriormente*".

244. Añade el Perito EY que determinó[164] "*un total de $ 133,905.48 USD que cumplen con los requisitos señalados en el apartado 3.2 del Acuerdo (puntos i, ii y iii anteriores) para ser acreditados como gastos directamente relacionados con las Obras, razonables y documentados. Sin embargo, a la fecha de presentación de este Informe no han sido liquidados por el Contratista*".

[162] Primer Informe de EY, p 26.
[163] Primer Informe de EY, p 27.
[164] Primer Informe de EY, p 28.

245. Igualmente señala que "*un total de $ 45,940.79 USD … corresponde a los montos retenidos al subcontratista "MHO Engineering, SA de CV" por concepto de "Retención de calidad" que, si bien corresponden a gastos directamente relacionados con las Obras, razonables y documentados, no han sido reembolsados al subcontratista. Por lo que, a la fecha de presentación del presente Informe, no ha sido erogado por parte del Contratista*".

246. Finalmente señala[165] que "*determinamos un total de $ 341,114.35 USD que corresponden a gastos no compensables*".

247. Por lo anterior el Perito EY concluye que el monto que debería compensarse por este concepto asciende a US$ 7'836,863.81 (Siete millones ochocientos treinta y seis mil ochocientos sesenta y tres dólares americanos 81/100 cy), los cuales discrimina de la siguiente manera[166]:

> *"Gastos reclamados por Dunor y reconocidos por CFE sin diferencia en el oficio RGROS-174/20 $4,598,31.38*
>
> *Gastos por la Gestión de Personal y de Administración de Campo objeto de análisis que cumple con lo establecido en el Acuerdo para su compensación $3,238,440.3".*

248. Finalmente señala[167] que como parte de los US$ 520,960.62 (Quinientos veinte mil novecientos sesenta dólares americanos 62/100 cy) no acreditados, existe un total de US$ 133,905.48 (Ciento treinta y tres mil novecientos cinco dólares americanos 48/100 cy) que cumple con los requisitos del Acuerdo, sin embargo dichos pagos no han sido liquidados por el Contratista.

249. Agrega[168] que un total de US$ 45,940.79 (Cuarenta y cinco mil novecientos cuarenta dólares americanos 79/100 cy) corresponde a los montos retenidos al subcontratista MHO Engineering por concepto de

[165] Primer Informe de EY, p 28.
[166] Primer Informe de EY, p 30.
[167] Primer Informe de EY, p 31.
[168] Primer Informe de EY, p 31.

retención de calidad, advierte que dichos conceptos no han sido reembolsados al contratista, por lo que no han sido erogados por DUNOR.

250. Por su parte, la Demandada formula sus observaciones en relación con este *item* bajo los siguientes rubros[169]: i) gastos fuera del periodo de reconocimiento; ii) facturas no liquidadas; (iii) gastos no susceptibles de reconocimiento por no estar en el alcance del acuerdo; (iv) gastos no razonables; y (v) gastos sin un soporte documental.

251. Por lo que se refiere a gastos fuera del período de reconocimiento, señala que los mismos se desecharon como consta en el documento RGROS-174/20 a pesar de haber sido conciliados[170]. A este respecto la Demandante en su Réplica señala que la Comisión en su Contestación analizó cada factura, a pesar de que las incluidas en este rubro no han sido reclamadas[171]. La Demandada por su parte señala que la Demandante presentó todas las facturas como anexos a su Demanda, por lo que la Demandada se pronunció sobre ellas en su Contestación. En relación con este punto encuentra el Tribunal que los gastos a que se refiere esta objeción no son reclamados por la Demandante, por lo que no hay lugar a realizar consideraciones adicionales.

252. En cuanto a las facturas no liquidadas, en su Dúplica[172] la Demandada señala que existe un monto de US$ 133,905.48 (Ciento Treinta y tres mil novecientos cinco dólares americanos 48/100cy) que corresponde a facturas de Elecnor de México consideradas por la Comisión como no procedentes porque no han sido pagadas y en consecuencia no podrían ser reembolsadas. Este monto coincide con el que el Perito EY señala que no ha sido pagado por el Contratista[173]. En su Réplica la Demandante señala que no han sido pagadas debido a la asfixia financiera a la que la CFE tiene sometida a

[169] Contestación de CFE, párrafo 300.
[170] Contestación de CFE párrafos 302.
[171] Contestación y Réplica de Dunor, párrafo 65.
[172] Dúplica y Réplica a la Reconvención de la CFE, párrafo 68.
[173] Primer Informe de EY, p 31.

Dunor[174]. En esta medida, considera el Tribunal que como quiera que lo que se debe reembolsar son los gastos incurridos solo hay lugar reconocer este monto en tanto se haya pagado.

253. Por lo que se refiere a gastos no susceptibles de reconocimiento por no estar en el alcance del acuerdo, la Demandada en su Dúplica se remite a lo expuesto en los párrafos 307 a 312 de su Contestación. Por su parte la Demandante se refiere a los diferentes casos e indica que en cuanto se refiere a las facturas relacionadas con el suministro de consumibles o mano de obra para instalaciones provisionales, las mismas no se reclama bajo este rubro, sino bajo el apartado 3.5 del Acuerdo y agrega que los demás gastos a que se refiere la Demandada en ese rubro no son importes reclamados en este arbitraje[175], por lo anterior considera el Tribunal que respecto de estos últimos gastos no proceden consideraciones adicionales.

254. En cuanto se refiere a los gastos no razonables, los mismos se refieren a las sumas reclamadas por energía eléctrica, gastos de personal de la empresa Entre el Angel y la Diana, S.A. de C.V., y otras facturas por servicios profesionales que según la Demandante no tenían valor directo para el Proyecto. Procede entonces el Tribunal a pronunciarse sobre estos últimos conceptos.

255. En relación con las sumas por energía eléctrica, la Demandada[176] señala que los "*Gastos por la Gestión de Personal y de Administración de Campo*", fracción V inciso f), solo son aplicables los gastos por consumo de oficina, y no de ninguna otra actividad.

256. A tal efecto advierte la Demandada[177] que el Contratista solo tenía contratado un servicio de energía eléctrica con la CFE con un solo medidor de luz del cual se alimentaba a las oficinas y a la obra, por lo tanto solo existía un solo recibo que incluía el consumo en ejecución del desarrollo de la obra y

[174] Contestación y Réplica de Dunor, párrafo 66.
[175] Contestación y Réplica de Dunor, párrafo 67.
[176] Dúplica y Réplica a la Reconvención de la CFE, párrafo 71.
[177] Dúplica y Réplica a la Reconvención de la CFE, párrafo 72.

pruebas de puesta en marcha. Advierte que esto se puede constatar con los consumos de energía eléctrica de los años 2016 y 2017, donde los consumos no excedían de los MXN$ 57,902.00 (Cincuenta y siete mil novecientos dos pesos mexicanos 00/100 M.N.) mensuales por concepto de consumo oficinas y obra (28,248 kWh por precio promedio de 2.0498 $ / kW), y los cuales a partir de mayo del 2017 se incrementaron sustancialmente por el orden de los MXN$ 279,462.29 (Doscientos setenta y nueve mil cuatrocientos sesenta y dos pesos mexicanos 29/100 M.N.) mensuales (151,618 kWh por precio promedio de 1.8432 $ / kW), cuando DUNOR inició actividades de pruebas, pretendiendo que se le reconozca el total de la factura.

257. Señala la Comisión[178] que con la finalidad de reconocer lo justo y razonable, determinó los consumos de oficinas, comedor y enfermería, estimados de acuerdo a la carga máxima del equipo e instalaciones de la Demandante, verificadas en Sitio. Aclara que los cálculos de la Comisión se refieren únicamente y exclusivamente a las instalaciones provisionales propiedad de DUNOR (oficina, comedor y enfermería), sin incluir las instalaciones de Subcontratistas que también estaban consumiendo del mismo medidor de luz.

258. Agrega entonces que el cálculo del Perito EY no tiene sustento alguno[179], por las siguientes razones: a) la carga instalada en las oficinas, comedor, enfermería, etc., no pueden generar estos consumos de energía eléctrica facturados y reclamados, b) si bien DUNOR declara que no hubo actividades relacionadas con la obra en los meses que tomó el Perito EY para su cálculo, señala la CFE que en el periodo de tiempo que se considera en el cálculo sí incluye actividades desarrolladas en la obra hasta la fecha de Aceptación Provisional del Proyecto, misma que fue el 14 de agosto de 2019, donde se registraron trabajos de obra pendientes por atender, las cuales consisten en 658 Deficiencias Menores y posteriormente 95 Reclamos de Garantía, que hoy no se han atendido en su totalidad, por lo que resulta falso

[178] Dúplica y Réplica a la Reconvención de la CFE, párrafo 73.
[179] Dúplica y Réplica a la Reconvención de la CFE, párrafo 74.

lo señalado por el Perito EY, donde indica que en dicho periodo del mes de mayo de 2019 a marzo de 2020 no había actividades relacionadas con las obras. Destaca que el perito está reconociendo implícitamente que había una sola conexión de luz para las oficinas y la obra. Agrega que en el Segundo Informe Pericial de EY, se disminuyó el monto inicial reclamado aproximadamente a un 50%, y aun así resulta excesivo el consumo de energía eléctrica para oficinas de campo, no siendo claros en la metodología utilizada para determinar los gastos. Señala[180] que el monto razonable a reconocer es de US$ 17,981.00 (Diecisiete mil novecientos ochenta y un dólares americanos 00/100 cy) como máximo, lo cual es acorde a la carga instalada por el consumo de oficinas e instalaciones provisionales y no el monto de US$ 30,672.97 (Treinta mil seiscientos setenta y dos dólares americanos 97/100 cy) determinado por el Perito EY, que no está basado en cifras reales de los equipos instalados en las oficinas de campo y que considera estos consumos de energía eléctrica de obra, la cual se estaría pagando doble ya que es parte del precio del Contrato.

259. Por su parte la Demandante[181] señala que el monto reclamado por DUNOR por energía eléctrica para oficinas de obra durante el Periodo de Análisis por MXN$ 606,374.32 (Seiscientos seis mil trescientos setenta y cuatro pesos mexicanos32/100 cy) que señala la Demandada, no corresponde con un consumo mensual razonable de una oficina de campo. Advierte que CFE se basa en la capacidad instalada para estimar lo que considera un "*gasto razonable*" por este concepto. Por su parte, para la comprobación de este gasto, EY revisó un cálculo realizado por DUNOR basado en el gasto promedio de los meses de mayo 2019 a marzo 2020 del pago de luz (sin IVA), ya que en estos meses no hubo actividades relacionadas con la obra, por lo que el gasto de este periodo correspondió solo al uso de electricidad para las oficinas de campo. De conformidad con este cálculo, EY determinó la procedencia y razonabilidad de un monto de US$ 30,672.97 (Treinta mil seiscientos setenta y dos dólares americanos

[180] Dúplica y Réplica a la Reconvención de la CFE, párrafo 76.
[181] Réplica y Contestación Reconvención, párrafo 68.

97/100 cy) por este concepto[182]. Agrega el perito que este monto se soporta en cálculos basados en cifras reales de las oficinas de campo y no en meras estimaciones teóricas que toman como referencia la potencia instalada (como lo hace la Comisión en su Memorial de Contestación).

260. En relación con el consumo de energía encuentra el Tribunal acreditada la diferencia ente el consumo de energía de Empalme II frente a Empalme I (Anexo R-113).

| | **EMPALME II** | **EMPALME I** | **OBSERVACIÓN** | **DIFERENCIA** |
|---|---|---|---|---|
| **No. De Servicio CFE** | **85520 16-07-14** | **525160201601** | | |
| dic-17 | $269,391.65 | S/M | Se anexa recibo Se anexa recibo Se anexa recibo Se anexa recibo Se anexa recibo Se anexa recibo Se anexa recibo | ***NO ES POSIBLE TENER DIFERENCIA POR CARECER DE MONTOS*** |
| ene-18 | $207,237.13 | S/M | | |
| feb-18 | S/M | $21,673.11 | | |
| mar-18 | S/M | $25,555.51 | | |
| abr-18 | S/M | $26,092.98 | | |
| may-18 | S/M | $32,481.62 | | |
| jun-18 | S/M | $38,659.94 | | |
| jul-18 | $271,011.34 | $44,227.94 | | $226,783.40 |

[182] Réplica, párrafo 68.

| | | | | |
|---|---|---|---|---|
| ago-18 | $114,360.42 | $45,533.33 | Importe obtenido de históricos de julio 2018 | $68,827.09 |
| sep-18 | $135,276.77 | $43,923.35 | | $91,353.42 |
| oct-18 | $92,824.17 | $30,777.08 | | $62,047.09 |
| nov-18 | $67,179.01 | $19,449.88 | | $47,729.13 |
| dic-18 | $105,253.43 | $12,711.81 | | $92,541.62 |
| ene-19 | $114,894.72 | $14,690.64 | | $100,204.08 |
| feb-19 | $105,706.16 | $18,073.04 | | $87,633.12 |
| mar-19 | $606,376.76 | $17,544.23 | | $588,832.53 |

261. Por otra parte se anexó también la estimación del consumo realizada por funcionarios de la Demandada teniendo en cuenta los equipos instalados (Anexo R-048).

262. Al revisar dichos documentos se aprecia, de una parte, una diferencia sustancial en el consumo de electricidad de las dos centrales, lo que de los elementos aportados por la Demandante, no parece tener justificación, a menos que ello corresponda a la energía empleada en resolver problemas de deficiencias menores u otras actividades. Es de advertir que el promedio de consumo de EMPALME I que cita también la Comisión, se acerca más a los consumos estimados por la Demandada, es decir la suma de MXN$ 606,374.32 (Seiscientos seis mil trescientos setenta y cuatro pesos mexicanos 32/100 cy).

263. Tomando en cuenta los elementos aportados por las Partes que resultan documentalmente válidos, como consecuencia de lo anterior el Tribunal considera que se debe reconocer un monto de US$ 17,981.00 (Diecisiete mil novecientos ochenta y un dólares americanos 00/100 cy).

264. Por otra parte señala la Comisión[183] que en relación con el personal a cargo de la empresa "*ENTRE EL ANGEL Y LA DIANA S.A. DE C.V.*", se solicitó la documentación soporte, entre otros, el tabulador salarial, con la evidencia de los costos por cada uno de los trabajadores presentados en las

[183] Contestación de CFE, párrafo 317.

diferentes facturas. Señala que el Contratista se negó alegando que de entregar este desglose se violaría la ley de protección de datos personales.

265. Al respecto en su Réplica[184] señala la Demandante que *"la Comisión reconoce un total de USD$ 756,231.13 de los USD$ 840,761.44 reclamados por Dunor".* Agrega que "*los US$ 84,530.32* de diferencia corresponden, según CFE, a importes que la Demandante* '*dolosamente pretende que la Comisión cubra [y que se refieren a] la totalidad de prestaciones de toda la antigüedad del tiempo trabajado en la obra (liquidaciones, vacaciones, etc.*)'". Señala la Demandante que sin embargo, de conformidad con el criterio del Perito EY, estas prestaciones entran dentro del concepto de "*Prestaciones a que obliga la Ley Federal del Trabajo*" referenciado en el Acuerdo y que tuvieron lugar dentro del Periodo de Análisis. Además, debe tenerse en cuenta que si bien existen algunos gastos dentro del Periodo de Análisis que pudieran no tener su origen en la prórroga, existen otros que sí fueron derivados de la prórroga y que, en cambio, quedaron fuera del periodo acordado. Así, tanto el Perito EY como DUNOR coinciden en que se trata de gastos procedentes, ya que corresponden a un concepto de gasto acordado para reembolso y que tuvo lugar en el Periodo de Análisis. Adicionalmente debe tenerse en cuenta que, según los cálculos del Perito EY y las cédulas de gasto, el importe reconocido como procedente por parte de CFE a julio de 2020 era de US$ 768,941.30 (Setecientos sesenta y ocho mil novecientos cuarenta y un dólares americanos 30/100 cy) y no de US$ 756,231.13 (Setecientos cincuenta y seis mil doscientos treinta y un dólares americanos 13/100 cy)..

266. Al respecto la Demandada[185] señala que la controversia en este punto no es si son aplicables o no las prestaciones, pues el Acuerdo lo contempla, pero lo que se debe reconocer es la parte proporcional. Señala la Demandada que DUNOR pretende que la Comisión absorba todos los gastos laborales por prestaciones que no pertenecen al período de reconocimiento. Por ello la

[184] Réplica y Contestación Reconvención, párrafo 68.
[185] Dúplica y Réplica a la Reconvención de la CFE, párrafo 79.

Comisión hizo el cálculo por honorarios, salarios y prestaciones, metodología que es justa y razonable al no contar con información que debió ser proporcionada por la Demandante.

267. En relación con lo anterior, debe observar el Tribunal que para que la Demandada deba reconocer una suma por estos conceptos debe suministrarse la información que señala el numeral 3.2 del Acuerdo, excluyendo la información "*sensible*" que no afecte en la acreditación y determinación de importe reclamado. Por consiguiente, desde el punto de vista del Acuerdo celebrado por las Partes, si la información solicitada es necesaria para determinar el importe reclamado la misma debe proveerse. Como quiera que no aparece acreditado que dicha información se haya suministrado, la reclamación de DUNOR debe negarse en relación con este aspecto.

268. Señala la Demandante[186] que la Demandada alega que diversas facturas correspondientes a "*Servicios profesionales, realización de reclamación de gastos indirectos incurridos por Dunor*" no serían razonables por no ser un servicio que brinde valor directo al Proyecto. A este respecto señala que el Acuerdo lo que pretende es compensar, esto es, mantener al Contratista indemne por retrasos superiores a 60 días debido a Fuerza Mayor Gubernamental o por culpa de la Comisión. Advierte entonces que resulta claro que no se estaría compensando al Contratista si tuviera que asumir los gastos necesarios para hacer aplicable el propio Acuerdo. Señala que estos gastos (i) se incardinan en el apartado 3.2 del mismo; (ii) corresponden al Periodo de Análisis y, (iii) cumplen con todos los requisitos para ser reembolsables.

269. Por su parte la Comisión señala que las actividades realizadas bajo el concepto de las facturas referidas, no cumplen con el objeto del Acuerdo, ya que la naturaleza de los trabajos reclamados son la "*Revisión, análisis y armado de reclamación de Gastos Financieros e incremento de garantías*", lo cual no es un gasto directo relacionado con las obras y que no brindan valor

[186] Réplica, párrafo 68.

directamente con el Proyecto. Agrega además que algunas de estas facturas no tienen comprobante de pago.

270. Entiende el Tribunal que las Partes se refieren a las facturas presentadas por DUNOR que fueron rechazadas por la CFE y a las que se refiere esta última en el párrafo 327 de su Memorial de Contestación y Reconvención. De acuerdo con lo expuesto en dicho párrafo "*la Demandante presentó facturas que Comisión rechazó en el apartado 'III. Servicios', inciso a) 'Consultores, Asesores, Servicios y Laboratorios', como es el caso de ELECNOR MEXICO S.A. DE C.V., con el concepto 'Revisión, análisis y armado de reclamación de Gastos Financieros e incremento de garantías de equipos de los meses agosto 2018, septiembre 2018, octubre 2018 y noviembre 2018' y de la empresa PROYECTOS E INGENIERÍA PYCOR S.A. DE C.V., con el concepto "Servicios profesionales, realización de reclamación de gastos indirectos incurridos por DUNOR, periodo de agosto de 2018 a noviembre de 2018", ya que No son Razonables por ser un servicio que no brinda valor directamente al Proyecto y son exclusivamente en beneficio de la Demandante para entablar reclamaciones a la Comisión, por lo que resulta improcedente e inaceptable que la Demandada absorba dichos gastos, los cuales deben estar a cargo del Contratista y que además no están previstos en el Acuerdo 25.5*".

271. En relación con este punto advierte el Tribunal que la Cláusula 25.5 prevé la compensación de los gastos "*que estén directamente relacionados con las obras*", por lo que es claro que los gastos incurridos en la preparación de la reclamación no tienen tal carácter y por ello no pueden ser reconocidos. En todo caso advierte el Tribunal que en el anexo DOC.EY-21 al Primer Informe del Perito EY se indican una serie de transacciones con Elecnor que no han sido liquidadas por el Contratista.

272. Por lo anterior, se reconocerán las sumas señaladas por el Perito EY, con excepción del valor por energía eléctrica, caso en el cual se reconocerá el monto calculado por la CFE US$ 17,981.00 (Diecisiete mil novecientos ochenta y un dólares americanos 00/100 cy) y no el reclamado por el Contratista US$ 30,672.97 (Treinta mil seiscientos setenta y dos dólares americanos 97/100 cy),

y el valor correspondiente a las prestaciones de MHO ENGINEERING por US$ 84,530.32 (Ochenta y cuatro mil quinientos treinta dólares americanos 32/100 cy).

273. Por consiguiente el valor a reconocer y pagar por parte de la Demandada es la suma de US$ 7’739,641.51 (Siete millones setecientos treinta y nueve mil seiscientos cuarenta y un dólares americanos 52/100 cy).

274. Es pertinente agregar que las sumas que no han sido pagadas por la Demandante, que forman parte las partidas identificadas por el Perito EY, deberán ser pagadas por la Demandada cuando se acredite el pago efectivo por la Demandante. Lo anterior con excepción a los gastos incurridos por la preparación de la reclamación a los que se ha hecho referencia.

### 12.1.2.4 Gastos de Administración y Estructura de las Oficinas

#### 12.1.2.4.1 Posición de la Demandante

275. En relación con los Gastos de Administración y Estructura de las Oficinas, DUNOR expresa que el apartado 3.3 del Acuerdo prevé que CFE designe a un Consultor Externo para analizar y cuantificar esta partida de gastos. Considera que, aunque la Comisión retrasó deliberadamente esta designación (desde el 28 de agosto de 2019 hasta el 13 de febrero de 2020), finalmente designó a la empresa EY quien emitió su informe con fecha de 3 de agosto de 2020 (Informe sobre Costos Indirectos de EY), mediante el cual validó US$ 2’663,129.37 (Dos millones seiscientos sesenta y tres mil ciento veintinueve dólares americanos 37/100 cy) por Gastos de Administración y Estructura de las Oficinas Centrales reclamados por DUNOR y concluyó que los costos indirectos indicados por la Demandada, que se encuentran en un rango de 3-4.5%, son razonables, debiendo ser entonces reembolsados por la CFE. Se precisa que en este rubro se incluyen los gastos incurridos por DUNOR a nivel corporativo en la ejecución del Proyecto, durante el Periodo de Análisis, los cuales no han sido debidamente satisfechos por parte de CFE[187].

[187] Memorial de Demanda, No 103-106.

276. DUNOR señala que dicho informe arrojó las siguientes conclusiones: (i) resulta procedente y razonable, dadas las circunstancias, cuantificar el concepto reconocido en el apartado 3.3 del Acuerdo. (ii) Existen tres (3) estructuras centrales que proporcionan servicios a DUNOR y que, por ende, han incurrido en costos indirectos en la ejecución del Proyecto. (iii) El importe total de costos indirectos incurridos por las oficinas centrales de DUNOR, para el periodo indicado, ascendió a US$ 2’663,129.37 (Dos millones seiscientos sesenta y tres mil ciento veintinueve 37/100 cy)[188].

277. Agrega que la Comisión solicitó aclaraciones, que fueron oportunamente contestadas por EY. Sin embargo, el 30 de octubre de 2020 CFE volvió a reiterar su solicitud de aclaraciones desconociendo las conclusiones de EY, a pesar de que la intención del Acuerdo era claramente que las conclusiones del Consultor Externo fuesen vinculantes para ambas Partes[189].

278. DUNOR advierte que el Perito EY ha revisado y validado nuevamente su informe anterior como parte del informe pericial que adjunta al Memorial de Demanda y sostiene que el Perito EY ha alcanzado las mismas conclusiones, a saber: (i) que los costos indirectos están reflejados en el Balance de Situación y en la Cuenta de Pérdidas y Ganancias; (ii) que se incluyen en el Catálogo General de Cuentas del sistema contable; (iii) que encajan en la definición de coste “*indirecto*” con base en la doctrina contable y el artículo 211 del RLOPSMR ; (iv) que están directamente relacionados con el Proyecto y fueron incurridos durante el Periodo de Análisis, y (v) que el porcentaje de imputación es razonable conforme al Acuerdo y las Directrices OCDE en materia de precios de transferencia. Derivado de lo anterior, EY concluye que el importe total de Costos de Administración y Estructura de las Oficinas Centrales incurridos por DUNOR durante el Periodo de Análisis asciende a un total de US$ 2’975,708.00 (Dos millones novecientos setenta y cinco mil setecientos ocho dólares americanos 00/100 cy) (este importe está calculado al tipo de cambio de 31 de diciembre de 2020). Dicho monto “*está dentro del rango razonable respecto de las prácticas*

[188] Réplica y Contestación Reconvención, No 107.
[189] Memorial de Demanda, No. 108.

*de mercado*" y debe ser compensado a DUNOR conforme al apartado 3.3 del Acuerdo[190].

279. Adicionalmente, DUNOR agrega en su Réplica que CFE y su perito no reconocen alguna suma a la Demandante por este concepto, sin embargo, sus argumentos son discrepantes en este punto. En primer lugar, la Pericial DATG no pone en duda la metodología que EY siguió en el Informe, y confirma que los gastos erogados por este concepto se encuentran directamente relacionados con el Proyecto. Del mismo modo, la Pericial DATG entiende razonables los porcentajes de Costos Indirectos Administrativos calculados por EY. Agrega DUNOR que el perito de CFE confirma que los porcentajes de Costos Indirectos identificados en estudios realizados y/o solicitados por CFE son sustancialmente superiores a los indicados por el Perito EY (en un rango de 8-14%), llegando incluso a afirmar, sobre la experiencia propia de CFE, que: "*Nos fue afirmado que esa Dirección, la cual controla a la Coordinación de Proyectos Termoeléctricos (quien solicitó este estudio) incorpora a su precio de venta de sus proyectos de ingeniería el 15% de Costos Indirectos relacionados con el Costo del Administrativo del Corporativo de esa Dirección y de CFE. Y que en proyectos fuera de México se ha agregado hasta el 21,5% sobre el monto directo, en procesos de licitatorios internacionales*"[191].

280. Sostiene entonces que un primer punto de discrepancia son los Costos Indirectos de las Oficinas Centrales inicialmente contenidos en la Oferta Económica (que no los referentes al Acuerdo) que ascendían a una cantidad que oscilaba entre US$ 8'981,774.00 (Ocho millones novecientos ochenta y un mil setecientos setenta y cuatro dólares americanos 00/100 cy) y US$ 13'472,661.00 (Trece millones cuatrocientos setenta y dos mil seiscientos sesenta y un dólares americanos 00/100 cy).

281. Advierte DUNOR que respecto de estos costos la Comisión y su perito se inventan un requisito no previsto en el Acuerdo, a saber, que ese monto inicialmente presupuestado debía agotarse en su totalidad para que lo ahora reclamado por DUNOR suponga un costo adicional.

[190] Memorial de Demanda, No. 109 y 110.
[191] Réplica y Contestación Reconvención, No 101.

282. La Demandante sostiene que esta lógica es deficiente por cuanto el Acuerdo tiene como objetivo compensar al Contratista por los costos en que incurre por un período de retraso imputable a CFE, incluso con una franquicia de 60 Días, siendo esto independiente del hecho de que se hayan agotado o no los Costos Indirectos de las Oficinas Centrales correspondientes al período contractual. Agrega que el Contrato es un contrato EPC a riesgo y ventura del Contratista, en el que se presupuestaron unos gastos determinados por Costos Indirectos de Oficinas Centrales. Dada la naturaleza del Contrato, de incurrirse en sobrecostos, sería DUNOR quien los absorbería, de igual manera sería DUNOR quien se beneficiaría en caso de erogar menores costes a los presupuestados[192]. Adicionalmente, recuerda que los gastos presupuestados se calculan con base a la totalidad del Precio del Contrato y respecto a la duración del Proyecto inicialmente acordada (916 días). El Acuerdo, en cambio, es un acto jurídico independiente, que cubre un Periodo de Análisis adicional a esos 916 días[193].

283. En segundo lugar, el Perito DATG estima que no es posible emitir una opinión determinante sobre la razonabilidad de este concepto en tanto el Tribunal Arbitral no se haya pronunciado sobre el resto de los conceptos en disputa. Sostiene DUNOR que esta argumentación, además de poco comprensible, carece de lógica, en tanto, tal y como indica el Perito EY, no se entiende por qué el Perito DATG establece un nexo causal entre (i) la razonabilidad de los costos indirectos de casas matriz calculadas sobre los costos directos de la obra, y (ii) los costos adicionales en disputa. Ni para DUNOR ni para EY existe tal relación. Los costos incluidos bajo el apartado 3.3 no son sino unos más de los enumerados en el Acuerdo de forma independiente, nada tienen que ver éstos con los demás, ni existe entre sus montos relación alguna[194].

284. En tercer lugar, la Demandante señala que el Perito DATG entiende que los costes indirectos del corporativo no serían razonables por dos motivos: (i) no se cuenta con un documento que permita discernir cómo fueron distribuidas las cargas de trabajo entre las tres empresas matrices, ni tampoco se han identificado las actividades y evidencia de los servicios prestados por cada una

[192] Réplica y Contestación Reconvención, No. 105.
[193] Réplica y Contestación Reconvención, No 105.
[194] Réplica y Contestación Reconvención, No. 106.

de ellas y, (ii) en todo caso, los costos imputados a Elecnor México no serían razonables, pues "*tiene una participación accionaria de 0.01% y presenta un 8.49% del reclamo*"[195].

285. Al respecto, DUNOR sostiene que hace suyas las consideraciones del Perito EY, quien establece que el Acuerdo no requiere que la razonabilidad de los costos indirectos del corporativo se determine con referencia a un documento que establezca la distribución de las cargas de trabajo (el Acuerdo no requiere siquiera la elaboración de dicho documento). Asimismo, el Perito EY indica que la manera de cuantificar los costos indirectos de las casas matrices no es si existen o no contratos de prestación de servicios, sino "*con base en criterios de imputación razonables de los costos indirectos existentes en cada uno de los proyectos*". Agrega que tampoco se requiere que se deban identificar las actividades y la evidencia de los servicios prestados[196].

286. También expresa DUNOR que, tal y como explica el Perito EY, la cuantificación de los costos indirectos de las casas matrices se realizó con base en criterios de imputación razonable de los costos indirectos existentes para cada uno de los proyectos (entre los que se encuentra Empalme II), dando así cumplimiento a lo requerido en el Acuerdo, lo que analizó a satisfacción el Perito EY con toda la información requerida[197].

287. Por otra parte, en cuanto a los reparos que formula la CFE a los costos de Elecnor México por su baja participación, señala DUNOR que se trata de un argumento carente de sentido, por cuanto nada tiene que ver la participación accionaria de un determinado corporativo con los servicios por éste prestados y, en consecuencia, con los costes incurridos. Esta también es la posición del Perito EY, quien además establece que tratar de vincular proporción accionaria y porcentaje de reparto supondría desconocer los criterios de cálculo del Acuerdo, tal y como fueron explicados en el Informe del Perito EY. Además, aclara que Elecnor España es la empresa matriz y por ello incorpora en su organización a Elecnor México. Elecnor España es quien toma la decisión de cómo encauzar sus actividades en cada proyecto y en este caso, decidió que

[195] Réplica y Contestación Reconvención, No. 107.
[196] Réplica y Contestación Reconvención, No. 108.
[197] Réplica y Contestación Reconvención, No. 108.

gran parte de las actividades de apoyo al corporativo fuesen prestadas por su filial mexicana, cosa que, por otro lado, explica por qué los costes de Elecnor España (25.52% del total) son comparativamente tan bajos. Es decir, la utilización del corporativo de Elecnor en México fue más eficiente que haber utilizado sus oficinas en España, lo que lógicamente reduce la cuantía de la reclamación de DUNOR por los costes del corporativo en España[198].

288. Asimismo, DUNOR señala que la Comisión no acepta el Informe del Perito EY, de 3 de agosto de 2020, porque en su opinión CFE no ha mostrado su conformidad expresa y porque CFE habría carecido de elementos para determinar la procedencia del Informe en tanto no había podido revisar las fuentes del Perito EY para sostener que unos costes en un rango del 34.5% serían razonables[199].

289. Adicionalmente, la Demandante indica que CFE considera que el Perito EY no fue imparcial en la emisión de su Informe, al haber sido posteriormente contratado por DUNOR en el marco de este procedimiento, debiendo desestimarse dicho Informe[200].

290. DUNOR expresa que CFE afirma que el hecho de que fuese ella quien designó a EY como Consultor Externo "*no implicaba que la Comisión aceptara [el Informe] en su totalidad sin una revisión previa*". Advierte DUNOR que esta interpretación es manifiestamente contraria al Acuerdo, donde se estipula que *"[p]ara determinar la procedencia y correspondiente participación sobre el proyecto de la administración y estructura central con la que cuenta EL CONTRATISTA a nivel corporativo, LA COMISIÓN designará un Consultor Externo... para que lleve a cabo la validación de la razonabilidad de la procedencia del concepto y lleve a cabo la revisión documental requerida*"[201].

291. Señala DUNOR que el Acuerdo permite a la Comisión tener acceso al proceso de revisión y le otorga el derecho a que se le proporcione información.

[198] Réplica y Contestación Reconvención, No. 109 y 110.
[199] Réplica y Contestación Reconvención, No.112.
[200] Réplica y Contestación Reconvención, No.112.
[201] Réplica y Contestación Reconvención, No.114.

Sin embargo, esto no significa que lo decidido por el Consultor Externo quede supeditado a la "*validación*" de la Demandada[202].

292. Agrega la Demandante que la Comisión señala que "*EY… no aportó elementos que permitieran a CFE determinar la procedencia del Informe, argumentando que debido a obligaciones de confidencialidad que EY mantiene con la Contratista, no es posible proporcionar esta información*"[203].

293. A este respecto, DUNOR destaca que tal y como se desprende del Documento C-085, la confidencialidad alegada por CFE sólo juega un rol relevante respecto a dos de las siete preguntas planteadas por la Comisión. La primera se refiere a la fuente del Perito EY para afirmar que el rango de 3 - 4,5% es acorde a otros proyectos similares y, por ende, razonable. El Perito EY respondió estar contractualmente impedida de facilitar esa información debido a motivos de confidencialidad con sus clientes, no con DUNOR. Es decir, el Perito EY se refiere a cláusulas de confidencialidad en contratos con terceros, siendo su experiencia con ellos la que le permite afirmar la razonabilidad de los costes indirectos[204].

294. DUNOR agrega que lo mismo sucede en la pregunta 3, en la que CFE solicita conocer la "*postura de EY sobre la razonabilidad de los Costos Corporativos de empresas similares*". El Perito EY contesta que no puede proporcionar esta información por la "*confidencialidad que la firma EY mantiene sobre información de empresas similares*". Expresa DUNOR que el perito de la Comisión compartió algunos estudios que establecen que los costos indirectos pueden estar un rango del 8 al 14% pero que por cuestiones de confidencialidad no fue posible conocer las empresas, países y períodos considerados[205]. Por lo anterior señala DUNOR que CFE también se ampara en la confidencialidad para no desvelar sus fuentes ni tan siquiera a su perito y es del todo irrazonable que la Comisión pretenda ahora que el Perito EY actúe de un modo diferente, máxime cuando

[202] Réplica y Contestación Reconvención, No. 117.
[203] Réplica y Contestación Reconvención, No. 118.
[204] Réplica y Contestación Reconvención, No. 119.
[205] Réplica y Contestación Reconvención, No. 120 y 121.

resulta que el porcentaje de costes indirectos identificado por CFE es sustancialmente superior al propuesto por el Perito EY[206].

295. DUNOR señala que la Demandada ha llegado incluso a cuestionar la imparcialidad del Perito EY, justificando su gravísima acusación con una falsedad, que "*al momento de su elaboración [del Informe], EY ya formaba parte del equipo de Defensa de la Demandante, situación que invariablemente afecta también a la imparcialidad y objetividad del [Informe Pericial EY, de 5 de febrero de 2021*]"[207]. Frente a esto, DUNOR precisa que el Informe relativo al apartado 3.3 del Acuerdo fue emitido por EY el 3 de agosto de 2020 y DUNOR solo contrató al Perito EY el 18 de diciembre de 2020 es decir, 137 días después[208].

296. Por todo lo anterior, DUNOR concluye que los Costos de Administración y Estructura de las Oficinas Centrales de DUNOR cumplen con todos los requisitos del Acuerdo, debiendo CFE reembolsar a DUNOR un monto total de US$ 2'975,708.00 (Dos millones novecientos setenta y cinco mil setecientos ocho dólares americanos 00/100 cy) [209].

#### 12.1.2.4.2 Posición de la Demandada

297. Frente a esta controversia, la Comisión sostiene que la Demandante solo trata de justificar el actuar doloso del Perito EY cuando fungía como Consultor Externo. Agrega que la Demandante pretende un monto por US$ 2'975,708.00 (Dos millones novecientos setenta y cinco mil setecientos ocho dólares americanos 00/100 cy), sin embargo, la Comisión sostiene que esta cantidad no ha sido soportada documentalmente por DUNOR ni por su Perito[210].

298. Además, CFE señala que la designación del Consultor Externo para que realizará el análisis correspondiente, no implicaba que Comisión lo aceptara en su totalidad, sin una revisión previa y poder realizar las manifestaciones que a su derecho convenga[211]. Lo anterior, porque la Comisión no formó parte del

[206] Réplica y Contestación Reconvención, No 122.
[207] Réplica y Contestación Reconvención, No. 126.
[208] Réplica y Contestación Reconvención, No. 127.
[209] Réplica y Contestación Reconvención, No. 131.
[210] Dúplica y Réplica a la Reconvención de la CFE , No. 105 y 106.
[211] Memorial de Contestación y Reconvención, No. 376.

análisis del consultor, y para poder reconocerlo como válido y razonable, requiere evaluar la metodología aplicada, llevar a cabo una revisión general de la información revisada y evaluar la razonabilidad de los montos determinados de conformidad con el Acuerdo. Por lo tanto, la Comisión, mediante correo electrónico de fecha 28 de septiembre de 2020, solicitó al Contratista una serie de aclaraciones respecto del Dictamen elaborado por el Consultor EY[212].

299. Agrega la Comisión que el Perito EY al referirse a las observaciones planteadas por la Comisión, no aportó elementos que permitieran a CFE determinar la procedencia del Dictamen, pues argumentó que debido a obligaciones de confidencialidad que EY mantiene, no es posible proporcionar esta información. Además indicó que la información citada en el dictamen es lo que en la experiencia de la firma ha observado en países de América Latina en empresas internacionales con proyectos similares y con operaciones transnacionales[213].

300. Asimismo, CFE agrega que con fecha 30 de octubre de 2020, CFE vía correo electrónico le manifestó al Contratista lo que CFE entendía contestaba EY: "*Sería importante que las respuestas fueran realizadas desde la óptica de Ustedes como contratista y no de la firma, que entiendo tiene algunas limitaciones de confidencialidad o de conocimiento de las formas cómo se evalúa la razonabilidad de los extra-costos de proyecto*"[214].

301. Agrega que mediante correo de 7 de diciembre de 2020, el Contratista manifestó a la CFE lo siguiente: *"… Al respecto, desde DUNOR deseamos indicar que no tenemos previsto entregar más que lo ya presentado a CFE en el dictamen pericial elaborado por el perito designado de acuerdo a lo acordado entre las Partes en los Puntos 3.3 y 3.4 'Costos de Administración y estructuras Oficinas Centrales' de la Cláusula 25.5 del Contrato*"[215].

302. Señala la CFE que posteriormente DUNOR envió la solicitud de arbitraje, por lo cual la Comisión se vio materialmente imposibilitada de continuar con la

[212] Memorial de Contestación y Reconvención, No 377.
[213] Memorial de Contestación y Reconvención, No 380.
[214] Memorial de Contestación y Reconvención, No 381.
[215] Memorial de Contestación y Reconvención, No. 382.

revisión del Dictamen emitido por el Consultor Externo EY y en consecuencia, de reconocer como procedentes y razonables los Costos de Administración y Estructura de Oficinas Centrales, por lo que carece de elementos para manifestarse sobre las conclusiones a las que llegó el Consultor, dejando a la Comisión en un estado de indefensión[216].

303. Bajo esta misma línea, CFE señala que el consultor externo EY, que fue el que elaboró el Dictamen de fecha 03 de agosto de 2020, es ahora el perito elegido por la Demandante y quien elabora el dictamen de fecha 04 de febrero de 2021 que se acompaña a su Memorial de Demanda, por lo que dicho experto EY no fue imparcial en la elaboración del primer dictamen, ya que al momento de su elaboración ya formaba parte del equipo de Defensa de la Demandante, situación que invariablemente afecta también la imparcialidad y objetividad de su segundo dictamen[217]. Por lo anterior, solicita al Tribunal Arbitral desestimar el primer dictamen porque el Consultor Externo en el momento de la elaboración del dictamen no era imparcial, y por el contrario, no se tiene la certeza que lo desarrollado fuera para apoyar la postura de la Demandante.

304. Por otra parte, señala la CFE que el Perito De Anda, Torres, Gallardo y Cia, concluye que *"el costo determinado por DUNOR con apoyo de dictamen elaborado por la firma EY no es estrictamente un costo contable y solo debe identificarse como un costo económico hipotético*"[218]. Adicionalmente, señala que "*no se cuenta con un Contrato de Prestación de Servicios, entre las TRES casas matrices de DUNOR y esta; por lo que no es posible identificar las actividades que dichas empresas prestaron al Proyecto. Además, el estudio de la firma EY no menciona el haber revisado la evidencia de los servicios prestados … a DUNOR en México ni dicha evidencia fue proporcionada a CFE como parte de la documentación soporte del reclamo*"[219].

305. Consecuentemente y derivado de los dos puntos anteriores señala la Comisión que no se cuenta con evidencia de facturas, asientos contables, ni de los entregables asociados a servicios prestados, que permitan identificar un

[216] Memorial de Contestación y Reconvención, No. 384.
[217] Memorial de Contestación y Reconvención, No. 385.
[218] Memorial de Contestación y Reconvención, No 388.
[219] Ibíd.

costo erogado que pueda ser repercutido a CFE vía la Cláusula 25.5 del Contrato. Por todo esto, considera que el dictamen presentado por DUNOR y elaborado por la firma EY no debe ser la única documentación que DUNOR debió presentar como soporte de este concepto a reclamar y por lo tanto, el concepto de Costos Indirectos no cumple con el atributo de comprobación y en consecuencia no es procedente su reclamo por parte de la Contratista a la CFE[220].

306. Por otra parte, la Comisión señala que en la Orden Procesal No. 4, se instruyó la Demandada exhibir el Anexo 2 Solicitudes de la CFE, categoría 3 que corresponde a "*Todos los Contratos celebrados entre la Demandante y a quienes identifica como Partes Relacionadas*", mismos que la Demandante no presentó, ya que los documentos entregados son los Contratos de Crédito entre DURO FELGUERA Y ELECNOR, por una parte, y DUNOR ENERGÍA, por la otra, y los requeridos por la Demandada son los contratos de prestación de servicios que acrediten estos trabajos realizados al Contratista durante el período de reconocimiento de conformidad con el Acuerdo 25.5[221]. Por lo anterior, la Comisión se pregunta ¿el Perito EY tuvo en su poder los Contratos celebrados entre DUNOR y los que identifica como Partes Relacionadas?, y si es que contó con ellos, ¿por qué la Demandante no los presentó en la etapa de exhibición de documentos? En caso contrario entonces, ¿cómo es que realizó su análisis sin contar con estos contratos tan importantes?[222].

307. Agrega la Comisión que el Perito Moore está de acuerdo con su observación, ya que señala en su segundo dictamen pericial que el hecho de que no se cuente con evidencia de que los costos reclamados formaron parte de los libros de DUNOR, no permite validar los mismos para que sean cubiertos por CFE. Esto, porque el espíritu de la Cláusula 25.5 es un Reembolso de Costos y/o Gastos reales y no hipotéticos o económicos que pudieron erogarse por parte de la empresa Contratista[223].

[220] Ibíd.
[221] Dúplica y Réplica a la Reconvención de la CFE, No. 107.
[222] Dúplica y Réplica a la Reconvención de la CFE, No. 108.
[223] Dúplica y Réplica a la Reconvención de la CFE, No. 109.

308. La CFE sostiene además que la Demandante tergiversa los comentarios realizados por el Perito Moore, pues saca de contexto sus manifestaciones o las reproduce a medias como en el Numeral 100 del Memorial de Réplica, que señala: "*Del mismo modo, la Pericial DATG entiende razonables los porcentajes de Costos Indirectos Administrativos calculados por EY*", omitiendo que sigue diciendo: "*para que esto sea cierto se requiere concluir todos los conceptos adicionales en disputa los cuales con base en este rango presentado por DUNOR ascenderían a 78,529,166.66 USD. (Multiplicar este monto por el rango en % nos hace llegar al rango en USD que señala el dictamen de EY: USD 2,355,875- USD 3,533,813,87)*". Expresa la Comisión que la metodología por parte del Perito EY es correcta, pero la misma no contempla los escenarios en la que las Partes están en controversia, situación que la Demandante oportunamente omite señalar[224].

309. Por otra parte, señala la Comisión que la Demandante no cuenta con los documentos ordenados por el Tribunal Arbitral, ya que el único soporte de su pretensión es lo indicado por el Perito EY, en particular "*criterios de imputación razonables de los costos indirectos existentes en cada uno de los proyectos*". Agrega que lo anterior es contradictorio ya que más adelante en su Segundo Informe Pericial el Perito EY señala que sí tuvo acceso a la contabilidad de las casas matrices. Agrega que es por ello por lo que la Comisión insiste en que no se encuentran reflejadas las actividades prestadas por las 3 casas matrices en el período de reconocimiento de conformidad con el Acuerdo [225].

310. En este contexto la Comisión se pregunta: ¿cómo es que el Perito EY afirma que las actividades prestadas por las casas matrices se reflejan en los costos indirectos de sus contabilidades?, si la Demandante y éste no presentan los contratos señalados en la Orden Procesal No. 4, en los que se podría visualizar los trabajos relacionados con el período de reconocimiento, hecho que deja en evidencia que las argumentaciones del Perito EY carecen de soporte documental[226]. Señala la Comisión que el Perito EY se abocó a señalar costos sin contar con un soporte documental, tal y como lo indica el Perito Moore, "*sin*

[224] Dúplica y Réplica a la Reconvención de la CFE, No. 113.
[225] Dúplica y Réplica a la Reconvención de la CFE, No 115.
[226] Dúplica y Réplica a la Reconvención de la CFE, No. 116.

*tomarse la molestia*" de verificar si dichos costos forman parte o no de los libros contables de la Contratista[227].

311. Expresa que las voluminosas manifestaciones realizadas por la Demandante al querer justificar el actuar de EY cuando se conducía como Consultor Externo y que fungía como experto independiente de las Partes evidencian que este no fue imparcial y que a todas luces favorecía a DUNOR[228].

312. La Comisión destaca que el Dictamen presentado como Consultor y el Dictamen ya presentado como Perito de la Demandante, emplea la misma metodología y concluye de igual manera[229]. A lo anterior, agrega que, en todo caso, el Consultor debió abstenerse de participar en el presente caso como perito de cualquiera de las Partes por configurarse un conflicto de interés equiparable a los regulados en diversos instrumentos de *soft law* como las Reglas IBA sobre Conflicto de Interés[230].

313. Por último, añade que la credibilidad del perito está en duda porque cuando las Partes se encontraban conciliando los montos relacionados en el Acuerdo y en particular, al tema de Gastos de Administración y Estructura de las Oficinas Centrales, el Perito EY no había terminado con su labor de consultor cuando ya formaba parte del equipo de defensa de DUNOR en el presente Arbitraje[231].

#### 12.1.2.4.3 Consideraciones del Tribunal

314. En relación con este ítem el numeral 3.3. del Acuerdo establece

> *"Para determinar la procedencia y correspondiente participación sobre el proyecto de la administración y estructura central con la que cuenta EL CONTRATISTA a nivel corporativo, LA COMISIÓN designará un Consultor Externo especialista en la materia para que lleve a cabo la revisión de la razonabilidad de la procedencia del concepto y lleve a cabo la revisión documental requerida para la determinación del porcentaje de participación del corporativo respecto de la administración y ejecución del Proyecto. Asimismo, se*

[227] Dúplica y Réplica a la Reconvención de la CFE, No. 117.
[228] Dúplica y Réplica a la Reconvención de la CFE, No 119.
[229] Dúplica y Réplica a la Reconvención de la CFE, No 119.
[230] Dúplica y Réplica a la Reconvención de la CFE, No 120.
[231] Dúplica y Réplica a la Reconvención de la CFE, No. 121.

*contará con la presencia, de acuerdo a lo que se estipule entre las partes de un Fedatario Público o Notario Público quien dará fe de hechos del contenido de la documentación que se muestre al consultor externo y personal de LA COMISIÓN, de acuerdo a las actividades que se indican en el Procedimiento para la verificación del porcentaje de participación de indirecto de oficinas corporativas en la ejecución del Proyecto, quien emitirá el testimonio correspondiente.*

*Así mismo el Fedatario Público o Notario Público dará fe de:*

*I. Reporte que muestre el Estado de Resultados (Balance de Situación y Cuenta de Pérdidas y Ganancias) con la periodicidad que se muestre de la oficina central del sistema SAP o similar de Mayo de 2018 a la Fecha de Aceptación Provisional formalizada en el último Convenio Modificatorio al Contrato, que acrediten la afectación de costos al Proyecto 313 CC Empalme ll. Reporte que muestre el Catálogo General de Cuentas del sistema SAP o similar, en el que se detalle entre otras cosas los conceptos relacionados con las cuentas.*

*Cualquier documento que, en defecto de los anteriores, demuestre fehacientemente los costos de los conceptos anteriores"* (se subraya).

315. Desde esta perspectiva lo primero que debe determinar el Tribunal es cuál es la función del Consultor en la cláusula transcrita. Lo anterior porque señala la Demandada que la "*designación del Consultor Externo para que realizara el análisis correspondiente, no implicaba que Comisión lo aceptará en su totalidad, sin una revisión previa y poder realizar las manifestaciones que a su derecho convenga*"[232].

316. Si se revisa la cláusula se aprecia que la tarea del mismo es llevar "*la revisión de la razonabilidad de la procedencia del concepto*" y "*la revisión documental requerida para la determinación del porcentaje de participación del corporativo respecto de la administración y ejecución del Proyecto*". Desde esta perspectiva considera el Tribunal que la función del Consultor es apoyar a las partes en esta materia. El pacto no prevé claramente que la opinión del Consultor defina la materia, pues su función es revisar la razonabilidad y la documentación. Si la opinión del Consultor fuera definitoria, lo lógico era que

[232] Contestación de CFE, párrafo 376.

las partes lo hubieran pactado expresamente y hubieran previsto algún mecanismo para el evento en que alguna de ellas no estuviera de acuerdo con la opinión del Consultor.

317. Ahora bien, como quiera que el dictamen pericial presentado por la Demandante en este trámite arbitral fue elaborado por EY, que fue igualmente quien elaboró el informe "*Costos indirectos incurridos por las oficinas corporativas de Dunor Energía S.A.P.I de C.V.*", y en el dictamen pericial se expresa[233] que "*el análisis y resultados presentados en la sección son los correspondientes al trabajo realizado*" en el informe previamente presentado, debe en primer lugar el Tribunal determinar si existe en este caso una situación que pueda afectar el valor que debe dársele al informe inicialmente realizado en desarrollo del Acuerdo de las Partes o al dictamen presentado en este trámite arbitral.

318. En su Contestación a la Demanda, la CFE expresó[234]:

> *"…no debe pasar desapercibido del Tribunal Arbitral este hecho, el consultor externo E&Y que fue el que elaboró el Dictamen de fecha 03 de agosto de 2020 (primer dictamen), es ahora el perito elegido por la Demandante elaborando el dictamen de fecha 04 de febrero de 2021 (segundo dictamen) que se acompaña a su Memorial de Demanda, por lo que se puede apreciar que dicho experto E&Y no fue imparcial en la elaboración del primer dictamen, ya que al momento de su elaboración ya formaba parte del equipo de Defensa de la Demandante, situación que invariablemente afecta también la imparcialidad y objetividad de su segundo dictamen"*

319. A este respecto, la Demandante precisa que el Informe relativo al apartado 3.3 del Acuerdo fue emitido por EY el 3 de agosto de 2020 y no fue hasta el 18 de diciembre de 2020 cuando DUNOR contrató a EY como perito, es decir, 137 días después[235].

320. Desde esta perspectiva Tribunal no encuentra razón para privar del valor que le corresponde el Informe de Costos Indirectos elaborado por EY,

[233] Primer Informe de EY, página 31.
[234] Contestación de CFE, párrafo 385.
[235] Réplica y Contestación Reconvención , párrafo 127.

en la medida que en su momento dicho Informe fue elaborado de conformidad con lo previsto en el Acuerdo entre las Partes, y sin que se hayan establecido elementos que permitan sostener que quien lo elaboró no haya actuado en ese momento conforme a su criterio profesional.

321. Por otra parte, en cuanto al dictamen presentado por la Parte en el trámite arbitral, considera el Tribunal que tampoco existen elementos que permitan descalificarlo desde el punto de vista técnico. El hecho que adopte su posición inicial no lo descalifica desde el punto de vista técnico, pues es natural que si un experto emite una opinión sobre una situación en determinado sentido, es de esperar que, salvo que se establezcan nuevos hechos, la mantenga con posterioridad.

322. Desde esta perspectiva, el hecho de que se haya presentado un dictamen pericial por EY que reafirma lo que había señalado en su informe previo no descalifica lo dicho previamente, ni el dictamen presentado en este proceso pierde valor por tal razón.

323. En todo caso es evidente que el hecho de que sea la misma persona la que elabora el Informe Inicial y el Dictamen pericial, determina que al examinar el Dictamen el Tribunal tenga en cuenta que quien lo elabora no puede expresar una opinión independiente frente a lo dicho en el Informe Inicial.

324. En cuanto al fondo de la controversia, encuentra el Tribunal que en lo que se refiere a que los gastos tengan relación directa con las obras, el Perito Moore señala[236] que "*el cálculo de los Costos Indirectos reclamados a CFE se refieren al período acordado como imputable a esa Empresa Productiva del Estado Mexicano (del 19 de julio del 2018 al 14 de marzo del 2019*)", por ello concluye que "*que la metodología de la firma EY, sobre los Costos Indirectos erogados originalmente por las casas matrices de DUNOR, imputables al proyecto CC Empalme II, se encuentran directamente*

[236] Primer Informe de Moore, p 50.

*asociados a este proyecto*"[237]. Por consiguiente, los costos están directamente relacionados con las obras.

325. Ahora bien, en cuanto se refiere a la razonabilidad que deben tener los gastos, en el dictamen del Perito EY se expresó[238]:

> *"…la relación de razonabilidad que debería existir entre los gastos señalados en la cláusula 25.5 del Contrato, en el Acuerdo, y el precio pactado en el Contrato. Es decir, para analizar el importe de los gastos indirectos incurridos por las Oficinas Centrales, debemos entender cuál sería un "rango razonable" de gastos indirectos en el que suelen incurrir las Oficinas Centrales con casas matrices internacionales. El cual, según prácticas de mercado existentes y proyectos similares al caso que nos ocupa (plantas de ciclo combinado) puede medirse con base en lo que representan respecto del monto total del Contrato ($ 396,997,949 USD).*"

326. Señaló así mismo el Perito EY[239]:

> *"Estos precios, con base a mi experiencia, en proyectos similares de energía (plantas de ciclo combinado) en países de Latinoamérica, realizados por grupos internacionales con estructuras organizativas similares al caso que nos ocupa, siempre incluyen tanto el margen de contribución, como los costos de indirectos de las Oficinas Centrales. Asimismo, estos costos indirectos de las oficinas centrales suelen oscilar (dependiendo del riesgo país y el grado descentralización del proyecto) entre un 3% o 4.5%, calculado sobre el total de los costos fijos del proyecto (sin IVA y sin margen de contribución).*
>
> *"Por lo tanto, concluimos que dentro de los costos fijos ofertados por Dunor Energía en el Contrato, deberían de estar incluidos los costos indirectos de las oficinas centrales que oscilarían entre $ 8,981,774 USD y $ 13,472,661 USD (3% y 4.5% respectivamente) durante el periodo de ejecución estipulado en el Contrato (915 días), es decir, desde la fecha de inicio de las obras (26 de octubre de 2015) hasta la Fecha Programada de Aceptación Provisional de la Central (28 de abril de 2018). Para el Periodo de Análisis (239 días), de forma proporcional, un rango razonable de costos de administración incurridos por las oficinas centrales directamente relacionado con el Proyecto oscilaría entre $ 2,336,243 USD y $ 3,504,364 USD (3% y 4.5%, respectivamente)".*

[237] Informe de Moore, p 50.
[238] Primer Informe de EY, páginas 31 y 32.
[239] Primer Informe de EY, página 32.

327. Ahora bien, en su contestación a la Demanda, la CFE expresó que había hecho una serie de manifestaciones al Perito EY con ocasión del informe presentado y que le solicitó "*Identificar la fuente para que EY pueda afirmar categóricamente que un proyecto similar mantiene costos indirectos en un rango de 3 – 4.5%. Sería importante conocer las empresas que fueron consultadas para esta afirmación*"[240]. Agrega la Demandada que al contestar, el Perito EY manifestó que no era posible proporcionar esta información y señaló que "*la información citada en el dictamen es lo que en la experiencia de la firma ha observado en países de América Latina en empresas internacionales con proyectos de estas características / proyectos similares y con operaciones transnacionales*". Ante lo cual la CFE el 30 de octubre de 2020, le expresó que "*las respuestas fueran realizadas desde la óptica de Ustedes como contratista y no de la firma, que entiendo tiene algunas limitaciones de confidencialidad o de conocimiento de las formas cómo se evalúala razonabilidad de los extra-costos de proyecto*". A lo cual el Perito EY manifestó que no tenía previsto entregar más información[241].

328. Ahora bien a este respecto debe destacar el Tribunal que en el primer dictamen pericial de Moore se indica lo siguiente sobre información verbal que recibió de CFE y que fue autorizado a compartir[242]. En primer lugar, se refirió a proyectos de ingeniería donde CFE participa, como prestador de servicios, a través de la Dirección Corporativa de Ingeniería y Proyectos de Infraestructura (DCIPI) y expresó:

> *"Nos fue afirmado que esa Dirección, la cual controla a la Coordinación de Proyectos Termoeléctrico (quien solicitó este estudio) incorpora a su precio de venta de sus proyectos de ingeniería el 15% de Costos Indirectos relacionados con el Costos Administrativo del Corporativo de esa Dirección y de CFE. Y que en proyectos fuera de México se ha agregado hasta el 21.5% sobre el monto directo, en procesos licitatorios internacionales".*

[240] Contestación de CFE, párrafo 379.
[241] Contestación de CFE, párrafos 380 a 382. Los correos citados obran como Anexo R-072.
[242] Primer Informe de Moore, página 52.

329. Por otra parte, también se refirió a Estudios de Costos Indirectos en otras partes del mundo y señaló[243]

> *"CFE nos compartió que en algunos estudios que se han realizado y / o solicitado se identificaron que los Costos Indirectos pueden encontrarse en un rango de 8 – 14%, sobre el monto directo de las obras, para identificarse como razonables.*
>
> *"Como fue comentado anteriormente, por cuestiones de confidencialidad no nos fue posible conocer las empresas, países y períodos considerados.*
>
> *"Sobre estos porcentajes, pareciera que es válida la afirmación que hace DUNOR (con base en el trabajo realizado por la firma EY) en el sentido de que los Costos Indirectos en cuestión son razonables. Con la información que la misma CFE presenta. Esto, porque el estudio de EY calcula los Costos Indirectos adicionales del proyecto en el rango de 3.0% y 4.5%. Sin embargo, para que esto sea cierto se requiere concluir todos los conceptos adicionales en disputa los cuales con base en este rango presentado por DUNOR ascenderían a 78,529,166.66 USD. (Multiplicar este monto por el rango en % nos hace llegar al rango en USD que señala el dictamen de EY: USD 2,355,875 - USD 3,533,813)*
>
> *"Por lo anterior, hasta en tanto no se haya concluido todos los conceptos en disputa no es posible emitir una opinión determinante sobre la razonabilidad de este concepto."*

330. Observa el Tribunal que aun cuando el perito de la CFE señala que parecería que los costos indirectos son razonables, así mismo señala que "*se requiere concluir todos los conceptos adicionales en disputa los cuales con base en este rango presentado por DUNOR ascenderían a 78,529,166.66 USD*".

331. Ahora bien, teniendo en cuenta la información que proporcionó EY y el Perito Moore, encuentra el Tribunal que los montos calculados por EY son razonables y en la medida en que tales costos son una proporción de los costos directos, los mismos serán calculados teniendo en cuenta los valores finalmente reconocidos.

[243] Primer Informe de Moore, página 52.

332. Por otra parte, el Perito Moore en su dictamen señala que "*no identificamos ningún estudio, contrato, facturas, pagos o cualquier información soporte conocida o entregada a CFE sobre la erogación de algún monto identificado en este rango por el concepto de Costos Indirectos que pudieran comprobar que dicho monto ya fue agotado en su totalidad y por ende, el costo reclamado en este concepto es un costo adicional imputable a CFE*"[244].

333. A tal efecto considera el Tribunal que de conformidad con la Cláusula 25.5 del Contrato lo que se reconocen son los gastos en que se incurra por el retraso adicional a los 60 días previstos en la cláusula. De esta manera, la cláusula contractual no prevé que deban compararse los gastos incurridos, con los que se había estimado, para solo pagar el exceso. Lo que debe determinarse son los costos adicionales en que efectivamente se incurre. Lo anterior porque en los contratos a precio alzado, el contratista asume el riesgo de las diferencias entre el costo estimado y el precio pactado y por ello el precio pactado no puede identificarse con los costos incurridos.

334. Por otra parte el Perito Moore[245] manifiesta que *"…no se cuenta con un Contrato de Prestación de Servicios, entre las TRES casas matrices de DUNOR y ésta; por lo que no es posible identificar las actividades que dichas empresas prestaron al Proyecto. Además, el estudio de la firma EY no menciona el haber revisado la evidencia de los servicios prestados por sus tenedoras a DUNOR en México ni dicha evidencia fue proporcionada a CFE como parte de la documentación soporte del reclamo*". Igualmente señala que "*Consecuentemente … no se cuenta con evidencia de facturas, asientos contables, ni de entregables asociados a los servicios prestados, que permitan identificar un costo erogado que pueda ser repercutido a CFE vía la cláusula 25.5 del Contrato*".

[244] Primer dictamen de Moore, página 51.
[245] Primer dictamen, p 54 y 55.

335. Ahora bien, en su segundo dictamen EY[246] señala que "*En el Acuerdo no observamos que se debe presentar y/o acreditar un contrato de servicios entre las tres casas matrices de Dunor Energía y por lo tanto no entendemos por qué para el C.P. Gallardo si debe existir tal contrato. La veracidad del monto reclamable no se tiene que basar en la existencia de un contrato, sino en lo establecido en el Acuerdo. Es en el propio Acuerdo donde se establece que la veracidad de este concepto es, por un lado, si existen o no unos costes indirectos de las casas matrices y, en segundo lugar, si el criterio de imputación de estos costes a los proyectos (entre los que esta Empalme II), es razonable o no*". Igualmente señala que [247]"*No entendemos a que se refiere el C.P. Gallardo con que no se han identificado las actividades y la evidencia de los servicios prestados por las casas matriz. Si fuera este un requisito para cuantificar el monto del reclamo, así se hubiera plasmado en los apartados 3.3 y 3.4 de Acuerdo, y no fue así. Por el contrario, el Acuerdo es claro y define de forma inequívoca toda la información necesaria para cuantificar los Costos Indirectos Administrativos de las Casa Matriz objeto de reclamo*".

336. Agrega que[248] "*los servicios prestados por las casas matrices se reflejan en los costos indirectos de sus contabilidades respectivas, que son alocados y/o imputados a los proyectos (ej. Empalme II) con un criterio de imputación razonable. Es decir, la manera de cuantificar estos costos indirectos de las casas matrices no es si existe o no contratos de prestación de servicios; es con base en criterios de imputación razonables de los costos indirectos existentes a cada uno de los proyectos (entre los que se encuentran Empalme II); y así lo hicimos - ver Sección 5 y en los anexos V, VI, VII, VIII, IX, X, XI, XII, XIII de nuestro Informe Pericial EY*".

337. A este respecto observa el Tribunal que en el Acuerdo entre las Partes Sobre la Aplicación de la Cláusula 25.5 para cumplir con el Objeto del

[246] Segundo dictamen EY, p 24.
[247] Segundo Informe de EY, p 22.
[248] Segundo Informe de EY, p 24.

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Contrato PIF-039/2015 del 17 de septiembre de 2018, se pactó en el apartado 3.4 lo siguiente:

*"3.4 METODOLOGíA PARA QUE LA TERCERÍA A CONTRATAR ESTÉ EN CONDICIONES DE ACREDITAR LOS GASTOS INDIRECTOS DE OFICINAS CENTRALES CONFORME A LA CLÁUSULA 25.5 DEL CONTRATO PIF-039/2015 DEL PROYECTO 313 CC EMPALME ll, CON EL OBJETO DE ADICIONARLO A LOS DEMÁS RUBROS DEL ACUERDO.*

- *Reporte que muestre el Estado de Resultados (Balance de Situación y Cuenta de Pérdidas y Ganancias) con la periodicidad que se muestre de la oficina central del sistema o similar de Mayo de 2018 a la Fecha de Aceptación Provisional formalizada en el último Convenio Modificatorio al Contrato, que acrediten la afectación de costos al Proyecto 313 CC Empalme ll.*

- *Reporte que muestre el Catálogo General de Cuentas del sistema SAP o similar, en el que se detalle entre otras cosas los conceptos relacionados con las cuentas.*

- *Declaratoria bajo protesta de decir verdad por parte de EL CONTRATISTA en donde haga constar el número y relación de contratos que son administrados por la oficina central. (Mensual)*

- *Análisis y cálculo del porcentaje de participación de la oficina central por la administración del Proyecto en función de los importes correspondientes a los contratos de los proyectos que son administrados por la oficina central.*

- *Tabla(s) detallada que contenga la información indicada en los puntos anteriores para obtener el importe de participación de la oficina central al costo total que esta representa en el Proyecto 313 CC Empalme ll.*

*Cualquier documento que, en defecto de los anteriores, demuestre fehacientemente los costos de los conceptos anteriores.*

*Procedimiento:*

*1.- Contando con el Estado de Resultados Mensual de la Oficina Central y haciendo uso del Catálogo General de Cuentas se deberá discriminar los conceptos que no estén directamente relacionados con el Proyecto 313 CC Empalme ll para obtener el importe total de los conceptos aplicables e imputables al Proyecto.*

*2.- Realizar el análisis y cálculo del porcentaje de participación mensual de la oficina central por la administración del proyecto tomando en cuenta la ponderación de los importes de los contratos, número de contratos y vigencia de los mismos (fecha de inicio y término).*

*3.- Al importe resultante indicado en el punto 1, aplicar el porcentaje calculado indicado en el punto 2, para con ello obtener el importe con cargo al Proyecto 313 CC Empalme II."*

338. Como se puede apreciar, las Partes establecieron una metodología específica para calcular los costos indirectos. Al revisar dicha metodología no se observa que en la misma se haya contemplado la necesidad de que existan de contratos entre las Partes con el fin de establecer los costos. En efecto, en los ítems que se tienen en cuenta no hay referencia alguna a dichos contratos. En esta medida considera el Tribunal que dicho requisito no es procedente.

339. Finalmente, el Perito Moore[249] en su dictamen señala que al no haber encontrado "*un contrato de servicios que regule la participación de las TRES empresas tenedoras con DUNOR y de ahí poder identificar las cargas de trabajo de estas empresas con relación al proyecto, evaluamos el comportamiento del reclamo con base en cada empresa y la participación accionaria que cada una tiene en DUNOR. De este análisis identificamos lo siguiente (y es ratificado por la firma EY en el trabajo realizado para este concepto)*

| **Accionista** | **% Participación** |
|---|---|
| Duro Felguera | 50.00% |
| Elecnor España | 49.99% |
| Elecnor México | .01% |

340. Agrega el perito que el reclamo por Costos Indirectos asciende a US$ 2'663,130.00 (Dos millones seiscientos sesenta y tres mil ciento treinta dólares americanos 00/100 cy) discriminado de la siguiente manera[250]:

[249] Informe Moore, p 52 y 53.
[250] Primer informe de Moore, página 53.

| **Accionista** | **Participación en Reclamo (USD)** | **Participación en Reclamo (%)** |
|---|---|---|
| Duro Felguera | 1,757,137 | 65.98% |
| Elecnor España | 679,632 | 25.52% |
| Elecnor México | 226,361 | 8.49% |
| **Total** | **2,663,130.00** | **100%** |

341. Señala entonces el Perito Moore[251] que la metodología utilizada por el Perito EY no presenta un monto razonable. Más aún cuando no se cuenta con algún documento que permita discernir cómo fueron distribuidas las cargas de trabajo de las empresas tenedoras con el proyecto CC. Empalme II, por lo cual, el resultado de la aplicación de los factores parece más un hecho eventual asociado a la falta de proyecto que a un esfuerzo administrativo. Resalta el caso de Elecnor México quien tiene una participación accionaria de .01% y presenta el 8.49% del reclamo.

342. Agrega que *"los costos asociados a Elecnor México, el cual presentaría ingresos exorbitantes por este concepto (.01% de participación vs 8.49% del Contrato). A menos de que se cuente con el contrato DUNOR – Elecnor México que justifique el trabajo realizado por ese Corporativo*".

343. Sobre este aspecto el Perito EY en su segundo dictamen expresó su desacuerdo en relación a que deba existir un nexo entre la participación accionaria y el porcentaje de reparto. Agrega[252] que tratar *"de vincular y establecer criterios de proporcionalidad entre ambos no es razonable para el caso que nos ocupa – sería desconocer los criterios de cálculo del Acuerdo, el cual parte de las dos variables básicas: (i) por un lado, los costos indirectos de las casas matriz (Duro Felguera, Elecnor y Elecnor México) y, (ii) por otro lado, el criterio de reparto por proyecto (Empalme II). Criterios explicados en*

[251] Primer Informe de Moore, p 53.
[252] Segundo Informe, p 23.

*nuestro Informe Pericial EY del que el C.P. Gallardo parece no cuestionar ni contradecir*."

344. Al respecto, encuentra el Tribunal que, por una parte, en el Acuerdo no se estableció ninguna regla de distribución entre las sociedades en función de la participación como accionistas en DUNOR. Por otra parte, el hecho de que la participación accionaria de Elecnor México sea baja, no significa que la misma no haya prestado un apoyo significativo al proyecto. A lo anterior se agrega que finalmente Elecnor México es filial de Elecnor, y por ello es apenas razonable que sea a través de la filial que se haya prestado el apoyo que requería DUNOR. Por lo demás, no sobra señalar que entre Elecnor México y Elecnor tienen el 50% del capital de DUNOR, y entre ellas dos participan en menos del 50% del reclamo. Finalmente en el Informe Pericial de EY[253] se explica la forma como se llegó a la distribución de costos, sin que se haya demostrado que los criterios seguidos por EY para el efecto no son correctos.

345. Por lo anterior concluye el Tribunal que el valor calculado de US$ 2'975,708.00 (Dos millones novecientos setenta y cinco mil setecientos ocho dólares americanos 00/100 cy) es procedente por ajustarse a lo pactado y por ello este Tribunal lo reconoce como procedente.

### 12.1.2.5 Gastos por Reclamaciones de Terceros

#### 12.1.2.5.1 Posición de la Demandante

346. La Demandante señala que el apartado 3.5 del Acuerdo establece que CFE debe compensar a DUNOR por los gastos derivados de las Reclamaciones de Terceros incluyendo "*todas las reclamaciones de suministradores y subcontratistas recibidas por el Contratista*" como consecuencia de los retrasos sufridos en la ejecución del Proyecto. Por ello, DUNOR presentó la información requerida respecto de los gastos por un total de US$ 6'285,204.81 (Seis millones doscientos ochenta y cinco mil doscientos cuatro dólares americanos 81/100 cy). Dicho importe está integrado por (i) gastos cuyo origen es la reclamación de un

[253] Doc C-039.

tercero y (ii) gastos originalmente incluidos en el apartado 3.2 del Acuerdo que fueron reclasificados a este rubro por CFE[254].

347. DUNOR agrega que mediante Oficio de 28 de octubre de 2019, la Comisión remitió a Dunor sus comentarios en relación con las facturas presentadas por Reclamaciones de Terceros (correspondientes al Periodo de Análisis), indicando que faltaban facturas que justificasen el reclamo. Expresa la Demandante que atendiendo a los comentarios indicados, volvió a remitir a CFE el estudio correspondiente al citado periodo[255].

348. Agrega que el Acuerdo no sujeta en modo alguno el cumplimiento de las obligaciones de la Comisión a la forma en que la Demandante presente sus facturas. El Acuerdo únicamente señala que "*el Contratista entregará los soportes documentales de los reclamos por mes calendario a más tardar el último día hábil del mes próximo siguiente*". DUNOR sostiene que ha cumplido diligentemente con dicha obligación. No lo ha hecho así la Comisión, que dispone del mismo plazo para realizar la revisión y conciliación[256].

349. En cuanto al análisis financiero realizado, DUNOR señala que del monto total presentado por DUNOR (US$ 6'285,204.81) (Seis millones doscientos ochenta y cinco mil doscientos cuatro dólares americanos 81/100 cy), el Perito EY distingue entre: (i) gastos originados por Reclamaciones de Terceros, que ascienden a US$ 2'160,299.20 (Dos millones ciento sesenta mil doscientos noventa y nueve dólares americanos 20/00 cy), de los cuales, el Perito EY confirma que un total de US$ 1'072,457.09 (Un millón setenta y dos mil cuatrocientos cincuenta y siete dólares americanos 09/100 cy) cumple con las especificaciones señaladas en el apartado 3.5 del Acuerdo y debe ser reembolsado a DUNOR. Además, un monto adicional de US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy) "*fueron incurridos durante el Periodo de Análisis, están directamente relacionados con el Proyecto y corresponden a conceptos definidos dentro del apartado 3.5*", pero se trata de importes que, a pesar de no haber sido pagados todavía, son procedentes y deben compensarse. (ii) Gastos Reclasificados por

[254] Memorial de Demanda, No. 111.
[255] Memorial de Demanda, No. 112.
[256] Memorial de Demanda, No. 113.

CFE al apartado 3.5 del Acuerdo, que ascienden a US$ 4'124,905.61 (Cuatro millones ciento veinticuatro mil novecientos cinco dólares americanos 61/100 cy). De estos el Perito EY considera compensables un total de US$ 3'624,304.66 (Tres millones seiscientos veinticuatro mil trescientos cuatro dólares americanos 66/100 cy) y señala que un monto adicional de US$ 168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy) cumple con los requisitos del Acuerdo, y si bien, todavía esta cantidad no ha sido pagada, es procedente y debe compensarse. (iii) Una partida de US$ 90,936.34 (Noventa mil novecientos treinta y seis dólares americanos 34/100 cy) integrada en el apartado 3.2 del Acuerdo que ha sido reclasificada por el Perito EY a este rubro[257].

350. DUNOR precisa en su Réplica que entregó a la Comisión la información requerida para el análisis de estos conceptos conforme a los apartados 3.5 y 5 del Acuerdo. En este sentido se presentaron: (i) las facturas reclamadas, (ii) sus respectivos asientos contables, (iii) comprobantes de pago (en caso de no existir estos se informó a CFE), (iv) contratos, (v) reclamaciones de proveedores y, (vi) los oficios compartidos con los proveedores donde se evidencian los esfuerzos comerciales realizados para minimizar el impacto de las reclamaciones de terceros[258].

351. Precisa DUNOR que la documentación era completa, lo que se deriva de que el Perito EY contó con la misma información para elaborar su Informe. Agrega que a pesar de ello, CFE formuló comentarios a la documentación presentada mediante Oficio RGROS-283/2019, de 28 de octubre de 2019, esto es, más de 3 meses después de que fueran presentadas las facturas. En concreto, CFE solicitó que se señalara específicamente en qué parte de los contratos y sus anexos se establecía su alcance y la prestación de los servicios. Lo anterior, evidencia que durante 3 meses la Comisión ni tan siquiera había leído los contratos, lo que demuestra su poca diligencia durante el proceso de revisión de facturas[259].

[257] Memorial de Demanda, No. 114.
[258] Réplica y Contestación Reconvención, No. 134.
[259] Réplica y Contestación Reconvención, No. 136.

352. DUNOR, además, afirma que se trata de una solicitud de información que sobrepasa manifiestamente las estipulaciones del Acuerdo. Adicionalmente, en el mismo comunicado, la CFE solicitó la entrega de los comprobantes de pago realizados a Siemens y a Doosan Skoda[260]. Señala DUNOR que de buena fe atendió ambas solicitudes de CFE remitiéndole la nueva información. Agrega que el 6 de noviembre de 2019 la CFE volvió a solicitar la misma información, incumpliendo así los términos del Acuerdo, y además informó que faltaban 4 facturas. Nuevamente el Demandante, como muestra de su buena fe y diligencia, atendió esta solicitud el 15 de noviembre de 2019[261].

353. La Demandante advierte que, en noviembre de 2019, la Comisión solicitó la reclasificación de una serie de facturas del apartado 3.2 al 3.5 del Acuerdo, a lo que DUNOR no se opuso, bajo el entendido de que tal reclasificación no implicaría ninguna renuncia a los montos, sino un ajuste que resultaba administrativamente conveniente para la Comisión. Después de realizar la reclasificación solicitada por la Comisión en noviembre de 2019, del monto inicial reclamado por el apartado 3.5 del Acuerdo (US$ 6’285,204. 81) (Seis millones doscientos ochenta y cinco mil doscientos cuatro dólares americanos 81/100 cy) solo se está reclamado en el procedimiento arbitral el valor de US$ 5’913,324.53 (Cinco millones novecientos trece mil trescientos veinticuatro dólares americanos 53/100 cy) [262].

354. Agrega la Demandante que pese a la entrega de la nueva documentación, CFE requirió continuamente nueva información que excedía lo dispuesto en el apartado 3.5 del Acuerdo, retrasando aún más el procedimiento de revisión. Esta actuación de la Demandada resultó del todo abusiva y su único propósito es retrasar los pagos a los que se ha obligado[263].

355. Señala DUNOR que, en opinión de la CFE, existen facturas presentadas por DUNOR que son improcedentes, por lo que estima que sólo US$ 1’056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy) serían reembolsables. En concreto, la Comisión sostiene que no

[260] Ibíd.
[261] Réplica y Contestación Reconvención, No. 137 y 138.
[262] Réplica y Contestación Reconvención, No. 141.
[263] Réplica y Contestación Reconvención, No. 143.

serían procedentes por (i) quedar fuera del Periodo de Análisis; (ii) haber sido previamente consideradas bajo el apartado 3.2 del Acuerdo; (iii) no haber sido pagadas por DUNOR, y (iv) por pretender DUNOR cobrar doblemente las retenciones.

356. Frente lo anterior, DUNOR señala lo siguiente: en primer lugar, el monto de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy) reconocido por CFE ya resulta equivocado, pues tal y como analiza el Perito EY (i) no existe un reconocimiento acordado entre las Partes respecto a este monto, y (ii) en cualquier caso este monto está mal calculado y debería ser de US$ 1'072,457.09 (Un millón setenta y dos mil cuatrocientos cincuenta y siete dólares americanos 09/100 cy). Lo anterior porque la factura ICI258 debe ajustarse, siendo procedentes por ella US$ 64,392.57 (Sesenta y cuatro mil trescientos noventa y dos dólares americanos 57/100 cy) y no los US$ 48,801.30 (Cuarenta y ocho mil ochocientos un dólares americanos 30/100 cy) indicados por el perito de la Demandada[264].

357. En segundo lugar, sostiene que resulta equivocada la postura de la Comisión en lo referente a los montos en disputa. DUNOR destaca las siguientes conclusiones del Perito EY: i) un monto de US$ 1'422,603.55 (Un millón cuatrocientos veintidós mil seiscientos tres dólares americanos 55/100 cy) ha sido acordado por las Partes, no existiendo controversia al respecto; ii) un monto de US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy) (por gastos reclasificados del apartado 3.2 al 3.5) cumple con los lineamientos del Acuerdo, es decir, "*pertenecen a trabajos relacionados con la prórroga de la Aceptación Provisional, que pertenecen al Período de Análisis y que han sido realmente devengados o pagados por el Contratista*". Por lo tanto, existe acuerdo entre esta Parte y el perito de CFE en que este monto debe ser reembolsado a DUNOR; y iii) un monto de US$ 979,670.48 (Novecientos setenta y nueve mil seiscientos setenta dólares americanos 48/100 cy) que no habría sido pagado a los subcontratistas y por ello, no sería reembolsable según el perito de CFE[265].

[264] Réplica y Contestación Reconvención, No.146 y 148.
[265] Réplica y Contestación Reconvención, No. 149.

358. Agrega que conforme a los puntos i) y ii), el perito de CFE reconoce que sería reembolsable un monto total de US$ 4'214,197.84 (Cuatro millones doscientos catorce mil ciento noventa y siete dólares americanos 84/100 cy). Con ello queda patente la falta de fundamento de la Demandada, quien, en discrepancia con su propio perito, estima únicamente reembolsable un monto de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy) [266].

359. Por otra parte, señala DUNOR que respecto de la diferencia entre US$ 1'422,603.55 (Un milllón cuatrocientos veintidós mil seiscientos tres dólares americanos 55/100 cy) reconocidos por el Perito Cámara y US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy) reconocidos por CFE, se debe a un importe de US$ 365,726.90 (Trescientos sesenta y cinco mil setecientos veintiséis dólares americanos 90/100 cy) que a juicio del perito debe pagarse a DUNOR en virtud del acuerdo formalizado en la Minuta 7. Señala DUNOR que sin perjuicio de que este sea un monto que debe pagarse, tal y como indica el Perito EY en su Segundo Informe Pericial, las Partes no han celebrado un acuerdo formal respecto a los gastos del apartado 3.5 del Acuerdo que ponga fin a las reclamaciones por este rubro. Señala que existen acuerdos posteriores como el de mayo de 2020 cuyos reconocimientos de importes deberían haberse tenido en cuenta por el Perito Cámara[267].

360. DUNOR señala respecto de los gastos reclasificados, que tampoco es correcta la referencia a los US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy). Sostiene que más allá de errores aritméticos, el Perito EY comprobó de manera minuciosa todos los cálculos llevados a cabo por el Perito Cámara para este concepto y encontró un gran número de errores e inconsistencias[268].

361. En cuanto al monto de US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy), el Perito EY concluye

[266] Réplica y Contestación Reconvención, No. 150.
[267] Réplica y Contestación Reconvención, No. 152.
[268] Réplica y Contestación Reconvención, No. 153.

que "*de acuerdo con la documentación analizada determinamos que las transacciones fueron incurridas durante el Periodo de Análisis, están directamente relacionadas con el Proyecto y corresponden a conceptos definidos dentro del apartado 3.5 del Acuerdo*"[269].

362. Dunor agrega que el componente principal de la diferencia que existe entre lo reclamado por Dunor y lo reconocido por el perito de CFE, se debe a (i) montos que cumplen con todos los requisitos del Acuerdo pero que no han sido liquidados (US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy) y US$ 168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy)), y (ii) diferencias en lo relativo a los montos reclasificados del apartado 3.2 al 3.5 del Acuerdo[270].

363. En relación con los montos reclasificados del apartado 3.2 al 3.5 del Acuerdo, señala que la diferencia entre los US$ 3'624,304.66 (Tres millones seiscientos veinticuatro mil trescientos cuatro dólares americanos 66/100 cy) reconocidos por EY y los US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy) considerados por el perito de CFE, se debe a una gran cantidad de errores e incongruencias de la pericial presentada por el Perito Cámara. En ese sentido, DUNOR sostiene que dichos errores son los siguientes: i) existe un importe de US$ 365,726.90 (Trescientos sesenta y cinco mil setecientos veintiséis dólares americanos 90/100 cy) por montos reclasificados del mes de julio. Esta cantidad no está actualizada al no tener en cuenta cartas y oficios intercambiados entre las Partes posteriores a la Minuta. ii) Un monto de US$ 7,735.00 (Siete mil setecientos treinta y cinco dólares americanos 00/100 cy) por "*cantidades reclasificadas de los meses de agosto 2018 a marzo 2019*" considerado por el Perito Cámara como no liquidado pero que de hecho sí lo está y cumple con todos los requisitos del Acuerdo para ser compensable. iii) El Perito EY concluyó que el Perito Cámara tuvo en cuenta en esta sección las facturas de "*MHO Engineering*" que el Perito él considera como imputables al apartado 3.2 del Acuerdo, en tanto se trata de prestaciones de personal y no de un reclamo de terceros *per se*. Advierte

[269] Réplica y Contestación Reconvención, No. 154.
[270] Réplica y Contestación Reconvención, No. 155.

DUNOR que además existe un acuerdo, de conformidad con el Oficio RGROS-174/20, para la reclasificación de este importe al punto 3.2 del Acuerdo. Agrega que el importe de esta factura fue calculado de manera incorrecta, no descontándose además el importe de las retenciones de calidad. iv) La pericial del Perito Cámara no ha analizado seis gastos diferentes que DUNOR reclamó y por los que el Perito EY reconoció como procedentes US$ 2,187,78. (Dos mil ciento ochenta y siete dólares americanos 78/100 cy)[271]. v) Existen gastos determinados como no procedentes por el Perito EY pero que el Perito Cámara sí considera procedentes por un importe de US$ 85,037.19 (Ochenta y cinco mil treinta y siete dólares americanos 19/100 cy) (por concepto de suministros de la Central); vi) se presentan fallos en la determinación de la proporción del servicio que se produjo dentro del Periodo de Análisis. vii) Hay errores en la base de las facturas consideradas por el Perito Cámara. En ocasiones no se descuentan retenciones de calidad no devueltas. viii) La Pericial Cámara omite la evidencia de qué trabajos forman parte del Periodo de Análisis o se derivan del mismo; y, por último, existen discrepancias con la Pericial Cámara sobre los conceptos compensables según el Acuerdo[272].

364. Con base en lo anterior, DUNOR señala que el Perito EY, tras haber realizado su análisis de las variaciones entre los peritos, sólo identifica cuatro partidas en las que el importe determinado por la Pericial Cámara es correcto, procediendo por ello una corrección al importe reclamado por US$ 14,663,80 (Catorce mil seiscientos sesenta y tres dólares americanos 80/100 cy)[273].

365. Por lo tanto, concluye DUNOR que tal y como indica el Perito EY, CFE debe reembolsar a DUNOR por un lado US$ 4’682,097.96 (Cuatro millones seiscientos ochenta y dos mil noventa y siete dólares americanos 96/00 cy) y US$ 90,936.34 (Noventa mil novecientos treinta y seis 34/100 cy) y por otro US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy) (por los importes incurridos, pero no liquidados) y US$

[271] Réplica y Contestación Reconvención, No. 157.
[272] Réplica y Contestación Reconvención, No. 157.
[273] Réplica y Contestación Reconvención, No. 158.

168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy) (por retenciones de calidad)[274].

366. Ahora bien, en relación con el mecanismo empleado por el Perito EY para determinar qué cantidades son procedentes, expresa que DUNOR entregó al Perito EY la documentación de soporte de cada una de las transacciones y se revisó de manera enunciativa más no limitativa: (i) la existencia de evidencia de la prestación del servicio incluyendo estimaciones de obra, bitácoras y listas de asistencia, (ii) que los gastos incurridos y facturados correspondan a subcontratistas y proveedores de DUNOR, (iii) que las facturas corresponden a importes y evidencia de los servicios recibidos, (iv) que los comprobantes de pago corresponden al gasto, y (v) el registro contable del pago del gasto[275].

367. En cuanto al *dies a quo* para el cómputo del plazo en el que CFE debía revisar la información entregada, DUNOR señala que la Comisión sostiene que el mismo debe empezar a contar "*cuando se entrega la información completa*". Al respecto, señala DUNOR en primer lugar, que dicha condición no es un requisito del Acuerdo, por cuanto su apartado 5 sólo se refiere a que "*la Comisión dispondrá del mismo plazo [1 mes] para la revisión y conciliación*" de las facturas. Adicionalmente, la decisión sobre cuándo debe entenderse completa la entrega de información, en la medida que supone la iniciación de un plazo contractual no puede quedar, como pretende CFE, a su sola discreción. Agrega que si este fuera el caso, no estaríamos en presencia de una obligación sujeta a plazo, sino a la condición de que CFE diese por buena y suficiente la documentación entregada. Es obvio y manifiesto que no es esto lo pactado en el Acuerdo. Si lo fuese (*quod non*), de conformidad con el artículo 1944 del Código Civil Federal, la condición sería nula por depender su cumplimiento de la voluntad exclusiva de la Demandada[276].

368. Agrega DUNOR que la CFE contó desde el primer momento con toda la información completa para su revisión. La lógica contractual del apartado 5 del Acuerdo lleva a considerar como *dies a quo* para el cómputo del plazo para la revisión de facturas por CFE, su entrega por parte de DUNOR. Señala que

[274] Réplica y Contestación Reconvención, No. 159.
[275] Réplica y Contestación Reconvención, No. 162.
[276] Réplica y Contestación Reconvención, No. 164.

únicamente la insuficiencia de información afectaría al plazo, aunque nunca suspendiéndolo o reiniciándolo, sino extendiéndolo. Sin embargo, esta extensión no podría quedar al arbitrio de CFE quien, en todo caso, habría de identificar los elementos documentales faltantes[277]. Al respecto, señala DUNOR que la Comisión no identifica ni concreta los elementos documentales faltantes y cuando lo hace, solicita documentos que sencillamente no existen, retrasando así su revisión y, consecuentemente, el pago de los importes debidos[278].

369. Bajo esta misma línea, DUNOR sostiene que CFE afirma que el cómputo del plazo para el pago del importe de las facturas conforme al Acuerdo sería desde que éstos son "*efectivamente reconocidos*" mediante la emisión de minutas. No obstante, la Demandante sostiene que este argumento significa dejar al arbitrio de una de las partes el pago de las facturas conforme al Acuerdo, interpretación que contradice el artículo 1707 del CCF[279].

370. Por todo lo anterior, DUNOR concluye que CFE tiene la obligación de reembolsar a DUNOR los gastos incurridos en relación con el Acuerdo 3.5 del Acuerdo.

#### 12.1.2.5.2 Posición de la Demandada

371. La Demandada expresa que acordó reembolsar los gastos derivados de las reclamaciones de terceros, originados de la prórroga de la aceptación provisional, la cual va desde el 19 de julio de 2018 hasta el 14 de marzo de 2019[280].

372. La CFE afirma que la Demandante fue entregando parcialmente la información mediante las cartas DUNOR-CFE-572, DUNOR-CFE-573, DUNOR-CFE-574, DUNOR-CFE-621, DUNOR-CFE-623, DUNOR-CFE-624, DUNOR-CFE-625, DUNOR-CFE-626 y DUNOR-CFE-628[281].

[277] Réplica y Contestación Reconvención, No. 165.
[278] Réplica y Contestación Reconvención, No. 166.
[279] Réplica y Contestación Reconvención, No. 167.
[280] Memorial de Contestación y Reconvención, No 392.
[281] Memorial de Contestación y Reconvención, No. 393: incluye tablas de referencia.

373. Al respecto, CFE precisa que realizó la revisión de toda la documentación entregada por el Contratista y en minuta de reunión de fecha 02 al 03 de octubre del 2019 y con oficio No. RGROS-238/2019 de fecha 28 de octubre del 2019, emitió comentarios respecto de todos los comunicados, en los cuales indicó al Contratista que todas las facturas carecían de la totalidad de la información necesaria y requerida para el análisis[282].

374. Señala la Comisión que, a la fecha de la Contestación de la Demanda, el Contratista no había cumplido con la obligación de entregar a la Comisión todos los documentos necesarios que acrediten y soporten los gastos que fueron devengados o incurridos[283]. También, agrega que hasta esa fecha el Contratista únicamente había presentado reclamaciones por un importe US$ 2'321,912.10 (Dos millones trescientos veintiún mil novecientos doce dólares americanos 10/100 cy), por lo que el monto reclamado en el numeral 111 del Memorial de Demanda (US$ 6'285,204.81) (Seis millones doscientos ochenta y cinco mil doscientos cuatro dólares americanos 81/100 cy) es completamente falso.

375. La Comisión sostiene que la Demandante astutamente trata de hacer ver que ha cumplido con la entrega de la información desde el inicio de su solicitud de fecha 25 de junio de 2019, pero, como se aprecia en los diversos documentos emitidos por el Contratista, ha entregado la información a "*cuenta gotas*", lo que ha afectado el tiempo para la revisión por parte de la Comisión[284].

376. Agrega que según consta en la Minuta 3 del 2 y 3 de octubre de 2019, las Partes se reunieron para poder conciliar los importes de las facturas del mes de julio, sin llegar a un acuerdo sobre el monto a reconocer[285].

377. Ahora bien, de la revisión realizada por la Comisión a los expedientes de facturas entregadas por DUNOR para el apartado 3.2 "*Gastos por la Gestión de Personal y de Administración de Campo"*, se observó que algunas no correspondían a este apartado, conforme a los lineamientos establecidos en el Acuerdo, por lo que en minuta de reunión No. 04 de fecha del 20 al 21 de

[282] Memorial de Contestación y Reconvención, No 395.
[283] Memorial de Contestación y Reconvención, No 397.
[284] Memorial de Contestación y Reconvención, No. 399.
[285] Memorial de Contestación y Reconvención, No.400.

noviembre de 2019, se indicó que se hizo la propuesta de reclasificación de algunas facturas reclamadas "*ya que se considera que corresponden a los apartados 3.1, 3.3 y 3.5, los cuales se muestran en la tabla adjunta a la presente minuta*". Igualmente se expresa que DUNOR estuvo de acuerdo[286].

378. Respecto de la reclasificación anterior, la Comisión señala que la nueva reclasificación nunca implicó un compromiso de la aceptación para su pago, sino que formó parte del proceso de análisis y conciliación, ya que conforme a lo estipulado en el acuerdo y en el Oficio RGROS-101-2020 estas encuadran en el apartado 3.5 del Acuerdo[287].

379. Respecto de la documentación entregada por DUNOR, la Comisión expresa que con oficio No. RGROS-101-2020 de fecha 24 de abril de 2020, le manifestó a DUNOR que las solicitudes no se sustentaban con las reclamaciones de suministradores y subcontratistas que hayan sido recibidas por DUNOR y que sean motivadas por la prórroga. Igualmente solicitó se mostraran los esfuerzos para minimizar el impacto de las reclamaciones recibidas por terceros[288].

380. También, señala que la Comisión elaboró un listado de todas las facturas sobre las cuales DUNOR no entregó el sustento documental, las cuales además no contienen los reportes, las actividades y/o trabajos realizados por el personal reclamado, ni justifica que estos fueron originados por el tiempo de afectación establecido en el Acuerdo. Sostiene CFE que DUNOR reconoce la procedencia de las observaciones emitidas por la Comisión en el Oficio No. RGROS-238/2019, situación que demuestra con la entrega por DUNOR de la documentación soporte requerida a través del comunicado No. DUNOR-CFE-812[289].

381. Expresa la Comisión que posteriormente emitió comentarios a esta respuesta en minutas de reunión de 20 de noviembre 2019 y en reunión del 02 y 03 de diciembre de 2019, en las que la Demandante reconoció su omisión por lo que

[286] Memorial de Contestación y Reconvención, No. 401.
[287] Memorial de Contestación y Reconvención, No. 402.
[288] Memorial de Contestación y Reconvención, No. 403.
[289] Memorial de Contestación y Reconvención, No. 405.

se le solicitó a DUNOR nuevamente que exhibiera la documentación soporte necesaria[290].

382. Sostiene la CFE que DUNOR no ha entregado la documentación requerida conforme al Acuerdo, pues falta la entrega de la información que evidencie los reclamos de terceros, los reportes de trabajo del personal de terceros que utilizó y que demuestren qué trabajos ejecutaron. Además, está pendiente para acreditar que realizó el pago a sus subcontratistas de diversas facturas[291]. Así mismo, la Comisión señala que identificó dos facturas que dolosamente la Demandante, aprovechándose de la oportunidad, incluyó y que están fuera del periodo reconocido[292].

383. Además, la Comisión observa que en los expedientes de pago de cada una de las facturas se presenta un monto por retenciones. Señala que a la fecha del Memorial de Contestación no se cuenta con la evidencia de que estas retenciones han sido devueltas a los subcontratistas, y sostiene que el monto por retención identificado por la Comisión es de US$ 216,759.20 (Doscientos dieciséis mil setecientos cincuenta y nueve dólares americanos 20/100 cy), monto que DUNOR pretende cobrar a la Demandada, aprovechándose de la oportunidad y con toda la intención de dolo, al cobrar esta cantidad dos veces, por un lado, al tercero seguramente por penalización y por otro lado el mismo importe a la Comisión[293].

384. La Comisión destaca que todas las empresas a las que se refieren estas reclamaciones tienen formalizados contratos y/o adendas que tienen por objeto la contratación de Personal por Administración, aclarando que algunos de estos inicialmente sí contaban con un objeto específico de trabajos a realizar en el alcance del Contrato, sin embargo, estos fueron modificados mediante adendas, para que durante el periodo de reconocimiento del Acuerdo quedaran con el objeto de personal por administración, es decir, no tienen un objeto específico que permita definir si la actividad o trabajo realizado fue afectado o requerido debido a la prórroga de la Fecha Programada de Aceptación Provisional o fue

[290] Memorial de Contestación y Reconvención, No. 406.
[291] Memorial de Contestación y Reconvención, No. 407.
[292] Memorial de Contestación y Reconvención, No. 408.
[293] Memorial de Contestación y Reconvención, No. 409.

para la ejecución de un trabajo específico que forma parte del alcance del contrato y que no fue afectado[294].

385. La Comisión agrega que, en la etapa de solicitud de exhibición de documentos en este proceso, la CFE solicitó la descripción de los trabajos contratados por DUNOR durante la prórroga referida en el Acuerdo, sin embargo, DUNOR no agregó documentación adicional, limitándose a manifestar que lo solicitado se encuentra en los Doc. EY-22 y Doc. EY-36. Esto, pese a que el Tribunal había ordenado que de no poderse precisar con dicho documento el objeto de los trabajos contratados, DUNOR debía exhibir tales contratos[295].

386. Advierte la Comisión que no debe pasar desapercibido el incumplimiento por parte de la Demandante en lo indicado en la Orden Procesal No. 4 respecto de los documentos que debía exhibir, pues existe el riesgo de pagar excedentes, i) por trabajos incluidos en los alcances de contrato original, y/o ii) de recuperación de atrasos por parte del Contratista, que se encuentran fuera del Acuerdo citado[296].

387. Asimismo, la Comisión observa que dentro de los contratos se tiene el Pedido de Obra No. 157 AD 06102 de la empresa SEPIEC, formalizado en octubre de 2018, por conceptos de cableado y personal por administración (oficial y ayudante eléctrico) que tiene la categoría de alguien que va a realizar el trabajo, por un importe de MXN$ 1’516,577.44 (Un millón quinientos dieciséis mil quinientos setenta y siete pesos mexicanos 44/100 M.N.). De ahí que, la CFE advierte que se está reclamando el costo de este personal por administración, por el simple hecho de haber ejecutado estas actividades dentro del periodo de reconocimiento, cuando son trabajos dentro del alcance del Contrato y la actividad de cableado no sufrió afectación alguna por las prórrogas, por lo que DUNOR no demuestra evidencia de los trabajos realizados por el personal que pretende le sea reconocido[297].

[294] Dúplica y Réplica a la Reconvención de la CFE, No. 129.
[295] Dúplica y Réplica a la Reconvención de la CFE, No. 130.
[296] Dúplica y Réplica a la Reconvención de la CFE, No. 131.
[297] Dúplica y Réplica a la Reconvención de la CFE, No. 132.

388. Hace la Comisión una relación de empresas[298], respecto de las cuales solo se cuenta con reportes de horas sin contar con bitácora de trabajos realizados o reporte alguno que permita comprobar las actividades realizadas por este personal[299]. Señala que esta información fue solicitada por la Comisión inicialmente mediante correo electrónico del 15 de febrero del 2019 y finalmente durante la fase de exhibición de documentos. En esta fase se solicitó el reporte de las actividades realizadas por el personal de cada una de las empresas subcontratistas respecto de las cuales se reclaman costos, pero la Demandante se ocupó en manifestar diversas objeciones, entre ellas que el reporte de las actividades realizadas por los subcontratistas ha sido compartido con la Comisión a través de: (i) Bitácoras de Obra, (ii) Reportes y Programas, y (iii) reuniones de coordinación entre las Partes, documentación que no sustenta ni especifica las actividades realizadas por el personal reclamado.

389. Precisa también que DUNOR solo presentó dos documentos que consisten en reportes de actividades de las empresas (i) SEPIEC SA DE CV y (ii) PORRAS ARMENDÁRIZ CONSTRUCTORES, los cuales fueron presentados incompletos y de personal que no corresponde al reclamado. Señala entonces que: a) De la empresa SEPIEC SA DE CV, se presentan reportes por solo una fracción del periodo reclamado y no de la totalidad del tiempo, así como una fracción mínima del personal que obra en las reclamaciones, y a la simple lectura de estos se desprenden actividades en alcance al Contrato, incluso reparaciones de trabajos mal ejecutados por el Contratista. b) En lo que respecta a la empresa PORRAS ARMENDÁRIZ CONSTRUCTORES, DUNOR exhibe reporte de actividades de personal distinto al reclamado[300].

390. Señala la Comisión que en los reportes de horas que forman parte de los anexos de las facturas reclamadas en el mes de julio de las empresas citadas en la tabla[301], se indican las categorías del personal de la siguiente forma: ayudantes, instrumentistas, mecánicos, oficial de instrumentación, técnico

[298] Dúplica y Réplica a la Reconvención de la CFE, No. 128.
[299] Dúplica y Réplica a la Reconvención de la CFE, No. 133.
[300] Dúplica y Réplica a la Reconvención de la CFE, No. 135.
[301] Se refiere a la tabla que obra en el No. 128 de la Dúplica y Réplica a la Reconvención de la CFE.

especialista en pruebas primario, oficial eléctrico, operadores, tubero, soldador, almacenista, oficial electricista soldador, responsable de operación, cabo mecánico, gruista, soldador, argonero, oficial tubero, pailero y personal de control para prueba de lazo. Se trata de personas que realizan actividades de trabajo en obra que son parte del costo directo de la Central[302].

391. La CFE señala que, conforme al apartado 3.5 del Acuerdo, la Demandante no ha acreditado contar con reclamaciones de las empresas señaladas en la tabla, a pesar de haber sido solicitadas por la Comisión mediante oficio RGROS-101/2020 del 24 de abril 2020. Agrega que la Comisión realizó una última solicitud de documentos en este procedimiento arbitral, la cual fue objetada por la Demandante manifestando que no existen reclamaciones de los suministradores y subcontratistas identificados, que se trata de personal técnico especializado y de supervisión que no operaba bajo un contrato por tiempo determinado, sino por horas (contratos por administración)[303].

392. Por todo lo anterior, la Comisión considera que está imposibilitada en saber quiénes y qué montos fueron reclamados por terceros al Contratista y cuáles tienen origen en la aplicación del Acuerdo. Sostiene que la negativa de la Demandante en el sentido de no aportar los elementos documentales que acrediten la existencia de dichos reclamos y de sus supuestos montos, genera la duda razonable de que éstos son inexistentes[304].

393. Señala la CFE que el Perito EY manifiesta que realizó una revisión y análisis de la información entregada por DUNOR referente al reclamo derivado del apartado 3.5 del Acuerdo, pero de sus dictámenes no se desprende un análisis de ninguna documental, ni se anexa evidencia alguna de los documentos analizados, para determinar que los gastos reconocidos por este son derivados de la prórroga de la fecha programada de Aceptación Provisional[305].

394. Agrega la Comisión que el Perito EY no tomó en cuenta lo siguiente: i. los contratos de las empresas antes descritas son de personal por administración,

[302] Dúplica y Réplica a la Reconvención de la CFE, No. 137.
[303] Dúplica y Réplica a la Reconvención de la CFE, No. 138.
[304] Dúplica y Réplica a la Reconvención de la CFE , No. 139.
[305] Dúplica y Réplica a la Reconvención de la CFE, No. 143 y 144.

es decir, no se identifican las actividades realizadas derivadas del período de reconocimiento establecido en el Acuerdo. ii. Del personal reclamado, no se presentan reportes y/o evidencias de las actividades realizadas, solo se hace respecto de la empresa SEPIEC, donde se observan trabajos en el alcance del contrato e incluso reparaciones de trabajos mal ejecutados por DUNOR. iii. Del personal reclamado solo se cuenta con los nombres del personal, las horas trabajadas y la categoría de estos, con la cual se puede inferir que ejecutaron obra que corresponde al costo directo al alcance del contrato. iv. DUNOR manifiesta que no cuenta con reclamaciones de suministradores y subcontratistas. v. Durante el periodo de reconocimiento de gastos DUNOR ejecutó obras al alcance del Contrato, que le dieron avance al Proyecto. vi. DUNOR no presentó los Programas de ejecución por cada uno de los subcontratistas que realizaron trabajos relacionados con la prórroga referida en el convenio de la cláusula 25.5[306].

395. Señala la Comisión que DUNOR sí consideró inicialmente los criterios correctos aplicables a las facturas reclamadas en el apartado 3.5 del Acuerdo, es decir, conocía lo necesario para presentar las reclamaciones de suministradores o subcontratistas, y precisamente respecto de esas facturas, una vez atendidos los comentarios, entregó los documentos en apego al Acuerdo pero únicamente para tres empresas, y no así para el resto de las supuestas reclamaciones de terceros, que hasta la fecha no ha presentado, y que además se negó a entregarlos en relación con la Orden Procesal No. 4[307].

396. Expresa la Comisión que respecto de las facturas inicialmente presentadas conforme al apartado 3.5 del Acuerdo, el importe procedente es el valor de US$ 1’056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy), monto que cumple con todos los requisitos del Acuerdo. Hace referencia a la Factura ICI258 para explicar que ese es el importe que hace la diferencia entre el Cálculo de la Comisión (US$ 1’056,876.65) (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy) y el de DUNOR (US$ 1’072,457.09) (Un millón setenta y dos mil cuatrocientos cincuenta y siete dólares americanos 09/100 cy). Sostiene que este cálculo

[306] Dúplica y Réplica a la Reconvención de la CFE, No. 145.
[307] Dúplica y Réplica a la Reconvención de la CFE, No. 151.

obedece a que inicialmente se consideró un importe de US$ 68,336.98 (Sesenta y ocho mil trescientos treinta y seis dólares americanos 98/100 cy) por concepto de 7 días de afectación del periodo del 17 al 23 de julio del 2018, por lo que, al corregirse el periodo de afectación, se consideró del 19 al 23 de julio del 2018 es decir 5 días. Por lo tanto, el importe correcto es de US$ 48,812.13 (Cuarenta y ocho mil ochocientos doce dólares americanos 13/100 cy) , el cual fue obtenido aplicando la metodología determinada por la Comisión y DUNOR como se puede comprobar en la minuta No.7[308].

397. Por otra parte, en relación con la reclamación por concepto de energía eléctrica para energización y prueba de equipo en la puesta en servicio del Proyecto de la CC Empalme II, la Comisión considera que la Demandante y el Perito están solicitando un costo directo de la obra, siendo esto una obligación del Contratista. Señala también que la prórroga en las fechas de ejecución de las pruebas, no afectó los consumos de PEM, por no tener que repetir las pruebas o realizar trabajos adicionales de PEM que pudieran incrementar el consumo de la energía de las pruebas. De esta manera el consumo de energía eléctrica de los trabajos y pruebas realizados durante el periodo de reconocimiento del Acuerdo, fue un gasto que ya estaba considerado en el Contrato que permitió a DUNOR lograr el avance conforme las cedulas de avance de obra mensual conciliadas entre las Partes[309].

398. La Comisión aclara que los montos de US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy) (que según DUNOR es el componente principal de la diferencia entre lo reclamado por DUNOR y lo reconocido por el perito de CFE[310]) y US$ 168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy) no han sido pagados, ya que no cumplen con lo establecido en el Acuerdo, como lo confirma la Demandante cuando expresa que "*cumplen con todos los requisitos del Acuerdo, pero no han sido liquidados*"[311].

[308] Dúplica y Réplica a la Reconvención de la CFE, No. 154-159.
[309] Dúplica y Réplica a la Reconvención de la CFE, No. 164 y 165.
[310] Réplica, No. 155.
[311] Dúplica y Réplica a la Reconvención de la CFE, No. 166.

399. Reitera la Comisión que la Demandante y el Perito EY insisten que es procedente un monto por US$ 3’624,304.66 (Tres millones seiscientos veinticuatro mil trescientos cuatro dólares americanos 66/100 cy) derivado de la reclasificación del apartado 3.2 del Acuerdo al 3.5, pero, la Comisión manifiesta que no se han cumplido con la entrega de las documentales necesarias, a pesar de las solicitudes hechas[312]. Por lo anterior, la CFE manifiesta que confirma que el importe de US$ 1’056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy) es el soportado documentalmente en razón con lo establecido en el apartado 3.5 del Acuerdo [313].

400. A tal efecto la Comisión se refiere a la afirmación de la Demandante[314] y el Perito EY en el sentido que la factura reclamada de la empresa ABB México S.A. de C.V. No. 71047322918146, cumple con lo establecido en el Acuerdo Señala la CFE que las evidencias presentadas (Reportes de Servicios y Técnico) indican claramente que son trabajos relacionados con el contrato original, por ser reemplazo de una fuente de 24 volts, pruebas a equipos CEMS y calibraciones de analizadores, trabajos que fueron programados en la etapa de pruebas y puesta en servicio para las pruebas funcionales de los CEMS, lo cual se observa en la nota de bitácora de obra No. 65149 del periodo del 21 al 27 enero 2019 donde se visualiza el detalle de las actividades realizadas. Señala la Comisión que el Perito no contempló que el importe por US$ 7,735.00 (Siete mil setecientos treinta y cinco dólares americanos 00/100 cy) son gastos que están contemplados en el alcance del Contrato [315].

401. En relación con la empresa MHO, la Comisión argumenta que hay mala fe procesal por parte de la Demandante, ya que de manera maliciosa trata de confundir con sus argumentos lo relacionado con esta empresa. Por lo que la Comisión aclara lo siguiente: la Comisión en el oficio RGROS-174/2020 del 31 de julio del 2020, reconoció a la Contratista los Gastos por la Gestión de Personal y de Administración de Campo de conformidad con el apartado 3.2 del Acuerdo, por tres personas de la empresa MHO Engineering S.A. de C.V.,

[312] Dúplica y Réplica a la Reconvención de la CFE, No. 168.
[313] Dúplica y Réplica a la Reconvención de la CFE, No. 170.
[314] Réplica, No. 157.
[315] Dúplica y Réplica a la Reconvención de la CFE, No. 171 y 172.

especificando los motivos de reconocimiento y realizando el comentario que "*esta factura se incorpora de la reclamación del 3.5 al 3.2 solo el personal técnico administrativo que forman parte del organigrama del proyecto Inés Cantero, responsable documento, Jesús Martínez Cerón, responsable área eléctrica y Fidel Sánchez Padilla, supervisor Eléctrico MT/BT*"[316].

402. La Comisión considera que la Demandante pretende, en el caso de la empresa MHO Engineering S.A., incluir a todo el personal, sin que estos sean de aquellos que encuadran en el apartado 3.3 del Acuerdo por no ser Personal Directivo, Técnico, Administrativo de DUNOR, y muchos menos se encuentra en el organigrama del Proyecto. Al respecto, la Comisión menciona como ejemplo la reclamación de la primera factura M-149 del mes de julio del 2018, donde se puede observar un reclamo por la totalidad de veinticinco trabajadores, siendo que solo tres de ellos aparecen en el organigrama de la Demandante como personal Técnico Administrativo. Respecto de los veintidós restantes, de la descripción del soporte anexo "*reporte de horas*" se desprende que las actividades realizadas por estos veintidós trabajadores son parte del costo directo.[317]

403. Por todo lo anterior, indica que en relación con el Acuerdo apartado 3.5, el monto procedente es de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy).[318]

404. También, señala la Comisión que el Perito Cámara en su informe Complementario, determina procedente el pago que realizó DUNOR a sus proveedores por la cantidad de US$ 4'020,065.96 (Cuatro millones veinte mil sesenta y cinco dólares americanos 96/100 cy) ratificando lo señalado en su Dictamen Pericial, pero el Perito Cámara advierte al Tribunal Arbitral "*que dichas cantidades no se encuentran debidamente soportadas documentalmente en función de que no se tiene los contratos que definan cúal (sic) fue el objeto de los trabajos contratados por DUNOR durante la prórroga de la Aceptación Provisional, ni reportes de actividades realizadas, además de que dicha información, no obstante que fue requerida por el Tribunal Arbitral, no fue*

[316] Dúplica y Réplica a la Reconvención de la CFE, No. 173.
[317] Dúplica y Réplica a la Reconvención de la CFE, No. 173.
[318] Dúplica y Réplica a la Reconvención de la CFE, No. 174.

*exhibida por DUNOR, generando serías (sic) dudas a este Perito. Quedando pendiente presentar la documentación indicada en el párrafo anterior, para poder determinar su procedencia"*[319]. De esta manera, aunque el perito y la Comisión no concluyen en la misma cantidad procedente, están de acuerdo que la Demandante no soporta documentalmente los Contratos y actividades realizadas en el período de reconocimiento de conformidad con el apartado 3.5 del Acuerdo aunque fueron solicitados en la etapa de conciliación y ordenados por el Tribunal.

405. Se refiere igualmente la Comisión al importe por US$ 90,936.34 (Noventa mil novecientos treinta y seis dólares americanos 34/100 cy) que el Perito EY señala que corresponde a personal que en su entender laboró directamente en la obra y que realizaron trabajos durante el periodo de análisis, así como otros gastos asociados a los trabajos de obra, que a su entender corresponden a gastos por reclamación de terceros y que deben compensarse de conformidad con el apartado 3.5 del Acuerdo. Al respecto señala la Comisión que el Perito EY realiza tal aseveración sin presentar evidencia o documentación. Agrega que son trabajos de costo directo de obra, por lo tanto, es lógico que estos trabajos se encuentran en el alcance del Contrato.[320]

406. La Comisión señala que la reclasificación realizada por el Perito EY incluye facturas que ya habían sido analizadas por las Partes durante el proceso de conciliación. Algunas de dichas facturas no fueron reconocidas por ambas partes por incluir de manera evidente, gastos y trabajos en el alcance al Contrato, ya que no tienen nada que ver con el periodo de reconocimiento del Acuerdo. Para citar algunas, la Comisión hace referencia a las filas 242 y 284, a las facturas 1910000067 y 1910000082, y a la columna indicada con la letra "W" de la Cédula de Gastos por la Gestión de Personal y Administración de Campo, donde consta el comentario de la justificación del rechazo de cada una de estas que consiste en "*ESTAS VISITAS FUERON REALIZADAS PARA ATENDER Y CORREGIR LA ALTA VIBRACIÓN QUE PRESENTABAN LOS VARIADORES DE FRECUENCIA DE LAS BOMBAS DE AGUA DE ALIMENTACIÓN DE ALTA PRESIÓN, POR LO QUE NO ES PROCEDENTE SU RECONOCIMIENTO YA*

[319] Dúplica y Réplica a la Reconvención de la CFE, No. 176.
[320] Dúplica y Réplica a la Reconvención de la CFE, No. 178.

*QUE ES UNA OBLIGACIÓN DEL CONTRATISTA REPARAR TODAS LAS FALLOS Y DAÑOS QUE SE PRESENTEN DURANTE EL PROYECTO A SU SOLA COSTA*". Señala que es claro el trabajo deficiente y tendencioso realizado por el Perito EY, considerando estos gastos como procedentes sin siquiera presentar las documentales que acrediten que estos costos se encuentran en el alcance del Acuerdo[321].

407. Por su parte, en relación con los importes de US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy) y US$ 168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy), la Comisión reitera que no se ha cumplido con los dispuesto en el apartado 3.5 del Acuerdo, por lo que no pueden declararse como procedentes.

408. A manera de conclusión, la Demandada afirma que varias de las facturas que tanto DUNOR como su Perito EY han considerado como procedentes, carecen del soporte documental que acrediten dichos gastos, generando así un incumplimiento del Acuerdo. Por lo que, finalmente, reitera que el importe procedente para este rubro es de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy).

### 12.1.2.5.3 Consideraciones del Tribunal

409. El numeral 3.5 del Acuerdo establece lo siguiente.

> *"3.5 RECLAMACIONES DE TERCEROS.*
>
> *"Se incluyen en este rubro todas las reclamaciones de suministradores y subcontratistas recibidas por EL CONTRATISTA debido a la prórroga de la Fecha Programada de Aceptación Provisional y/o motivo que dio origen a esta afectación según lo descrito en el presente Acuerdo y en apego a la Cláusula 25.5 del Contrato. En este punto EL CONTRATISTA realizará todos los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros."*

[321] Dúplica y Réplica a la Reconvención de la CFE, No. 179 y 180.

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*"En este rubro, EL CONTRATISTA deberá presentar toda la información contractual, contable y toda aquella que se requiera para el análisis y procedencia de los conceptos y montos reclamados por terceros."*

*"Cualquier documento que, en defecto de los anteriores, demuestre fehacientemente los costos de los conceptos anteriores".*

410. En relación con las Reclamaciones de Terceros debe observarse que dicho rubro está compuesto de dos conceptos: el primero correspondiente a una serie de facturas que se presentaron desde un principio como reclamaciones de terceros y, el segundo, a otra serie de facturas que inicialmente se habían presentado como gastos a los que se aplicaba el apartado 3.2 del Acuerdo y que, posteriormente, la Comisión solicitó se sujetaran al apartado 3.5.

411. Teniendo en cuenta que las controversias surgidas sobre una y otra son diferentes, considera el Tribunal pertinente abordarlas por separado, por lo cual primero se referirá a las reclamaciones de terceros presentadas inicialmente, para posteriormente examinar las reclamaciones que fueron presentadas bajo el apartado 3.2 y que fueron trasladas al apartado 3.5.

### 12.1.2.5.3.1 Gastos por reclamaciones de terceros inicialmente presentadas

412. La Comisión señala que el valor a reconocer por las reclamaciones de terceros inicialmente presentadas es de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy)[322]. Por su parte, DUNOR considera que el valor que se le debe reconocer es de US$ 1'072,457.09 (Un millón setenta y dos mil cuatrocientos cincuenta y siete dólares americanos 09/100 cy)[323]. Dichas cifras corresponden a las que indican los respectivos peritos[324].

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[322] Dúplica de CFE, párrafo 154.
[323] Contestación y Réplica de Dunor, párrafo 148.
[324] Informe Pericial de Cámara Tabla 9.

413. Ahora bien, el Perito EY señala[325] que la diferencia entre los valores que la CFE considera se deben reconocer y aquellos que estima DUNOR y su perito provienen de la Factura ICI258, en lo cual está de acuerdo la CFE[326].

414. Al respecto señala la CFE[327] que en la Minuta de Reunión No. 7, del 23 y 24 de enero del 2020, tras demostrar DUNOR una afectación de costos del periodo del 10 al 23 de julio del 2018 (14 días de gastos), se concilió un importe procedente de US$ 68,336.98 (Sesenta y ocho mil trescientos treinta y seis dólares americanos 98/100 cy) por concepto de 7 días aplicables conforme al periodo de reconocimiento, es decir se reconocieron los gastos del 17 al 23 de julio del 2018. Para explicar cómo se llegó a dicho valor señala que en dicha reunión, se analizó cada uno de los conceptos reclamados y el origen de estos, realizándose por ambas partes los cálculos correspondientes, donde acordaron que algunos conceptos no aplicaban de conformidad con el Acuerdo, por ser gastos del alcance del Contrato que no tuvieron afectación, por citar algunos ejemplos, fletes de materiales, el traslado del personal a su lugar de origen etc., por lo que del total de US$ 180,299.20 (Ciento ochenta mil doscientos noventa y nueve dólares americanos 20/100 cy), que corresponde al finiquito del Contrato EMP0231, que abarca el periodo del 10 al 23 de julio del 2018, se determinó, de común acuerdo entre la Comisión y DUNOR, que el importe base para realizar el cálculo de la compensación durante el periodo del 17 al 23 de julio del 2018, sería de US$ 136,673.90 (Ciento treinta y seis mil seiscientos setenta y tres dólares americanos 90/100 cy), por lo que se reconocieron 7 de 14 días, esto es un 50%, por lo que resultó un importe conciliado de US$ 68,336.98 (Sesenta y ocho mil trescientos treinta y seis dólares americanos 98/100 cy)[328].

[325] Primer Informe Pericial de EY, Cuadro 30. Segundo Informe Pericial de EY, Cuadro 6.
[326] Dúplica y Réplica a la Reconvención de la CFE, párrafo 154.
[327] Dúplica y Réplica a la Reconvención de la CFE, párrafo 155.
[328] Dúplica y Réplica a la Reconvención de la CFE, párrafo 156.

415. Señala la CFE[329] que posteriormente solicitó a DUNOR corregir el periodo de afectación, aceptando el periodo de reconocimiento del acuerdo del 19 de julio 2018 al 14 de marzo del 2019 y rectificando su reclamación. Por consiguiente al hacer el ajuste se reclama por la factura ICI 258 un importe de US$ 48,812.13 (Cuarenta y ocho mil ochocientos doce dólares americanos 13/100 cy), "*siendo lo más justo, transparente y razonable*", aplicando la metodología expuesta pero solo considerando la afectación por 5 días, en lugar de los 7 inicialmente considerados.

416. Se refiere la CFE al análisis del Perito EY y señala que no es correcto lo indicado por este, ya que consideró el monto total del finiquito del contrato entre DUNOR y un tercero, sin realizar ningún análisis respecto de los conceptos contenidos en el Contrato y si todos estos están dentro del alcance del Acuerdo. Precisa la CFE que de haber realizado el análisis correcto el Perito EY debió determinar un importe de US$ 136,673.90 (Ciento treinta y seis mil seiscientos setenta y tres dólares americanos 90/100 cy), y no el importe unilateral de US$ 180,299.20 (Ciento ochenta mil doscientos noventa y nueve dólares americanos 20/100 cy).

417. En relación con lo anterior señala el Perito EY que la diferencia de US$ 15,580.44 (Quince mil quinientos ochenta dólares americanos 44/100 cy) obedece a la factura ICI258 del subcontratista "*Ingeniería Control e Instrumentación S.A. de C.V.*" donde "*nosotros cuantificamos una cantidad procedente de $ 64,392.57 USD, mientras el Perito Cámara determinó un importe de $48,801.30 USD*"[330]. En efecto, en el primer Informe del Perito EY se indica un valor de US$ 64,392.57 (Sesenta y cuatro mil trescientos noventa y dos dólares americanos 57/100 cy)[331] y en el informe del Perito Cámara un monto de US$48,801.30 (Cuarenta y ocho mil ochocientos un dólares americanos 30/100 cy) [332].

[329] Dúplica y Réplica a la Reconvención de la CFE, párrafo 157, Anexo R-118 Oficio RGROS-101/2020.
[330] Segundo Informe Pericial de EY, página 37.
[331] Primer Informe Pericia de EY, cuadro 28, página 46.
[332] Primer Informe del Perito Cámara, tabla 5, página 63.

418. Ahora bien, el Perito Cámara se funda en la comunicación de la CFE RGROS 101/2020[333] en la cual la CFE solicitó a DUNOR un ajuste por los montos reclamados del mes de julio, con fundamento en que los gastos solo pueden ser reconocidos a partir del 19 de julio de 2018, y no del 17 de julio del mismo mes, como se había hecho inicialmente. Así mismo el Perito Cámara invoca la respuesta de DUNOR del 21 de mayo[334], en la cual esta expresa que acompaña la revisión No. 3 de julio de 2018, reconsiderando el periodo reclamado del 19 al 31 de julio de 2018. Es pertinente señalar que la respuesta de DUNOR que incorporó el Perito Cámara no tiene anexos. El Perito Cámara indica que dicha cifra son "*los montos acordados por ambas partes*"[335].

419. Por el contrario el Perito EY señala[336] que DUNOR le informó que no existe un reconocimiento acordado por las Partes. Igualmente, como ya se vio, la Comisión señaló que es cierto que las Partes no han llegado a un acuerdo formal respecto a los gastos del apartado 3.5 del Acuerdo como lo manifiesta la Demandante, ya que deben de tomarse en cuenta las comunicaciones posteriores a la celebración de la Minuta 07, tal es el caso del oficio RGROS-101/2020 del 24 de abril del 2020, donde le fue informado al Contratista que las facturas reclamadas no se sustentan con las reclamaciones de los suministradores y subcontratistas que en su caso hayan sido recibidas y que sean motivadas por la prórroga. A tal efecto advierte el Perito EY que se acordó un importe en la Minuta 7, pero se realizaron revisiones posteriores como se observa en el Oficio EGROS-095/2020. Por otra parte, en su segundo Informe, el Perito EY expresa que la factura respectiva tenía un importe total de US$ 180,299.20 (Ciento ochenta mil doscientos noventa y nueve dólares americanos 20/100 cy) por el periodo del 10 de julio de 2018 al 23 de julio de 2018, pero para efectos de la compensación del gasto, solo la parte proporcional correspondiente del 19 al

[333] Anexo 114 del Primer Informe del perito Cámara.
[334] Anexo 115 del Primer Informe del perito Cámara.
[335] Primer Informe, página 63.
[336] Primer Informe de EY, página 44.

23 julio aplicaría para el reembolso de julio de 2018; esto es, 5 de los 14 días de servicio recibido, por lo que dividió, cinco entre catorce, lo que arrojó un porcentaje de 35.71%, ese porcentaje lo multiplicó por el importe total de la factura (US$ 180,299.20) (Ciento ochenta mil doscientos noventa y nueve dólares americanos 20/100 cy) con lo cual obtuvo un resultado de US$ 64,392.57 (Sesenta y cuatro mil trescientos noventa y dos dólares americanos 57/100 cy), que es valor que concluye debe tomarse en cuenta.

420. En este punto considera el Tribunal que en la comunicación de DUNOR se expresa: "*adjuntamos la revisión No. 3 de julio 2018 por un importe de USD 500,089.32 USD, reconsiderando el periodo reclamado del 19 al 31 de julio de 2018, se anexan al presente los archivos electrónicos contemplando las modificaciones citadas, solicitando que se programe para su revisión a la brevedad posible*".

421. Ahora bien, si se revisa la Minuta de la Reunión 7[337], que se encuentra firmada por ambas partes, se aprecia que en la misma se indica "*Del apartado 3.5 del Acuerdo correspondiente a las facturas del mes de julio 2018, el monto procedente conciliado queda en $560,470.12 USD*". En la "*Tabla de control de facturas del mes de julio de 2018, conciliadas para el apartado 3.5 y el monto procedente a la fecha*", aparece la factura ICI 258 por un valor de US$ 68,336.98 (Sesenta y ocho mil trescientos treinta y seis dólares americanos 98/100 cy) y se expresa lo siguiente:

| COMENTARIOS DE REUNIÓN 2Y 3 DE DICIEMBRE 2019 | COMENTARIOS DE REUNIÓN 23 Y 24 DE ENERO 2020 | ESTATUS |
|---|---|---|
| DUNOR INDICA QUE HA ENTREGADO TODA LA INFORMACIÓN EXISTENTE DURANTE EL PROCESO DE NEGOCIACIÓN CON EL SUBCONTRAISTA, CUMPLIENDO LO ESTABLECIDO EN EL APARTADO 3.5 DEL ACUERDO<br><br>CFE REITERA QUE UNA VEZ QUE SE ENTREGUE Y REVISE LA INFORMACIÓN LA CFE ESTARÁ EN CONDICIÓN DE RECONOCER LA PARTE PROPORCIONAL DEL MONTO A LOS DÍAS 17 AL 23 DE JULIO Y EXCLUYENDO LOS SIGUIENTES CONCEPTOS | DESPUES DE HACER UNA ANÁLISIS DE LA INFORMACIÓN ENTREGA SE ACUERDO LA PROCEDENCIA DEL SIGUIENTE IMPORTE DE :$ 68.336,98 | CONCILIADO |

[337] Anexo 60 del Primer Informe del Perito Cámara.

| | | |
|---|---|---|
| TRASLADOS A SU LUGAR DE ORIGEN - FLETES DE INCORPORACIÓN- GASTOS FINANCIEROS - ENERGÍA ELECTICA | | |

422. Como se puede apreciar, del Acta se desprende que el monto de US $68,336.98 (Sesenta y ocho mil trescientos treinta y seis dólares americanos 98/100 cy) fue conciliado, lo que implica que existió un acuerdo entre las Partes sobre el particular.

423. Ahora bien, la Comisión solicitó ajustar los días a reconocer. Al realizar el ajuste se obtiene un valor de US$ 48,801.30 (Cuarenta y ocho mil ochocientos un dólares americanos 30/100 cy) que es el que indica el Perito Cámara. Si bien es claro que las Partes reconocen que no tenían acuerdos definitivos, en este caso, existía una primera conciliación que se solicitó se ajustara por el número de días sin reparo de DUNOR. Por lo anterior, considera el Tribunal que el valor que se tomará en cuenta es el indicado por el Perito Cámara.

424. Por otra parte, es pertinente señalar que en su Primer Informe el Perito EY incluye adicionalmente un "*total de $ 971,935.48 USD de gastos donde, de acuerdo con la documentación analizada, determinamos que las transacciones fueron incurridas durante el Periodo de Análisis, están directamente relacionadas con el Proyecto y corresponden a conceptos definidos dentro del apartado 3.5 del Acuerdo. Sin embargo, a la fecha de presentación de este Informe, estas no han sido pagadas por el Contratista*"[338]. Por su parte, DUNOR ha precisado que reclama este valor a pesar de no haber sido pagado. A tal efecto señala que "*Como quiera que ese impago es directamente imputable a CFE, DUNOR sí reclama esta cantidad en el arbitraje*"[339]. Por su parte, el Perito Cámara señala que "*US$979,670.48 no cumplen con los criterios establecidos en el acuerdo, es decir, no han sido*

[338] Primer Informe Pericial, EY, página 47.
[339] Memorial de Conclusiones de Dunor, párrafo 118.

*pagados por el Contratista a sus subcontratistas*"[340], por lo que considera que son improcedentes.

425. De esta manera, lo que debe determinar el Tribunal es si en el evento en que el Contratista pagara dichos valores tendría derecho a recobrar este valor de la CFE. Considera el Tribunal que en la medida en que el Perito EY afirma que se cumplen los requisitos para ser reconocidos, salvo el del pago, y el Perito Cámara, no hace reparos de otro orden sobre este rubro excepto el pago, dicho valor debería ser pagado por CFE. En todo caso, como el Acuerdo exige que las sumas que debe reembolsar la CFE hayan sido pagadas, el referido reembolso deberá realizarse en el momento en el que DUNOR acredite a CFE el pago efectivo de las cantidades materia de este asunto.

#### 12.1.2.5.3.2 Gastos por reclamaciones trasladadas del apartado 3.2 al 3.5

426. En su Demanda DUNOR señala que en noviembre de 2019 la Comisión solicitó la reclasificación de unas facturas del apartado 3.2 al 3.5 del Acuerdo a lo cual procedió DUNOR.

427. En su Dúplica la Comisión expresó que "*propuso la reclasificación de estos gastos del 3.2 al 3.5 toda vez que no cumplían con los supuestos enunciados en el apartado 3.2, ya que en este únicamente deben incluirse los costos indirectos de la obra,…*"[341] y agrega que "*que después de varios meses que DUNOR entendió este hecho que finalmente en la minuta del 20 y 21 noviembre del 2019 en su numeral 1 se acordó su reclasificación sin conceder su procedencia en el apartado 3.5*"[342].

428. En relación con lo anterior encuentra el Tribunal que en la Minuta de Reunión No 04 del 20 y 21 de noviembre de 2019 celebrada entre las Partes se expresa[343]:

[340] Primer Informe pericial del perito Cámara, párrafo 319.
[341] Dúplica y Réplica a la Reconvención de la CFE, párrafo 86.
[342] Dúplica y Réplica a la Reconvención de la CFE, párrafo 87.
[343] Anexo R-114.

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|---|
| CFE, una vez realizada la consulta al área correspondiente, hace la propuesta de re-clasificación de algunas facturas reclamadas de gastos ya que se considera que corresponden a los apartados 3.1, 3.3 y 3.5, los cuales se muestran en la tabla adjunta a la presente minuta. DUNOR esta de acuerdo y procederá a esta re-clasificación durante los meses reconocidos por la CFE que cubren desde el 17 de Julio de 2018 al 14 de Marzo 2019. |
| Los criterios para esta re-clasificación de los apartados son:<br>Al Apartado 3.1 Financieros, Seguros y Avales - Las facturas asociadas a los servicios de asesoría y gestoría fiscal (GPC consultores).<br>Al Apartado 3.3 Oficinas Centrales - Todos los costos del Proyecto que correspondan a España - como son, personal de proyecto, viajes y rentas<br>Al Apartado 3.5 Reclamos de Terceros - Se incluirán los costos directos como son: energía eléctrica para pruebas, personal directo, consumibles, etc. |

429. De este modo, de acuerdo con esta Minuta, la reclasificación obedeció a que la Comisión consideró que en el apartado 3.2 del Acuerdo solo se deberían incluir costos indirectos y que los costos directos deberían reclasificarse en el apartado 3.5. Aspecto sobre el cual DUNOR expresó su acuerdo.

430. En su Demanda DUNOR señala que presentó la documentación requerida por los gastos derivados de las Reclamaciones de Terceros; agrega que la Comisión formuló observaciones, atendiendo lo cual remitió nuevamente el estudio correspondiente[344]. Añade[345] que la CFE requirió la entrega de nueva información que excedía el apartado 3.5 del Acuerdo, para lo cual señala que el Acuerdo no sujeta el cumplimiento de las obligaciones de la Comisión a la forma en que la Demandante presente sus facturas pues "*únicamente señala que 'el Contratista entregará los soportes documentales de los reclamos por mes calendario a más tardar el último día hábil del mes próximo siguiente'*"[346].

431. Expresa DUNOR[347] que, en junio y julio de 2019, DUNOR entregó a CFE la información requerida para el análisis de estos conceptos conforme a

[344] Demanda, párrafos 110-112.
[345] Réplica y Contestación Reconvención, párrafo 141.
[346] Dunor Réplica y Contestación Reconvención, párrafo 144.
[347] Dunor Réplica y Contestación Reconvención, párrafo 134.

los apartados 3.5 y 5 del Acuerdo. En este sentido se presentaron: *"(i) las facturas reclamadas, (ii) sus respectivos asientos contables, (iii) comprobantes de pago (en caso de no existir éste se informó a CFE), (iv) contratos, (v) reclamaciones de proveedores y (vi) los oficios compartidos con los proveedores donde se evidencian los esfuerzos comerciales realizados para minimizar el impacto de las reclamaciones de terceros*."

432. Por su parte, la Comisión expresa que las Partes no han llegado a un acuerdo formal respecto a los gastos del apartado 3.5 del Acuerdo. A tal efecto se remite al oficio RGROS-101/2020 del 24 de abril del 2020, donde le fue informado al Contratista que las facturas reclamadas no se sustentan en reclamaciones de los suministradores y subcontratistas que hayan sido recibidas y que sean motivadas por la prórroga. En el mismo oficio, se solicitó se muestren los esfuerzos comerciales para minimizar el impacto de las reclamaciones recibidas por Terceros, siendo esto indispensable para el análisis y procedencia de los conceptos y montos reclamados. Agrega la CFE que no debe pasar desapercibido por el Tribunal Arbitral, las documentales exhibidas por DUNOR ordenadas por este panel, entregadas de manera deficiente en las categorías 7, 8, 9, 10, 11, 12, 13 y 141, ya que éstas corresponden a la administración de personal y no a los alcances específicos de las tareas encomendadas. Añade que los programas de ejecución solicitados deben corresponder a actividades que son consecuencia de aquéllas afectadas en el período de reconocimiento. Advierte que tampoco se presentaron las actas de terminación de los trabajos efectuados por los Subcontratistas o algún documento que libere de cualquier pendiente existente de estos.

433. Expresa la CFE que "*DUNOR sí consideró inicialmente los criterios correctos de las facturas reclamadas en el Apartado 3.5, es decir, conocía lo necesario para presentar las reclamaciones de Suministradores o Subcontratistas, aclarando que precisamente de esas facturas a las que hace mención, una vez atendidos los comentarios entregó los documentos en apego al Acuerdo pero únicamente para tres empresas, y no así para el resto de las supuestas reclamaciones de terceros, que hasta la fecha no ha*

*presentado, y que además se negó a entregarlos en la Orden Procesal No. 4*"[348].

434. En su Memorial de Conclusiones, la CFE expresó[349] que "*se evidenció durante el desarrollo de la audiencia que no existieron Reclamaciones de Terceros, esto es, que el Perito de la Demandante solo se limitó a señalar que las facturas que ésta le presentó y que supuestamente por este concepto habían sido pagadas se encontraban dentro del período*". Agrega que el Perito EY "*no se cercioró que estas facturas contemplaran reclamaciones de los trabajos relacionados con el período afectado*"[350], "*su análisis se concentró en corroborar que la factura se presentara durante el período y se hubiese pagado sin analizar y corroborar la veracidad o su procedencia y así con su experticia y su metodología determinar que las facturas son derivado de reclamaciones de terceros por los trabajos afectados por las prórrogas durante el período pactado y que cumplieran con los atributos que estén directamente relacionados con las Obras, razonables y documentados*"[351]. Agrega que el Perito Cámara señaló: "*no hemos podido observar, donde efectivamente nos permita y nos demuestre que existió una reclamación no solo un gasto, no solamente cuantificar el gasto que se está argumentando, no existen evidencias fehacientes de que las actividades ejecutadas en la realidad hayan sido por causa y efecto de estos diferimientos en las fechas de Aceptación Provisional*"[352].

435. Vistas las posiciones de las Partes, hay varios aspectos que debe determinar el Tribunal: en primer lugar, cuál es el significado de reclamaciones de terceros en el presente caso, para determinar si existen o no reclamaciones; en segundo lugar, si están acreditados los requisitos exigidos por el Acuerdo y, en particular, si los gastos que se reclaman derivan de la prórroga de la fecha de la aceptación provisional; y, finalmente, los

[348] Dúplica, párrafo 151.
[349] Memorial de Conclusiones, párrafo 60.
[350] Memorial de Conclusiones, párrafo 61.
[351] Memorial de Conclusiones, párrafo 61.
[352] Memorial de Conclusiones, párrafo 62.

principios que deben regir la prueba de los esfuerzos para minimizar el impacto de las reclamaciones recibidas.

436. En relación con lo anterior estima el Tribunal necesario hacer referencia al Acuerdo celebrado por las Partes el cual dispone:

> *"3.5. RECLAMACIONES DE TERCEROS.*
>
> *"Se incluyen en este rubro todas las reclamaciones de suministradores y subcontratistas recibidas por EL CONTRATISTA debido a la prórroga de la Fecha Programada de Aceptación Provisional y/o motivo que dio origen a esta afectación según lo descrito en el presente Acuerdo y en apego a la Cláusula 25.5 del Contrato. En este punto EL CONTRATISTA realizará todos los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros.*
>
> *"En este rubro, EL CONTRATISTA deberá presentar toda la información contractual, contable y toda aquella que se requiera para el análisis y procedencia de los conceptos y montos reclamados por terceros.*
>
> *"Cualquier documento que, en defecto de los anteriores, demuestre fehacientemente los costos de los conceptos anteriores"* (se subraya).

437. En la medida en que el numeral 3.5 del Acuerdo hace referencia a las reclamaciones recibidas, es necesario precisar el alcance que se debe dar a dicha expresión, y si ella se refiere a la existencia de un documento formal denominado reclamación. A este respecto se observa que de conformidad con la Definición del Diccionario de la Real Academia Española de la Lengua, reclamar es *"Pedir o exigir con derecho o con instancia algo*". Es decir, la noción de reclamo no deriva de que se le de dicha denominación a una solicitud, sino del hecho de que se exija algo, en este caso un pago, que de conformidad con la cláusula tenga por causa la prórroga de la Fecha Programada de Aceptación Provisional y/o el motivo que dio origen a esta afectación.

438. Lo anterior es además armónico con la cláusula 25.5 del Contrato, la cual establece que en caso de retraso de la Fecha Programada para la Aceptación Provisional, el Contrato "*se dará por terminado, salvo que las Partes lleguen a un acuerdo por escrito sobre términos y condiciones que*

*razonablemente compensarán al Contratista los gastos directamente relacionados con las Obras, razonables y documentados en los que el Contratista pueda incurrir … como consecuencia de cualquier retraso adicional*". Es decir desde el punto de vista contractual lo fundamental es que el gasto cuyo pago se exige tenga como causa el retraso.

439. Lo anterior es también congruente con lo que manifestaron los peritos. En efecto, el Perito Cámara expresó durante la Audiencia que lo importante es establecer que el gasto debe ser causado o derivado de la prórroga. A tal efecto señaló:

> *"Por ejemplo, en el apartado 3.5 el que yo presente, yo tengo un proyecto en desarrollo y tengo una serie de llegada de documentos de mis proveedores por los servicios que me están ejecutando, pero que no necesariamente pueden ser originados en una reclamación, sino en el servicio que vengo desarrollando normalmente en mi proyecto y que coinciden con el periodo en el que yo puedo reclamar. Lo que nosotros tratamos de establecer razonablemente es que exista documentación que acredite que efectivamente son, están siendo reclamados por alguien y hablo de reclamo porque solo pueden encuadrar aquellos que sean causados o derivados de las prórrogas en el programa, yo me encontré, por ejemplo, por ahí una factura de que se integró en el expediente, que corresponde a un accidente automovilístico y pagan un seguro, bueno, sí está en el periodo, pero qué tiene que ver un accidente automovilístico con el diferimiento en el tiempo de este proyecto, no es una consecuencia de ese diferimiento en el proyecto, no sé cuál sea su origen, pero no encuadra en ese sentido. Hay facturas que son de administración de personal y lo que razonablemente se tiene que verificar es qué es lo que está haciendo ese personal, si es personal que está directamente en la obra y que está teniendo avances ¿por qué es un reclamo? O sea, lo que nosotros por eso lo plasmamos así en nuestro informe, es ¿son susceptibles de ser reconocidas? Sí, pero falta establecer que efectivamente corresponden a un reclamo hecho por un proveedor, reclamo que se derive directamente o que sea consecuencia de diferimiento en las Pruebas de Desempeño. Ese es el criterio que seguimos, si nosotros no podemos establecer esa trazabilidad, como en el caso del 3.5, no decimos que no sean susceptibles, no, en este momento no existen elementos suficientes que permitan considerarlos de esa forma, pero se tienen otros atributos, como existir la factura y que se haya pagado, por ejemplo.*
>
> *Roberto Hernández: Lo que ustedes hicieron fue, digamos, analizar la causa de la factura.*

*Lorenzo Cámara Anzures: Es correcto. La causa, correcto" (*se subraya).

440. Igualmente el Perito EY manifestó que se verificaba que los gastos eran derivados de la prórroga. En tal sentido señaló lo siguiente durante la audiencia:

> *"Adicionalmente a lo que dice la sección 3, el suscrito, EY, analizó uno a uno todos los gastos sujetos al análisis, repito, los 6 millones 285 mil. Uno por uno. ¿Y qué es lo que hicimos? Acreditando que fueron, primero, incurridos por el Contratista. ¿Qué verificamos? Primero, que los gastos corresponden a servicios prestados por sus suministradores o subcontratistas derivados de la prórroga. Dos, que los documentos que demuestran los esfuerzos comerciales que realizó el Contratista para minimizar el impacto de las reclamaciones. Tres, que existe evidencia de la prestación del servicio; como, por ejemplo: estimación de obras, bitácoras. Cuatro, que los gastos incurridos y facturados corresponden a las horas y servicios. Quinto, que la factura corresponde a los importes y evidencia. Sexto, por supuesto, la comprobación del pago, que es correspondiente al gasto. Y finalmente el registro contable"* (se subraya).

441. Por consiguiente, considera el Tribunal que lo fundamental no es que la solicitud de pago se denomine reclamo, sino que exista una factura que corresponda a gastos derivados de la prórroga de la fecha programada para la aceptación provisional.

442. Ahora bien, en cuanto hace referencia a que esté acreditado que los gastos son consecuencia de la prórroga de la aceptación provisional, es pertinente señalar que la CFE expresa[353] que para determinar la procedencia de los gastos del apartado 3.5, el Perito EY manifiesta haber hecho una revisión y un análisis de la información, sin que explique la metodología que lo llevó a concluir los montos del apartado 3.5. A tal efecto, la CFE hace una lista de empresas respecto de las cuales expresa que la CFE no cuenta con información:

| **SUBCONTRATISTAS** | **COMENTARIOS** |
|---|---|
| INTEGRAL COMMISSIONING SERVICE SAS | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR. |

[353] Dúplica y Réplica a la Reconvención de la CFE, párrafo 127.

| | |
|---|---|
| | - La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| EDILBERTO MARTINEZ HERRERA | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| ICIPEM INSTRUMENTACIÓN CONTROL Y PUESTA EN MARCHA SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| MHO ENGINEERING SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| INGENIERÍA CONTROL E INSTRUMENTACIÓN SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| SEPIEC SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal, solo de dos personas y se observan trabajos de costo directo al alcance del contrato sin afectación alguno por la Comisión.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| TAMOIN SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| PORRAS ARMENDÁRIZ CONSTRUCTORES | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |

| | |
|---|---|
| TURBOMEX REFACCIONES | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |
| MANTENIMIENTO Y SEGURIDAD INDUSTRIAL SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. |

443. Agrega la CFE[354] que con todas las empresas descritas en la tabla supra, la Demandante premeditadamente tiene formalizados contratos y/o adendas que tienen por objeto la contratación de Personal por Administración, aclarando que algunos de estos inicialmente sí contaban con un objeto especifico de trabajos a realizar en el alcance del Contrato, sin embargo, estos fueron modificados mediante adendas, para que durante el periodo de reconocimiento del Acuerdo quedaran con el objeto de personal por administración, es decir, no tienen un objeto específico que permita definir si la actividad o trabajo realizado fue afectado o requerido debido a la prórroga de la Fecha Programada de Aceptación Provisional o fue para la ejecución de un trabajo específico que forma parte del alcance del contrato y que no fue afectado.

444. Destaca la CFE que, durante la etapa de exhibición de documentos en este proceso, la Comisión solicitó en la categoría 7 de documentos, la descripción de los trabajos contratados por DUNOR durante la prórroga referida en el Acuerdo. Precisa la CFE que la Demandante no agregó documentación adicional, y solo se limitó a manifestar que "*lo solicitado se encuentra en el Doc. EY-22, Doc. EY-36*", a pesar de que el Tribunal Arbitral ordenó que de no poderse precisar con dicho documento el objeto de los trabajos contratados, DUNOR debía exhibir tales contratos. Señala entonces que se incumplió la Orden 4, y que existe el riesgo de pagar excedentes por

[354] Dúplica y Réplica a la Reconvención de la CFE, párrafo 129.

trabajos incluidos en el contrato original o por recuperar retrasos que se encuentran fuera del acuerdo.

445. Expresa la CFE[355] que dentro de estos contratos se encuentra el Pedido de Obra No. 157 AD 06102 de la empresa SEPIEC formalizado en octubre de 2018, por conceptos de cableado. Al respecto, advierte que es un alcance del contrato y personal por administración (oficial y ayudante eléctrico) que tiene la categoría de alguien que va realizar el trabajo, por un importe de MXN$ 1’516,577.44 (Un millón quinientos dieciséis mil quinientos setenta y siete pesos 44/100 cy), por lo que advierte que se está reclamando el costo de este personal por administración, por el simple hecho de haber ejecutado estas actividades dentro del periodo de reconocimiento, y que son trabajos en el alcance del Contrato donde la actividad de cableado no sufrió afectación alguna por las prórrogas, por lo que DUNOR no demuestra evidencia de los trabajos realizados por el personal que pretende le sea reconocido.

446. Advierte la CFE respecto del personal reclamado de las empresas listadas en la tabla que aparece en su Dúplica[356], que además de los contratos por administración antes señalados, solo se cuenta con reportes de horas y no se tiene la bitácora de trabajos realizados o reporte alguno que permita comprobar las actividades realizadas por este personal, siendo que solo presentan las horas trabajadas, incluyendo tiempo extraordinario, sin mayor información que pueda determinar si este trabajo fue afectado por el periodo de reconocimiento establecido en el Acuerdo[357].

447. Agrega la CFE[358] que la Demandante no presentó evidencia de las actividades realizadas por el personal reclamado por las empresas antes señaladas. Esta información fue solicitada inicialmente mediante correo electrónico del 15 de febrero del 2019 y la última durante la fase de exhibición de documentos. En esta última se solicitó el reporte de las actividades

[355] Dúplica y Réplica a la Reconvención de la CFE, párrafo 132.
[356] Dúplica y Réplica a la Reconvención de la CFE, Tabla que obra en el párrafo 128.
[357] Dúplica y Réplica a la Reconvención de la CFE, párrafo 133.
[358] Dúplica y Réplica a la Reconvención de la CFE, párrafo 134.

realizadas, por el personal de cada una de las empresas subcontratistas que se reclaman costos, como reclamación de terceros, pero en un acto de mala fe procesal, la Demandante se abocó a manifestar diversas objeciones, entre ellas que el reporte de las actividades realizadas por los subcontratistas ha sido compartido con la Comisión a través de: (i) Bitácoras de Obra, (ii) Reportes y Programas y, (iii) reuniones de coordinación entre las Partes, documentación que no sustenta ni especifica las actividades realizadas por el personal reclamado, ya que se requiere la información específica de los trabajos ejecutados por el personal relacionados con la afectación del periodo de reconocimiento y no de bitácoras de obra del Contrato o reportes y programas con actividades generales de dicho contrato y que lo único que se desprende es una mezcla de trabajos de la Cláusula 25.5 del Contrato y de aquellos en alcance del Proyecto 313 CC Empalme II.

448. Advierte la CFE[359] que en la Orden Procesal No. 4 se señaló que "*No obstante si existen otros documentos con la información solicitada deberán exhibirse*". Como consecuencia de lo anterior, la Demandante además de lo referido en el párrafo anterior, solo presentó dos documentales que consisten en reportes de actividades de las empresas (i) SEPIEC SA DE CV y (ii) PORRAS ARMENDÁRIZ CONSTRUCTORES, los cuales fueron presentados incompletos y de personal que no corresponde al reclamado, por lo cual hace las siguientes observaciones: i) respecto de la empresa SEPIEC SA DE CV, expresa que presenta reportes solo de una fracción del periodo reclamado y no de la totalidad del tiempo, así como una fracción mínima del personal que obra en las reclamaciones, y de la simple lectura de estos se desprenden actividades dentro del alcance al Contrato, incluso reparaciones de trabajos mal ejecutados por el Contratista lo cual consta en la información entregada en la categoría 12 de la Orden Procesal. Señala la CFE que la Demandante temerariamente manifiesta que no existían trabajos dentro del alcance del Contrato, pero como se observa de los documentos no se desprenden las actividades del personal reclamado. ii) En lo que respecta a la empresa

[359] Dúplica y Réplica a la Reconvención de la CFE, párrafo 135.

PORRAS ARMENDÁRIZ CONSTRUCTORES, señala la CFE que se exhibe reporte de actividades de personal distinto al reclamado, lo cual consta en la información entregada por DUNOR referente al punto 12 de la Orden Procesal 4. Observa la CFE que, en un intento de confundir, la Demandante exhibe documentales que no corresponden al personal reclamado y ofrece reportes que no se encuentran dentro del periodo de reconocimiento, y es por ello que la Comisión se hace la siguiente pregunta ¿por qué se tiene reportes de actividades de un personal específico que no es el reclamado, y que del personal reclamado dentro de las facturas en apego al acuerdo, no se generó reportes de actividades? A su juicio la Respuesta es simple: DUNOR no cuenta con el reporte de actividades del personal el periodo de reconocimiento del Acuerdo. Agrega que ésta debe "*Probar Documentalmente*" su procedencia y no pretender transmitir esta carga a la Demandada.

449. En relación con todo lo anterior, encuentra el Tribunal que en el Primer Informe del Perito EY se indica que se solicitó la documentación soporte y se verificó que "*ii. Los gastos reclamados están directamente relacionados con el Proyecto y corresponden a servicios prestamos (sic) por suministradores o subcontratistas derivado de la prórroga de la Fecha Programada de Aceptación Provisional*"[360] (se subraya).

450. Igualmente en el Segundo Informe del Perito EY al realizar el análisis correspondiente, se señala que los gastos "*corresponden a servicios prestados por suministradores o subcontratistas derivado de la prórroga de la Fecha Programada de Aceptación Provisional*"[361] (se subraya).

451. Adicionalmente, encuentra el Tribunal que obran en el expediente, como anexo del Primer Informe del Perito EY, los documentos DOC.EY.22 y DOC.EY.36 en los cuales se incorporan respecto de cada empresa cuyo pago se reclama, la factura correspondiente, y dentro de una carpeta denominada evidencia, diversa información, como las horas empleadas y en algunos casos

[360] Primer Informe, página 44.
[361] Segundo Informe Pericial, página 34.

otros documentos. Además, se acompañó el anexo DOC.EY.35 que contiene una cédula en la que respecto de cada gasto se indican los siguientes atributos que habrían de verificarse:

| Ref.en PT | Descripción | Atributo revisado |
|---|---|---|
| 1 | Gasto relacionado con la Obra | El tipo y naturaleza del gasto está directamente relacionado con la Obra (Central de Ciclo Combinado 313 CC Empalme II) y es razonable conforme al concepto de gasto descrito en el apartado 3.5 del Acuerdo |
| 2 | Incurrido (devengado) Periodo de Análisis | El gasto tuvo lugar y fue devengado en el Periodo de Análisis acordado entre las Partes (19-jul-18 al 14-mar-19) |
| 3 | Contrato/Pedido | Los gastos incurridos correspondan a las horas, servicios, personal, tarifas, etc., establecidas con los subcontratistas y proveedores en los contratos celebrados por Dunor Energía. |
| 4 | Evidencia del gasto | Existe evidencia de la prestación del servicio y/o recepción de los bienes, como por ejemplo: estimaciones de obra autorizadas, bitácoras de horas trabajadas, listas de asistencia, etc. |
| 5 | Factura | La factura corresponde a los importes y evidencia de los servicios recibidos y a los importes pactados en el contrato y/o pedido. |
| 6 | Pago | El comprobante del pago corresponde al gasto (factura). En los casos donde el pago incorporó varias facturas, verificamos la integración del pago total realizado. |
| 7 | Registro contable del pago | Observamos la póliza del registro contable correspondiente al pago. |

452. De esta manera, de acuerdo con este cuadro, lo que verificó el perito fue que el gasto estuviera relacionado con la obra; incurrido en el período de análisis acordado por las Partes; corresponda a horas establecidas en los

contratos; haya evidencia de la prestación del servicio; la factura corresponde a los servicios recibidos o los importes pactados, y que haya sido pagado. Ahora bien, la discusión que ha planteado la Comisión es si en estos casos el servicio prestado correspondía a la ejecución normal del Contrato, caso en el cual servicio estaría pagado con la remuneración del Contrato. Como ya se vio, en sus dos informes el Perito EY afirmó que los servicios prestados fueron "*derivado(s) de la prórroga*".

453. Por otra parte, encuentra el Tribunal que en su Primer Informe[362], el Perito Cámara encontró que la suma de US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy) "*cumplen con los lineamientos del acuerdo, es decir, pertenecen a trabajos relacionados con la prórroga de la Aceptación Provisional*".

454. Adicionalmente en diversos casos, los dos peritos EY y Cámara, consideraron que eran procedentes las reclamaciones de terceros, aun cuando por diversos valores, como se puede apreciar a continuación, con base en la información del Documento EY-41 que se acompaña al Segundo Informe del Perito EY:

| **SUBCONTRATISTAS** | **COMENTARIOS DE LA COMISION** | **LO QUE INDICA EL DOCUMENTO EY-41** |
|---|---|---|
| INTEGRAL COMMISSIONING SERVICE SAS | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | De acuerdo con el documento EY-41, el Perito Cámara propone reconocer $1.686,85, en tanto que el Perito EY indica que se debe reconocer $3.897,49 |
| EDILBERTO MARTINEZ HERRERA | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el | De acuerdo con el documento EY-41, el Perito Cámara propone reconocer $47.306,05, en tanto que |

[362] Primer Informe Pericial del perito Cámara, párrafo 318.

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| | reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | el Perito EY indica que se debe reconocer $ 41.178,41 |
| ICIPEM INSTRUMENTACIÓN CONTROL Y PUESTA EN MARCHA SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | Esta empresa aparece en dos conceptos en el documento EY-41, En el primero, el Perito Cámara propone reconocer $ 8,048.81, en tanto que el Perito EY indica que se debe reconocer $ 3,222.00<br>En el segundo, tanto el Perito Cámara como el Perito EY indican como valor a reconocer $8,179.74 |
| MHO ENGINEERING SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | De acuerdo con el documento EY-41, el Perito Cámara propone reconocer $67,416.79, en tanto que el Perito EY no indica ninguna cifra a reconocer, pues considera que forma parte de otro acápite. |
| INGENIERÍA CONTROL E INSTRUMENTACIÓN SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | De acuerdo con el documento EY-41, el Perito Cámara propone reconocer $ 10,591.21, en tanto que el Perito EY indica que se debe reconocer $ 127,185.20 |
| SEPIEC SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal, | Esta empresa aparece en dos rubros en el documento EY-41, |

| | | |
|---|---|---|
| | solo de dos personas y se observan trabajos de costo directo al alcance del contrato sin afectación alguno por la Comisión.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | En el primero el Perito Cámara propone reconocer $7,341.99, en tanto que el Perito EY indica que se debe reconocer $7,911.82<br>En el segundo el Perito Cámara indica un valor a reconocer de $2,824.91 en tanto el Perito EY indica como valor a reconocer $3,199.98 |
| TAMOIN SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | De acuerdo con el documento EY-41, el Perito Cámara propone reconocer $13,717.96 , en tanto que el Perito EY indica que se debe reconocer $ $15,677.66 |
| PORRAS ARMENDÁRIZ CONSTRUCTORES | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | De acuerdo con el documento EY-41, el Perito Cámara propone reconocer $4,369.93 , en tanto que el Perito EY indica que se debe reconocer $4,540.12 |
| TURBOMEX REFACCIONES | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para | De acuerdo con el documento EY-41, el Perito Cámara no propone reconocer nada a este contratista , en tanto que el Perito EY indica que se debe reconocer $8,369.42<br>En otro ítem del documento EY-41 el Perito Cámara no propone reconocer nada a este contratista, |

| | | |
|---|---|---|
| | minimizar el impacto de las reclamaciones recibidas por terceros. | en tanto que el Perito EY indica que se debe reconocer $ $7,899.63 |
| MANTENIMIENTO Y SEGURIDAD INDUSTRIAL SA DE CV | - La Comisión no cuenta con evidencia de las actividades realizadas por este personal.<br>- La Comisión no cuenta con el reclamo de un tercero hacia DUNOR.<br>- La Comisión no cuenta con evidencia de los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros. | En relación con esta empresa se aprecia que como aparece en los dictámenes periciales su nombre es TURBO-MEX REFACCIONES Y MANTENIMIENTO INDUSTRIAL SA DE CV, por lo cual está incluida en el acápite anterior. |

455. A lo anterior se agrega que en el Documento EY-35 se hace referencia a cada uno de los contratistas indicados y se señala en la lista de chequeo como un gasto relacionado con la obra.

456. De lo anterior se desprende que salvo en un caso los dos peritos consideraron que era procedente el reconocimiento, aunque por valores diferentes.

457. Ahora bien, en su Segundo Informe, el Perito Cámara agregó lo siguiente:

> *"149. Es preciso indicar que, dentro de las documentales que nos fueron puestas a la vista, detectamos que en el Redfern Schedule la CFE solicitó pruebas adicionales, relativas a los contratos que especificaran las actividades que los proveedores o subcontratistas realizaron durante el período de análisis, requerimiento que en nuestra opinión es necesario para validar la procedencia del reconocimiento por parte de la CFE, los cuales no fueron entregados a la CFE y por lo consiguiente generan una duda razonable respecto de su validez y Reconocimiento.*
>
> *150. Debido a ello, este Perito informa al Tribunal Arbitral que estos reclamos carecen de elementos documentales que acrediten y validen que estos trabajos fueron realizados como un efecto de la prórroga de la Aceptación Provisional".*

458. Es pertinente señalar que en su presentación en la audiencia, el Perito Cámara expresó (transcripción del tercer día):

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> *"Sin embargo, a diferencia de lo que manifestó el perito de EY, nosotros no tuvimos o no encontramos toda la documentación que, en nuestra opinión, cumpla o que haga cumplir con todos los atributos que se necesitan para poder ser compensados según este apartado. Por ejemplo, como les comentaba, en la parte donde se acordaron esos reclamos a terceros son facturas en lo particular referentes a Siemens, a los proveedores Siemens y Skoda, donde está completamente documentado el reclamo hecho por ellos, está toda la documentación fehaciente y por ese hecho es que llegan a una conciliación. En este caso, se ha solicitado información por parte de la Comisión que nosotros hasta este momento no hemos podido observar, donde efectivamente nos permita y nos demuestre que existió una reclamación no solo un gasto, no solamente cuantificar el gasto que se está argumentando, no existen evidencias fehacientes de que las actividades ejecutadas en la realidad hayan sido por causa y efecto de estos diferimientos en las fechas de Aceptación Provisional. No observamos tampoco que en bitácoras este personal se ha indicado de manera puntual. Y lo recalco porque hay muchos o hay varios contratos de administración en general que se están metiendo en este apartado, los cuales, si bien es cierto que podrían efectivamente pertenecer a este inciso para ser reconocidos, en nuestra opinión, no han sido acreditados debidamente. De hecho, inclusive, si mal no recuerdo, en la solicitud de información adicional por parte de la Comisión en el Redfern, se solicitó información relativa a esto. Y en las respuestas que dio Dunor a la Comisión, me parece, si no recuerdo mal, que indicó que no las tenía. Lo que sí es un hecho es que no aportó información que nos permitiera suponer que efectivamente corresponden a afectaciones generadas por el diferimiento en las fechas de Aceptación Provisional. Esto es lo relativo a los temas 3.2 y 3.5."*

459. De esta manera, en su Segundo Informe y durante la audiencia, el Perito Cámara consideró que no se habían acreditados las actividades desarrolladas por el personal, y que, adicionalmente, no se había acreditado la existencia de una reclamación, lo que encuentra el Tribunal que no es consistente con su primer Informe, en el que había expresado que la suma de US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy) "*cumplen con los lineamientos del acuerdo*".

460. Ahora bien, el Perito EY sostiene en su dictamen que verificó que los gastos que él considera se deben reconocer se hicieron necesarios por la prórroga de la fecha de la Aceptación Provisional. A lo anterior se agrega que en su primer dictamen el Perito Cámara consideró viables diversas

reclamaciones indicando que eran derivadas de la prórroga, sólo que por montos distintos de los estimados por el Perito EY, es decir que en ese primer dictamen, el Perito Cámara consideró que dichos gastos cumplían el requisito al que se ha hecho referencia. Fue en su segundo dictamen que señaló que no debían reconocerse esas sumas.

461. De otra parte, debe observar el Tribunal que en diversos casos el Perito EY consideró que no debían reconocerse determinados gastos porque no cumplían con dicho requisito. Así mismo, en otros casos en su dictamen y sus anexos indica las razones por las cuales considera que se debe reconocer un gasto. El Tribunal concluye que el Perito EY evaluó los gastos reclamados y su relación con la prórroga de la fecha de aceptación provisional, que es lo que exige el Acuerdo.

462. Por otra parte, en el Acuerdo se establece que "*EL CONTRATISTA realizará todos los esfuerzos comerciales posibles para minimizar el impacto de las reclamaciones recibidas por terceros*". Ahora bien, como se puede apreciar, en este caso lo que el Acuerdo impuso al Contratista es una obligación de hacer, cuyo contenido y alcance dependerá de cada caso concreto. Es por ello que es en cada caso que se debe evaluar si había o no lugar a minimizar el impacto de la reclamación del tercero y en tal caso exigir la demostración de la conducta asumida. En este punto recuerda el Tribunal que en materia de responsabilidad civil puede existir el deber de mitigar el daño por parte de la víctima y, en tal caso, es aquella persona a quien se le reclama que indemnice los perjuicios, a quien le corresponde demostrar que en las circunstancias la víctima podía haber mitigado el daño. En este contexto en cada caso concreto le corresponde a la CFE invocar que se pudo haber mitigado el daño, y que por ello no debe responder por el monto correspondiente.

463. Partiendo de lo anterior procede el Tribunal a examinar los diferentes valores que se reclaman y la cuantificación de los mismos por los peritos.

464. La Demandante solicita condenar por razón de lo dispuesto en el numeral 3.5 del Acuerdo a la Comisión al pago de US$ 5'913,324.53 (Cinco

millones novecientos trece mil trescientos veinticuatro dólares americanos 53/100 cy)[363]. La Comisión considera como procedente un importe de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy)[364].

465. Por su parte el Perito EY determinó un total de US$ 4'773,034.30 (Cuatro millones setecientos setenta y tres mil treinta cuatro dólares 30/100 cy) por Reclamaciones de Terceros incurridos por DUNOR durante el período de análisis[365], los que a su juicio cuentan con la documentación soporte señalada en el Acuerdo y que conforme a la naturaleza de las transacciones se encuentran directamente relacionadas con el Proyecto.

466. El Perito Cámara expresó en su informe "*que las partes han acordado la cantidad de US$1,422,603.55*". Agregó que adicionalmente se identificó la suma de US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy) que "*cumplen con los lineamientos del acuerdo, es decir, pertenecen a trabajos relacionados con la prórroga de la Aceptación Provisional, que pertenecen al período de afectación y que han sido realmente devengados o pagados por el contratista*" (se subraya). Finalmente, señaló que "*US$979,670.48 no cumplen con los criterios establecidos en el acuerdo, es decir, no han sido pagados por el Contratista a sus subcontratistas, por lo que considero que son improcedentes*".

467. Como quiera que en su dictamen el Perito EY señala que tomó las sumas indicadas por DUNOR para llegar a las conclusiones que se han señalado, considera el Tribunal pertinente partir de los cálculos realizados por dicho perito para confrontarlos con el dictamen del Perito Cámara y las observaciones realizadas por la Demandada.

[363] Contestación y Réplica de Dunor, párrafo 168 y Memorial de Conclusiones de Dunor, párrafo 116.
[364] Dúplica y Réplica a la Reconvención de la CFE, párrafo 154 y Memorial de Conclusiones de la CFE, párrafo 63.
[365] Segundo Informe de EY, página 37.

468. El Perito EY señala que verificó que se hubieran cumplido con los siguientes requisitos:

> *"Los gastos presentados hayan sido incurridos (devengados) durante el Periodo de Análisis."*
>
> *"Los gastos reclamados están directamente relacionados con el Proyecto y corresponden a servicios prestamos por suministradores o subcontratistas derivado de la prórroga de la Fecha Programada de Aceptación Provisional."*
>
> *"Los gastos son razonables y cuentan con la documentación soporte requerida en el apartado 3.5 del Acuerdo con lo que se acredita que fueron efectivamente incurridos por el Contratista, para tal fin, en este punto verificamos, de manera enunciativa más no limitativa:"*
>
> *"Exista evidencia de la prestación del servicio, como por ejemplo: estimaciones de obra autorizadas, bitácoras de horas trabajadas, listas de asistencia, etc."*
>
> *"La factura corresponde a los importes y evidencia de los servicios recibidos."*
>
> *"El comprobante del pago correspondiente al gasto. En los casos donde el pago incorporó varias facturas, verificamos la integración del pago total realizado."*
>
> *"El registro contable correspondiente al pago del gasto."*

469. Con fundamento en lo anterior, el Perito EY se refiere a los gastos reclasificados del apartado 3.2 del Acuerdo al 3.5, por un monto de US$ 4'124,905.61 (Cuatro millones ciento veinticuatro mil novecientos cinco dólares americanos 61/100 cy) y expresa:

> *"1. Un total de $3,624,304.66 USD cumplen con las especificaciones señaladas para ser acreditados como gastos directamente relacionados con las Obras conforme al apartado 3.5 del Acuerdo (puntos i, ii y iii anteriores)*
>
> *"2. Un total de $ 277,722.30 USD corresponden a gastos por la compra de suministros para la Central, por lo que no corresponden al concepto de Gastos por Reclamación de Terceros y tampoco puede asignarse a alguno de los rubros del concepto de Gastos por la Gestión de Personal y Administración de Campo. Por lo cual, si bien corresponden a gastos incurridos por Dunor Energía, los mismos no pueden compensarse bajo lo recogido en el Acuerdo.*

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*"3. Un total de $ 54,523.89 USD correspondientes a gastos por "Servicios de pruebas y puesta en servicio tableros de protecciones de transformadores y línea 400 Kv para TG1, TG2 y TV" donde las Partes acordaron descartar el monto a reclamar.*

*"4. Un total de $ 168,354.76 USD donde el gasto reclamado por Dunor Energía corresponde a los montos retenidos a los subcontratistas por concepto de "Retención de calidad" que, si bien corresponden a gastos directamente relacionados con las Obras, razonables y documentados, dichos importes no han sido reembolsados al subcontratista, por lo que a la fecha de presentación del informe este gasto no ha erogado por parte del Contratista. Este importe considera además ajustes realizados al monto reclamado del Periodo de Análisis.*

*"Finalmente, como mencionamos en la sección 4.3 del informe, determinamos un total de $ 90,936.34 USD de gastos integrados en el concepto de Gastos por la Gestión de Personal y de Administración de Campo que conforme a su concepto y naturaleza corresponden a Gastos por Reclamación de Terceros, por lo cual deben compensarse en el apartado 3.5 del Acuerdo".*

470. De este modo el Perito EY señala un valor de US$ 3'624,304.66 (Tres millones seiscientos veinticuatro mil trescientos cuatro dólares americanos 66/100 cy) que a su juicio cumple con las condiciones para ser acreditados como gastos directamente relacionados con las Obras conforme al apartado 3.5 del Acuerdo[366]. Agrega adicionalmente que hay un total de US$ 168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy) que corresponde a los montos retenidos a los subcontratistas por concepto de "*Retención de calidad*" que "*si bien corresponden a gastos directamente relacionados con las Obras, razonables y documentados, dichos importes no han sido reembolsados al subcontratista, por lo que a la fecha de presentación del informe este gasto no ha erogado por parte del Contratista. Este importe considera además ajustes realizados al monto reclamado del Periodo de Análisis*"[367].

471. Por su parte en su informe pericial, el Perito Cámara señala una cantidad reclasificada para el mes de julio, que según indica fue acordada por

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[366] Primer Informe Pericial de EY, página 46.
[367] Primer Informe Pericial de EY, página 49.

las Partes, de US$ 365,726.90 (Trescientos sesenta y cinco mil setecientos veintiséis dólares americanos 90/100 cy)[368], y unas cantidades reclasificadas de los meses de agosto 2018 a marzo 2019, que ascienden a US$ 2'791,594.29 (Dos millones setecientos noventa y un mil quinientos noventa y cuatro dólares americanos 29/100 cy)[369], para un total de US$ 3'157,321.19 (Tres millones ciento cincuenta y siete mil trescientos veintiún dólares americanos 19/100 cy)[370].

472. El Perito EY señala que analizó las diferencias con el Dictamen del Perito Cámara y presentó sus consideraciones en el documento denominado "Análisis de las variaciones de los importes determinados para compensación por EY y el Perito Cámara Reclamos de Terceros" (Doc. EY-41). Agrega que "*para algunas partidas, la diferencia en los importes obedece a más de una causa y por lo tanto, no estamos de acuerdo ni con la metodología utilizada por el Perito Cámara, ni con el monto que determina que la Comisión debería compensar al Contratista de USD $3,157,321.19 (Tres millones ciento cincuenta y siete mil trescientos veintiún pesos 19/100 cy) por este concepto de 'Gastos reclasificados del apartado 3.2 al apartado 3.5 a solicitud de CFE'*".

473. Procede entonces el Tribunal a examinar las diferencias entre los dos dictámenes periciales que el Perito EY indica en su dictamen en la hoja de Excel denominada "*Análisis variaciones EY Cámara*"[371].

474. En primer lugar, existen unos casos en los cuales el Perito Cámara señala que existió un acuerdo entre las Partes sobre el reclamo. Por el contrario el Perito EY señala que según le informó DUNOR no existió un acuerdo formal.

475. A tal efecto, el Perito EY se refiere a los gastos por US$ 365,726.90 (Trescientos sesenta y cinco mil setecientos veintiséis dólares americanos 90/100 cy) señalados en la tabla 9, página 72 del Dictamen del Perito Cámara

[368] Informe Pericial del perito Cámara, Tabla 7, páginas 65 y 66.
[369] Informe Pericial del perito Cámara, Tabla 8, página 71.
[370] Informe Pericial del perito Cámara, tabla 9, página 74.
[371] Doc. EY-41.

como "*cantidades reclasificadas del mes de julio*". Señala el Perito EY que el Perito Cámara indica que se trata de gastos conciliados y reconocidos por las Partes, pero considera el Perito EY que existieron cartas y oficios intercambiados entre las Partes posteriores a la Minuta No. 7 sobre la revisión de los gastos de julio de 2018; siendo la última la carta DunorCFE-910 de 21 de mayo de 2020 por lo que no habría acuerdo sobre ellos.

476. En relación con este punto considera procedente el Tribunal examinar la Minuta No 7[372]. En dicho documento se advierte que el mismo se refiere a una reunión realizada los días 23 y 24 enero del 2020 cuyo objetivo era la "*Revisión del listado de los gastos referentes a los puntos 3.5 del Acuerdo para el mes de JULIO/2018 y la documentación soporte de estas"*. En el acápite denominado Desarrollo se indica:

| | |
|---|---|
| 1 | Del apartado 3.5 del Acuerdo correspondiente a las facturas del mes de Julio 2018, el monto procedente conciliado queda en $ 560,470.13 USD. |
| 2 | Del mes de Julio 2018 DUNOR tiene pendiente por acreditar el monto de $ 22,399.48 USD como devolución de garantías a Subcontratistas para que la Comisión proceda su reconocimiento. |
| 5 | Se propone realizar la próxima reunión en la semana del 10 de febrero de 2020, previa confirmación. |

477. Bajo el acápite Compromisos y Acuerdos se dice "*Continuar con la revisión del apartado 3.5 del mes de Agosto*". Así mismo se acompaña una tabla de control de Facturas del mes de julio de 2018, conciliadas para el apartado 3.5 del Acuerdo y el monto procedente a la fecha. Ahora bien, está también demostrado en el proceso que la Comisión solicitó ajustes a la conciliación revisada y DUNOR las hizo. Es el caso de la comunicación de la CFE RGRPS-101/2020[373] y la respuesta de DUNOR del 21 de mayo de 2020[374]. Es importante señalar que en este último oficio se expresó que se anexaban los archivos electrónicos, y se solicitaba "*que se programe para su revisión a la brevedad posible*". A la luz de lo anterior encuentra el Tribunal que según se expresa en la Minuta, las Partes realizaron una conciliación de

[372] Doc. EY-37 Minuta No.7 del 23 y 24 del enero de 2020 (Acuerdo).
[373] Anexo 114 del Primer Informe Pericial de Cámara.
[374] Anexo 115 del Primer Informe Pericial de Cámara.

los valores correspondientes al mes de julio de 2018. Lo anterior implica que en principio ese era el valor acordado. Sin embargo, posteriormente la Comisión solicitó ajustes, los cuales realizó DUNOR y pidió una revisión a la brevedad posible. Es pertinente destacar que DUNOR no señaló que no estaba de acuerdo con lo solicitado, pues lo que requirió fue la revisión lo más pronto posible, con el propósito aparente de hacer más expedito el proceso. De lo anterior se desprende que si bien las Partes conciliaron los valores, al propio tiempo permitieron que se hicieran ajustes. Ahora bien, si las Partes habían conciliado los valores, los ajustes que una parte propusiera debería ser aceptados por la otra, para que les fueran vinculantes. Por lo anterior considera el Tribunal que salvo los ajustes solicitados por la CFE y realizados por DUNOR, debe tomarse el valor conciliado para el mes de julio de 2018.

478. Por otra parte, se refiere el Tribunal a la observación del Perito EY "*en cuanto a la 'cantidad sin pagar por DUNOR' por importe por USD $ 7,735 (Siete mil setecientos treinta y cinco dólares americanos 00/100 cy) indicada en la tabla 9, página 72 del dictamen del Perito Cámara como parte de las 'cantidades reclasificadas de los meses de agosto 2018 a marzo 2019' que determina como no susceptible de reclamo*". Señala el Perito EY que esta partida "*si está liquidada por el Contratista desde el 30 de abril de 2020 y cumple además con los requisitos establecidos en Acuerdo para compensarse al Contratista*". A tal efecto, el perito acompañó el comprobante de pago a ABB México del 30 de abril de 2020[375]. Teniendo en cuenta el documento que se acaba de mencionar considera el Tribunal que dicho monto debe reconocerse, pues la no inclusión de dicho rubro por parte del Perito Cámara obedeció a que no había sido pagada, según se aprecia en la tabla 9 del Primer Dictamen del Perito Cámara.

479. Señala asimismo el Perito EY[376] que el "*Perito Cámara incorporó al reclamo una parte del importe de los gastos incurridos con el subcontratista 'MHO Engineering*'". Expresa el Perito EY refiriéndose al Primer Informe del

[375] Doc. EY-42.
[376] Segundo Informe de EY, página 35.

Perito Cámara que en el "*aparto(sic) 3.2 considera un importe a compensar de $ 173,270.95 USD y para este apartado 3.5, determina un importe a compensar de $ 435,594.56; mientras que en el Informe Pericial EY analizamos la totalidad de los gastos como parte del reclamado de Gastos por Gestión de Personal y Administración de Campo*". Señala el Perito EY que considera que dicha partida es parte del reclamo de gastos del apartado 3.2, pues "*están relacionados a la prestación de personal para los servicios eléctrico, I&C y Supervisión Eléctrica de la Puesta en Marcha (PEM) del Proyecto y no a un Reclamo de Terceros per se*". Agrega que "*según obra en las cédulas anexas al Oficio RGROS-174/20, existe acuerdo de las Partes en la reclasificación de estos gastos del apartado 3.5 a la reclamación del apartado 3.2 del Acuerdo*". Adicionalmente, señala el Perito EY que "*el Perito Cámara no descuenta del importe de los gastos las cantidades correspondientes a las retenciones de calidad aplicadas que Dunor Energía no ha reembolsado al subcontratista*". Desde esta perspectiva considera el Tribunal que si DUNOR retiene valores del subcontratista, los mismos no pueden ser reclamados a CFE sino en la medida en que se paguen al subcontratista.

480. Por otra parte, expresa el Perito EY que se identificaron "*gastos que forman parte de los gastos reclamados por el Contratista y que el Perito Cámara no detalla en sus Cédulas de Costos y por lo tanto no fueron objeto de su análisis, mientras que nosotros por estas partidas en el Informe Pericial EY, de un importe reclamado por el Contratista de $ 18,873.82 USD determinamos procedentes $ 2,187.78 USD.*" Ahora bien, en el documento EY-41 del Perito EY se identifican dos casos relativos al proveedor SEPIEC SA de CV, que no fueron incluidos en el análisis del Perito Cámara, y que según se indica en la tabla fueron incluidos en las reclamaciones del 9 y 16 de mayo de 2019 anexas a los oficios Dunor-CFE 546 y 550, las cuales ascienden a un monto de US$ 2,187.78 (Dos mil ciento ochenta y siete dólares americanos 78/100 cy) (el concepto indicado en la tabla es Renta de Grúa), y corresponden a los períodos de septiembre y octubre de 2018. En este contexto como no se ha probado la razón de la no inclusión por parte del

Perito Cámara, y el Perito EY si los incluye y explica la razón, el Tribunal considera que dichos rubros deben incluirse.

481. Por otra parte, el Perito EY señala que de otra parte se identificaron "*gastos que en el Informe Pericial EY determinamos que no eran susceptibles para reembolso debido a que corresponden a compra de suministros para la Central, por lo cual no corresponden a una Reclamación de Terceros per se y tampoco puede clasificarse en alguno de los rubros del concepto de Gastos por la Gestión de Personal y Administración de Campo. Por lo cual, si bien corresponden a gastos incurridos por Dunor Energía, los mismos no pueden compensarse bajo lo recogido en el Acuerdo; sin embargo, para estos gastos el Perito Cámara determinó un importe de $ 85,037.19 USD como procedentes para compensación*". A este respecto encuentra el Tribunal que en la tabla del Perito EY se indican una serie de reclamaciones que el Perito EY considera que no proceden por no ajustarse a los criterios establecidos. El Tribunal considera que dichos valores no deben reconocerse. No sobra señalar que la Demandante ha expresado su acuerdo con los valores determinados por el Perito EY, por lo que debe concluirse que reconoce no tener derecho a los otros valores que reconoce el Perito Cámara.

482. Por otra parte, igualmente el Perito EY señala lo que considera son "*Errores del Perito Cámara en la cuantificación de la proporción que debe reconocerse del gasto (fracción de reconocimiento), ya sea por la fecha en que tuvo lugar el servicio y el Periodo de Análisis al que corresponde el gasto*". Dichos casos aparecen identificados en la tabla que se anexa al Segundo Informe Pericial de EY[377]. El Tribunal considera que deben tomarse en consideración los valores que indica el Perito EY en la medida en que sus observaciones son razonables y no han sido desvirtuadas.

483. Igualmente en dicha tabla se indican una serie de casos en los que se indica que el Perito Cámara "*no descuenta los importes retenidos de calidad a los subcontratistas y que no les han sido reembolsados*". A este respecto es claro que cuando existen retenciones por parte del Contratante, dicha suma

[377] Doc. EY-41.

no ha sido pagada y por ello no tiene que ser reconocida por CFE. Por lo anterior se tomará en cuenta la cifra que indica el Perito EY. Solo en la medida en que se paguen procede su reconocimiento.

484. Así mismo en otros casos, señala el Segundo Informe del Perito EY que el "*Perito Cámara omite la evidencia que indica que los trabajos forman parte de la afectación o que se derivan de la misma".* Dichos casos aparecen individualizados en la tabla[378]. Al respecto observa el Tribunal que en la columna de observaciones al estudio realizado por el Perito Cámara se señala en algunos casos que "*Se incurrió en estos gastos debido a que se tuvo que prolongar la estadía del personal lo que ocasionó la extensión del contrato original*" o que "*Este personal y equipo fue necesario movilizarlo y desmovilizarlo en múltiples ocasiones debido a la incertidumbre y cambio constante en las condiciones*" o que se trató de un servicio adicional. Por lo anterior, considera el Tribunal que se debe incluir los costos indicados por el Perito EY.

485. También hace referencia el Perito EY a discrepancias con el Perito Cámara sobre los conceptos que determina que proceden para su compensación según lo establecido en el Acuerdo, y a tal efecto cita como ejemplo el ajuste que el Perito Cámara hace "*al importe procedente del gasto incurrido por consumo de electricidad a un 85% argumentando que no se especifica que proporción es para PEM; sin embargo, el concepto de la factura es: 'Energía eléctrica para energización y pruebas de equipo en la puesta en servicio del Proyecto DE LA CC EMPALME II'; es decir, la factura menciona de forma clara que la energía fue para las actividades de PEM (energización y pruebas de equipo). Así mismo, de acuerdo con los comentarios facilitados por personal de Dunor Energía, entendemos que en el Periodo de Análisis se estaban desarrollando actividades de PEM, por lo que los consumos de energía fueron para actividades de PEM y para el funcionamiento de servicios auxiliares de la planta durante el periodo en que no se autorizaba por parte de CENACE la generación de la planta*". Agrega que por lo anterior "*el 15%*

[378] Doc. EY-41.

*que no reconoce el Perito Cámara carece de sentido y fundamento*". En relación con lo anterior, el Tribunal considera que en la medida en que la factura claramente señala el objeto de la energía eléctrica y ella corresponde a energización y pruebas debe partirse de lo que la factura indica. Por ello debe reconocerse el 100% como lo señala el Perito EY.

486. Ahora, bien el Perito EY expresa en su segundo dictamen que identificó "*cuatro partidas donde, en efecto, el importe determinado por el Perito Cámara es correcto, ya que el gasto reclamado por Dunor Energía de acuerdo con la evidencia tuvo lugar fuera del Periodo de Análisis por lo cual aplicaría una corrección al importe cuantificado por EY de $ 14,663.80 USD (Catorce mil seiscientos sesenta y tres dólares americanos 80/100 cy) , el detalle es como sigue*:

| Periodo de Reclamación | Proveedor | Concepto | Importe reclamado por Dunor Energía | Importe procedente EY | Importe determinado procedente Perito Cámara | Diferencia |
|---|---|---|---|---|---|---|
| mar-19 | Ambulancias Azteca, S.C. | Renta de buzo para captación de agua | $4,359.80 | $4,359.80 | $ 0.00 | $(4,359.80) |
| mar-19 | Ingersoll Rand S.A. de C.V. | Mantenimiento a compresores | $5,719.00 | $5,719.00 | 0.00 | $(5,719.00) |
| mar-19 | Ares Control S.A. de C.V. | Verificación, mantenimiento y calibración de analizadores | $4,585.00 | $4,585.00 | 0.00 | $(4,585.00) |
| | | | $14,663.80 | $14,663.80 | $ 0.00 | $14,663.80 |

…"

487. Teniendo en cuenta lo anterior el Perito EY calcula los siguientes valores en su segundo informe: "*Para la reclamación de Terceros, del importe reclamado por Dunor Energía por un total de $ 6,285,204.80 USD acreditamos un importe $ 4,682,097.96 USD, importe a los cuales se tienen que adicionar un importe de $90,936.34 USD con lo cual obtenemos un importe total de $ 4,773,034.30 USD para reembolso por concepto de gastos por Reclamos de Terceros*".

488. Ahora bien, señala el Perito EY[379] que "*como parte de los $ 1,603,106.842 USD no acreditados, existe un total de $ 971,935.48 USD de gastos donde de acuerdo con la documentación analizada determinamos que las transacciones fueron incurridas durante el Periodo de Análisis, están directamente relacionadas con el Proyecto y corresponden a conceptos definidos dentro del apartado 3.5 del Acuerdo. Sin embargo, a la fecha de presentación de este Informe, estas no han sido pagadas por el Contratista*". Igualmente señala[380] "*un total de $ 168,354.76 USD donde el gasto reclamado por Dunor Energía corresponde a los montos retenidos a los subcontratistas por concepto de "Retención de calidad" que, si bien corresponden a gastos directamente relacionados con las Obras, razonables y documentados, dichos importes no han sido reembolsados al subcontratista, por lo que a la fecha de presentación del informe este gasto no ha sido erogado por el Contratista*".

489. En todo caso ha de destacarse que en su escrito de Réplica la Demandante señaló que existen una serie de montos que cumplen todos los requisitos del acuerdo, pero que no han sido pagados[381]. Al respecto expresa DUNOR que *"…debe destacarse que se trata de gastos efectivamente incurridos por DUNOR, debiendo el Tribunal tener en cuenta que, la enorme deuda que la Comisión mantiene con DUNOR, le ha provocado una delicada situación financiera, hasta el punto de no haber podido hacer frente a alguno de los costes a cuyo pago venía obligado …. Tal es el caso de las Reclamaciones de Terceros (US$ 1'140,290.25) que no se han podido pagar precisamente por la asfixia financiera que CFE está provocando a la Demandante al no pagarle, ni si quiera, los montos que la misma reconoce como procedentes*".[382]

490. Ahora bien en su Memorial de Conclusiones la Demandante expresó[383] "*que como parte del monto por US$ 1'603,106.84 (Un millón*

[379] Segundo Informe, página 38.
[380] Ibidem.
[381] Contestación y Réplica de Dunor, párrafo 155.
[382] Contestación y Réplica de Dunor, párrafo 156.
[383] Memorial de Conclusiones de Dunor, párrafo 118.

*seiscientos tres mil ciento seis dólares americanos 84/100) no reconocido por el Perito EY, un total de US$ 971,935.48 (Novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100) corresponde con gastos incurridos por Dunor en los que concurren todos los atributos del apartado 3.5 del Acuerdo salvo el pago. Como quiera que ese impago es directamente imputable a CFE, Dunor sí reclama esta cantidad en el arbitraje*".

491. Desde esta perspectiva considera el Tribunal que si bien DUNOR no tiene derecho a que la CFE le reembolse sumas que DUNOR no ha pagado efectivamente, en el evento en que las pague CFE deberá pagar el valor correspondiente. Por lo anterior, el referido reembolso deberá realizarse en el momento en el que DUNOR acredite a CFE el pago efectivo de las cantidades materia de este asunto.

492. Teniendo en cuenta todo lo anterior, concluye el Tribunal que en cuanto se refiere a la reclamación por las sumas presentadas bajo el Acuerdo se debe reconocer la suma de US$ 1'056,876.65 (Un millón cincuenta y seis mil ochocientos setenta y seis dólares americanos 65/100 cy).[384]

493. Ahora bien, en cuanto a las reclamaciones que fueron reclasificadas al numeral 3.5 del Acuerdo el valor a reconocer es de US$ 3'624,304.66 (Tres millones seiscientos veinticuatro mil trescientos cuatro dólares americanos 66/100 cy) como lo señaló el Informe del Perito EY[385].

494. Finalmente, está acreditado un monto de US$ 971,935.48 (novecientos setenta y un mil novecientos treinta y cinco dólares americanos 48/100 cy) que cumple todas las condiciones exigidas en el Acuerdo, salvo que se haya hecho el pago[386]. Adicionalmente está probado un monto de US$ 168,354.76 (Ciento sesenta y ocho mil trescientos cincuenta y cuatro dólares americanos 76/100 cy) que corresponde a Retención de Calidad en poder de DUNOR y que por ello no ha sido pagado a los Contratistas[387]. Por lo que

[384] Primer Informe Pericial de Cámara Tabla 5.
[385] Primer Informe Pericial de EY, página 47.
[386] Primer Informe Pericial de EY, página 45. Primer Informe Pericial de Cámara, tabla 6 y párrafo 287.
[387] Primer Informe Pericial de EY, página 50.

DUNOR tendrá derecho a que se reembolse dicho monto una vez que el mismo haya sido pagado efectivamente.

### 12.1.3 Obligación de DUNOR de Entregar las Partes de Repuesto, Herramientas y Equipos Especiales

#### 12.1.3.1 Posición de la Demandante

495. Señala DUNOR que en el listado enunciativo de Obras a realizar por el Contratista contenido en la cláusula 4.1 del Contrato, se incluye el apartado (p) "*entregar las Partes de Repuesto y Herramientas y Equipos Especiales conforme a la Cláusula 21.5 del Contrato*"[388], lo que debía hacer a más tardar en la Fecha Programada de Aceptación Provisional de la Central[389].

496. Agrega que la cláusula 18.1 del Contrato establece como condición previa a la Aceptación Provisional de la Central "*el suministro de la totalidad de las Partes de Repuesto*" por parte del Contratista.

497. DUNOR señala que tenía la obligación de entregar las Partes de Repuesto, Herramientas y Equipos Especiales indicados expresamente en su Proposición Técnica, que a su vez está basada en las Especificaciones Técnicas contenidas en la Sección 7 de la Convocatoria.

498. Señala DUNOR que existían dos contratos (el Contrato OPF y el Contrato SGF). Precisa que el Contrato SGF se refiere a los turbogeneradores de gas, y en su cláusula primera especifica que "*la disponibilidad de partes de repuesto, control de las mismas, reparación y/o reacondicionamiento, transporte… será responsabilidad del Proveedor del Servicio [SGF]*", es decir que las partes de repuestos serían suministradas en desarrollo del Contrato SGF[390].

[388] Memorial de Demanda, No. 141.
[389] Memorial de Demanda, No. 143.
[390] Memorial de Demanda, No 150.

499. Adicionalmente, señala DUNOR que dado el riesgo de que determinadas piezas fueran entregadas por duplicado (bajo el Contrato y bajo el Contrato SGF), durante la fase de aclaraciones, uno de los participantes interesados preguntó a CFE si las Partes de Repuesto y Herramientas especiales del turbogenerador de gas se incluían en el Contrato SGF. La Comisión, a través del mecanismo de la Matriz de Preguntas y Respuestas contractualmente habilitado al efecto, respondió en un primer momento que el Contrato SGF únicamente incluía las refacciones y herramientas inherentes al Área Mecánica, y que las refacciones y herramientas del resto de áreas (eléctrica, de instrumentación y control etc.) debían incluirse en el Contrato[391].

500. DUNOR agrega que persistiendo la posibilidad de que las Partes de Repuesto, Herramientas y Equipos Especiales fueran suministrados por duplicado a través de ambos contratos, el mismo interesado nuevamente solicitó a la Comisión que aclarase si "*las refacciones, herramientas y equipos especiales recomendadas para el paquete del turbogenerador [de gas] estaban incluidas solamente en el Contrato SGF… mientras que las Herramientas especiales para el montaje de los turbogeneradores de gas debían ir dentro del Contrato OPF*". La Comisión contestó afirmativamente, señalando claramente que únicamente las herramientas especiales para el montaje de los turbogeneradores de gas se incluirían en el Contrato OPF[392].

501. DUNOR manifiesta que, al existir dos contratos, y de conformidad con la última respuesta dada por la Comisión, el Consorcio elaboró su Proposición Técnica tal y como consta en sus OT-10 y OT-11. Por lo anterior, DUNOR se comprometió a entregar a la Comisión: (i) los Equipos Principales indicados en su OT-9, referidos tanto a los turbogeneradores de gas como de vapor y, (ii) las Partes de Repuesto, Herramientas y Equipos Especiales enlistadas en sus OT-10 y OT-11, respectivamente.

[391] Memorial de Demanda, No. 151.
[392] Memorial de Demanda, No.152.

502. Señala DUNOR que el Consorcio que constituyó a DUNOR resultó ser Licitante Ganador, lo que significa que su Propuesta Técnica cumplía con todos los requisitos establecidos en la Convocatoria[393].

503. No obstante lo anterior, desde el 7 de febrero de 2018, la Demandada imputó a DUNOR no haberle entregado la totalidad de las Partes de Repuesto a las que, en opinión de CFE, venía obligada DUNOR bajo el Contrato OPF[394].

504. Reitera DUNOR que la cláusula 18.1 del Contrato establece como condición previa a la emisión del Certificado de Aceptación Provisional "*el suministro de la totalidad de las Partes de Repuesto (de conformidad con la Cláusula 21.5)*". Por tanto, al emitir el Certificado de Aceptación Provisional, la Comisión aceptó que el Contratista había suministrado todas las Partes de Repuesto a que venía obligado.

505. Precisa que desde el primer momento, DUNOR rechazó que estuviera obligada a entregar las Partes de Repuesto, Herramientas y Equipos Especiales que viene solicitando CFE[395].

506. Agrega también que en la Sección 1 de la Convocatoria (Instrucciones para los Licitantes) disponía que cada Licitante debía incluir en su Proposición una oferta para el Servicio de Garantías de Funcionamiento (SGF) de los turbogeneradores de gas, teniendo en cuenta que éste servicio sólo podía ser prestado por los tecnólogos o fabricantes de las turbinas, "*quienes resultan ser los titulares o tener las licencias exclusivas de las patentes correspondientes y los únicos capaces de incluir las refacciones originales que en su caso se requieran*"[396]. Señala que dicha sección también establecía expresamente que "*el refaccionamiento correr[ía] a cargo del Proveedor del Servicio*" ("Proveedor SGF").

507. En el mismo sentido, y acorde con los términos de la Convocatoria, DUNOR expresa que el Contrato SGF suscrito entre CFE y Siemens (fabricante de las TGs) establecía que "*la disponibilidad de partes de repuesto, control de las*

[393] Memorial de Demanda, No. 155.
[394] Memorial de Demanda, No. 156.
[395] Memorial de Demanda, No. 157.
[396] Réplica y Contestación Reconvención, No. 169.

*mismas, reparación y/o reacondicionamiento, transporte... será responsabilidad del Proveedor del Servicio [SGF]*". Con ello resulta claro que el Contrato SGF sí contiene la obligación expresa de entregar las piezas de repuesto de las TGs[397].

508. Menciona que el 29 de abril de 2019, CFE volvió a requerir a DUNOR "*la entrega de las Partes de Repuesto Solicitadas del área Eléctrica y de Instrumentación y Control para los Turbogeneradores de Gas confirmadas en la OT-9*", a pesar de que dicha OT-9 no se refiera a las Partes de Repuesto, sino a los Equipos Principales. Por lo anterior, DUNOR sostiene que la Comisión aplicó indebidamente las cláusulas 21.5 y 21.6 del Contrato, cobrando unilateralmente una pena convencional a modo de descuento del 100% del valor de mercado de las Partes de Repuesto por haber transcurrido más de 10 semanas desde la Fecha Programada de Aceptación Provisional. En total, la Comisión descontó del Precio del Contrato la cantidad de US$ 1'667,781.48 (un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy)[398].

509. Asimismo, DUNOR señala que la Comisión alega que la no entrega de las Partes de Repuesto Solicitadas supone un incumplimiento de las Especificaciones del Contrato y, por tanto, una ejecución incompleta de las Obras. Según la Comisión, por este "*incumplimiento*" procede aplicar un descuento de US$ 1'393,106.70 (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy). Por lo tanto, el descuento total aplicado al Precio del Contrato por estos conceptos asciende a US$ 3'060,888.18 (Tres millones sesenta mil ochocientos ochenta y ocho dólares americanos 18/100 cy) [399].

510. Para sostener su posición, DUNOR señala que, de acuerdo con el Contrato, las respuestas dadas en la Matriz de Preguntas y Respuestas son aclaraciones a las Especificaciones Técnicas que hace la propia CFE y que, sin duda alguna, forman parte de la Convocatoria[400]. Asimismo, indica que existe una contradicción entre las respuestas dadas por la Comisión, pues la respuesta a

[397] Réplica y Contestación Reconvención, No. 169.
[398] Memorial de Demanda, No. 159 y 160.
[399] Memorial de Demanda, No. 161 y 162.
[400] Memorial de Demanda, No. 167.

la pregunta No. 85 incluía en el ámbito del Contrato la provisión de refacciones y herramientas que, según la respuesta posterior No. 368, correspondía entregar únicamente al Proveedor del Servicio del Contrato SGF[401].

511. Dada la situación anterior, DUNOR sostiene que la cláusula 31.2 del Contrato prevé expresamente que, "*en caso de conflicto entre dos respuestas la última en el tiempo prevalecerá*". En consecuencia, la respuesta No. 368 prevalece sobre la respuesta No. 85, careciendo ésta última de valor para interpretar las obligaciones de DUNOR. Por ende, considera que debe rechazarse por completo la postura de la Comisión basada en su contestación a la pregunta No. 85[402].

512. Agrega además que la obligatoriedad de la última respuesta se deriva de la prevalencia de la intención de las Partes, según lo señalado en el CCF. A tal efecto DUNOR sostiene que la intención de la Demandada quedó conformada, entre otros documentos, a través de su respuesta No. 368 de las juntas de aclaraciones, donde expresamente indicó que consideraba correcta la afirmación de que "*las refacciones y las herramientas especiales recomendadas para el [turbogenerador de gas] sean incluidas solamente dentro del Contrato SGF".* Por tanto, la intención de las Partes en el momento de contratar (artículo 1851 CCF) era no obligar a DUNOR a entregar las Partes de Repuesto, Herramientas y Equipos especiales de los turbogeneradores de gas ahora reclamados por CFE[403].

513. Ahora bien, la Demandante manifiesta que la Demandada sostiene que DUNOR debe entregar las Partes de Repuesto en disputa por los siguientes motivos: (i) se incluían en la Sección 7 de la Convocatoria y (ii) porque, en su opinión, DUNOR las había incluido en su Proposición Técnica (OT-9), al confirmar que el Alcance de Suministro cumplía con las Especificaciones Técnicas de la Sección 7[404]. Agrega que la Comisión sostiene que no hay duda

[401] Memorial de Demanda, No. 170.
[402] Memorial de Demanda, No. 171.
[403]Memorial de Demanda, No. 172.
[404] Memorial de Demanda, No. 175.

en que el precio de las Partes de Repuesto Solicitadas se incluye en el Precio del Contrato.

514. Contrario a lo indicado por CFE en su Respuesta a la Solicitud de Arbitraje, DUNOR sostiene que las piezas en disputa son exclusivamente las Partes de Repuesto Solicitadas de los turbogeneradores de gas. Señala que esto queda inequívocamente confirmado por el Oficio 7B/2019/RJMN-00166, de 29 de abril de 2019, en el que se especifica "*la entrega total de las Partes de Repuesto, Herramientas y Equipos Especiales (solicitadas) del área eléctrica y de instrumentación y control… para los turbogeneradores de gas*"[405].

515. Respecto del argumento de la Comisión en el sentido que la entrega de las Partes de Repuesto disputadas estaba prevista en la Sección 7 de la Convocatoria, señala DUNOR que la Sección 7.2.(11) contiene un listado de Partes de Repuesto, Herramientas y Equipos especiales en los que únicamente existen dos referencias genéricas a la turbina de gas (concretamente dentro del apartado referente al Área de Instrumentación y Control)[406].

516. DUNOR recuerda que la Sección 7.2.11 remite a las OT-10 y OT-11, siendo éstos los documentos donde se fijan detalladamente todas las piezas que el Contratista se obliga a suministrar bajo el Contrato. DUNOR no se obliga a entregar piezas distintas a las contenidas en sus OT-10 y OT-11.

517. Consecuente con lo anterior, DUNOR sostiene que la Proposición Técnica del Consorcio (OT-10 y OT11) fue declarada la proposición ganadora de la Licitación. Aclara que si CFE hubiese querido que se incluyesen las Partes de Repuesto de los turbogeneradores de gas que ahora reclama, debería haberlo solicitado en su momento o incluso habría rechazado la proposición por considerarla insuficiente[407].

518. Por otra parte, en cuanto al argumento esgrimido por CFE, -esto es que el Contratista había incluido las piezas en su OT-9 - DUNOR expresa que dicho documento no se refiere a las Partes de Repuesto y Herramientas Especiales, sino los Equipos Principales. Señala que dicho documento sólo contiene una

[405] Memorial de Demanda, No. 179.
[406] Memorial de Demanda, No. 180.
[407] Memorial de Demanda, No. 181.

referencia genérica a las Partes de Repuesto, Herramientas y Equipos Especiales que debe ser completada con documentos que aporten mayor detalle. Por ello, la propia OT-9 en su apartado j) remite a la OT-10, siendo este el documento donde se enlistan las Partes de Repuesto a suministrar en virtud de la Sección 7.2.11 de la Convocatoria[408].

519. Al respecto, y en relación con la no inclusión de las Partes de Repuesto solicitadas de los TGs en la Ingeniería de Detalle, DUNOR señala que CFE se basa en que las Especificaciones Técnicas tan sólo describen la ingeniería básica del Proyecto para sostener que DUNOR debe entregar las Partes de Repuesto Solicitadas de los TGs, por estar éstas supuestamente incluidas en la Ingeniería de Detalle. Para sustentar su postura, CFE adjunta un listado de piezas remitido por DUNOR el 6 de diciembre de 2017. Este documento, que confeccionó DUNOR, representa la ingeniería de detalle de las piezas que se incluyeron en la OT-10. Agrega que en este documento no constan, ni se identifican las Partes de Repuesto de los TGs que ahora CFE está reclamando. Y no constan, por una sencilla razón: porque estas piezas nunca fueron enumeradas ni enlistadas en la OT-10[409].

520. También DUNOR precisa que está de acuerdo en que las Especificaciones Técnicas sólo contienen la ingeniería básica, y que es responsabilidad del Licitante desarrollarla en fase de ingeniería de detalle. Sin embargo, es rotundamente falso que DUNOR no haya realizado un detalle pieza a pieza de los suministros que se comprometía a entregar a CFE. Precisamente ese detalle se encuentra, entre otros, en el Doc. R-017, confeccionado de conformidad con la OT-10. Este Doc. R-017, es el detalle de las piezas enumeradas en la OT-10. Recalca que este documento se refiere a las piezas para la totalidad de la Central e incluye todas las piezas que DUNOR debe entregar. Después de éste, se fueron sucediendo otros listados en los que se iban reduciendo el número de piezas a medida que DUNOR las entregaba. El último listado de piezas faltantes conciliado por las Partes es de 18 de febrero de 2019, en el cual sólo constan seis (6) piezas (de nuevo, ninguna de ellas relativa a las TGs). Destaca DUNOR que el hecho de que las Partes de Repuesto de los TGs jamás formaran parte

[408] Memorial de Demanda, No. 183.
[409] Réplica y Contestación Reconvención, No 180.

de ninguno de estos listados acredita, sin duda alguna, el hecho de que DUNOR nunca se comprometió a entregarlas, y por eso, la Comisión no puede justificar lo contrario[410].

521. Advierte DUNOR que la Sección 2 de la Convocatoria (Metodología de Evaluación y Adjudicación), inciso 2.1.1.13 relativo al Alcance del Suministro especificaba que, a la hora de evaluar las ofertas en la fase de Licitación, se asignarían determinados puntos "*a la Proposición que proporcione en el formato OT-10, la confirmación del suministro de las Partes de Repuesto solicitadas y recomendadas... de acuerdo a la Sección 3.3.9.2 de la Convocatoria*". Esta última sección, referida a la Información Requerida con la Proposición Técnica, disponía que: *"[e]l Licitante debe indicar en el formato OT-10 la confirmación del suministro de las Partes de Repuesto Solicitadas y Recomendadas y proporcionar la lista de las Partes de Repuesto Solicitadas y Recomendadas, por área y por equipo, de acuerdo a la Sección 7, inciso 7.2.11.(1) de la Convocatoria"*[411].

522. DUNOR reitera que nunca incluyó en su Proposición Técnica (OT-10) ni posteriormente en fase de ingeniería de detalle, las piezas de Siemens para los TGs, por lo que de ningún modo puede derivarse ahora que tenga obligación de entregarlas. La Comisión conocía perfectamente el contenido de las OTs presentadas, y dado que DUNOR resultó Licitante Ganador, se desprende consecuentemente que su oferta cumplía con todos los requisitos de la Convocatoria, aceptándose ésta por la Comisión, existiendo, por tanto, acuerdo de voluntades al respecto. En el mismo sentido, si CFE consideraba que DUNOR no había suministrado la totalidad de Partes de Repuesto, no debería haber emitido el Certificado de Aceptación Provisional, cosa que precisamente confirmaba el suministro de la totalidad de las Partes de Repuesto por parte del Contratista[412].

523. Por lo tanto, DUNOR considera que ha cumplido con las Especificaciones Técnicas y únicamente tiene obligación de suministrar las Partes de Repuesto Solicitadas incluidas en su OT-10. Afirma que esto queda confirmado además

[410] Réplica y Contestación Reconvención, No 181.
[411] Réplica y Contestación Reconvención, No 182.
[412] Réplica y Contestación Reconvención, No. 186.

por el Perito Cámara al afirmar que DUNOR "*en su Oferta Técnica en las OT-10 y 0T-11 indica su compromiso para el suministro de "PHREES" acorde con la Sección 7..., que son las que al menos debe suministrar*"[413].

524. Por otra parte, DUNOR reitera que el Refaccionamiento de los TGs corre a cargo del Proveedor SGF. Sin embargo, la Demandada argumenta que el riesgo de que las Partes de Repuesto de las TGs fuesen entregadas por duplicado era nulo. Para mantener esta postura, la Comisión señala que la única función del Proveedor SGF es el mantenimiento de los TGs y que de ningún apartado del Contrato SGF, ni de sus anexos, puede deducirse su obligación de proporcionar las piezas de repuesto[414].

525. Frente a lo anterior, DUNOR sostiene que: i) las instrucciones para los Licitantes estipulaban que "*el refaccionamiento correrá a cargo del Proveedor del Servicio*", que sólo debe ser prestado por los tecnólogos o fabricantes de estos equipos, por ser éstos "*los únicos capaces de incluir las refacciones originales" que en su caso se requieran y, ii) la cláusula primera del Contrato SGF indica expresamente que: '… la disponibilidad de las piezas de repuesto será responsabilidad del PROVEEDOR…'*"[415]. Señala entonces que el Contrato SGF también prevé la obligación del Proveedor SGF de entregar las piezas de repuesto de los TGs, por lo que no es cierta la afirmación de CFE de que el Contrato SGF no incluye tal obligación y, tampoco cabe sostener – como afirma la Comisión – que no existía riesgo de que el refaccionamiento de las TGs fuese entregado por duplicado.

526. Ahora bien, en relación con el cálculo de los descuentos aplicados de manera incorrecta por la Comisión, la Demandante muestra que el valor de US$ 3'060,888.18 (Tres millones sesenta mil ochocientos ochenta y ocho dólares americanos 18/100 cy) se desglosa en dos partidas:

1. Primera Partida: US$ 1'667,781.48 (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy) a modo de descuento del 100% del valor de mercado

[413] Réplica y Contestación Reconvención, No. 187.
[414] Réplica y Contestación Reconvención, No. 189.
[415] Réplica y Contestación Reconvención, No. 193.

de las Partes de Repuesto al haber transcurrido más de 10 semanas desde la Fecha Programada de Aceptación Provisional; y

2. Segunda Partida: US$ 1’393,106.70 (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy) por Obra No Ejecutada, cantidad que corresponde al monto de la cotización que el proveedor (SIEMENS) realizó de las Partes de Repuesto, Herramientas y Equipos Especiales supuestamente no suministradas.

527. Frente a lo anterior, DUNOR pone de presente que ambas partidas se habían calculado de conformidad con la cotización que el fabricante (Siemens) había realizado. No obstante, el documento justificativo adjunto por CFE no era una cotización, sino una “*Carta Informativa*” que el propio tecnólogo consideró no vinculante[416].

528. Agrega la Demandante, en relación con la Primera Partida, que en su Comunicado DUNOR-CFE-1197, de 23 de enero de 2019, señaló que la misma no está de acuerdo con lo indicado en la Cláusula 12.3 del Contrato pues “*las fechas de Eventos Críticos están siendo modificadas por DUNOR y CFE sin que a día de hoy sea posible precisar la nueva Fecha Programada de Aceptación Provisional*”. Por ese motivo, “*Dunor no acepta el descuento de cantidad alguna hasta tener definida la Fecha Programada de Aceptación Provisional de los trabajos y se cumpla con el periodo y las condiciones contractuales que den respaldo a los descuentos que en su caso apliquen*”[417].

529. También, sostiene que la Demandada reconoció que “*es correcta su manifestación respecto a que la fecha la Fecha de Evento Critico - Aceptación Provisional - está siendo modificada en conjunto (Dunor-CFE)*”. Sin embargo, la Comisión indicó estar “*obligada a dar cumplimiento a lo indicado en la Cláusula 21.6 del Contrato*” utilizando la Fecha Programada de Aceptación Provisional previa a la modificación como base para la aplicación de descuentos[418].

[416] Memorial de Demanda, No. 191.
[417] Memorial de Demanda, No. 192.
[418] Memorial de Demanda, No. 193.

530. DUNOR considera que la posición de la Comisión es errada, ya que, por un lado, reconoce que procede la modificación de la Fecha Programada de Aceptación Provisional, lo que desembocó en la firma del Convenio Modificatorio No. 3 de 21 de octubre de 2019, que fija como nueva Fecha Programada de Aceptación Provisional el 14 de marzo de 2019; sin embargo, por otro lado, CFE procede (sin una verdadera justificación más allá de una supuesta obligación de aplicar la cláusula 21.6 del Contrato) a aplicar descuentos con base a una fecha de Aceptación Provisional, que fue modificada[419].

531. Bajo esta misma línea, indica que la Cláusula 21.6 del Contrato sólo establece que, *"[e]n caso de incumplimiento del Contratista en no suministrar a la Comisión las Partes de Repuesto... la Comisión descontará del Precio del Contrato las sumas estipuladas en el inciso D del Anexo 3*". Concluye DUNOR que del tenor literal de la cláusula se desprende que no se pueden imponer descuentos cuando todavía no existe incumplimiento, y precisamente no puede existir incumplimiento cuando las Partes están negociando la Fecha Programada de Aceptación Provisional, que es el *dies a quo* a partir del cual nace la obligación de entregar las piezas de recambio[420].

532. Agrega que, ante la claridad del clausulado, la única pauta interpretativa ha de ser la literalidad del mismo (artículo 1851 del CCF), y dada la claridad de los términos del Contrato no cabe duda de que no es posible la imposición de descuentos hasta después de que se haya fijado la Fecha Programada de Aceptación Provisional definitiva, que es la contenida en el Convenio Modificatorio No. 3 y que es el momento a partir del cual se puede hacer el cómputo del período de retraso[421]. Lo anterior es conforme a una interpretación sistemática del clausulado del Contrato (artículo 1854 del CCF), ya que la intención de las Partes, verdadero espíritu del Contrato, es indivisible, lo que significa que sus cláusulas no pueden interpretarse ni mucho menos aplicarse las unas aisladas de las demás, sino como un todo orgánico que permita al Contrato desplegar todos su efectos conforme a la buena fe. Por tanto, CFE debió interpretar que antes de conocer la Fecha Programada de Aceptación

[419] Memorial de Demanda, No. 194.
[420] Memorial de Demanda, No. 195.
[421] Memorial de Demanda, No. 196 y 197.

Provisional no podía aplicar pena convencional alguna por falta de entrega de las Partes de Repuesto[422].

533. También, en relación con la primera partida, en su Memorial de Réplica, la Demandante señala que la CFE calculó incorrectamente el descuento US$ 1'667,781.48 (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy), ya que no tomó como base el valor del mercado de las partes de repuesto[423].

534. Con relación a la Segunda Partida, DUNOR señala que el descuento que pretende aplicar la Comisión por "*Obra No Ejecutada*" carece de base contractual y, por tanto, es ilícito, pues pretende CFE sancionar dos veces por un mismo incumplimiento, es decir la falta de suministros de las Partes de Repuesto, haciendo pasar dicho incumplimiento como Obra no Ejecutada[424].

535. A tales efectos, se refiere a las cláusulas 20.11, 2.1.6 y el Anexo 3 del Contrato[425]. Con base en las mismas, DUNOR sostiene que las Partes han pactado con carácter expreso no solo la consecuencia contractual de incumplir la obligación de entregar las Partes de Repuesto y Herramientas y Equipos Especiales, sino que, además, estipularon el importe máximo de la sanción que la Comisión puede aplicar al Contratista en caso de que se produzca ese concreto incumplimiento[426].

536. Por tanto, reitera que la Comisión pretende sancionar el mismo hecho por una doble vía sin sustento contractual, lo que generaría, además de un incumplimiento contractual, un enriquecimiento ilícito[427].

537. En su Memorial de Réplica, DUNOR manifiesta que la Comisión cita como sustento del descuento el contenido del artículo 231 del RLOPSRM, pero olvida que este precepto no puede ser aplicado de forma aislada, sino que debe interpretarse y aplicarse de manera armónica con el resto de las disposiciones

[422] Memorial de Demanda, No.198.
[423] Réplica y Contestación Reconvención, No. 203.
[424] Memorial de Demanda, No. 190 y 200.
[425] Memorial de Demanda, No. 204.
[426] Memorial de Demanda, No. 205.
[427] Memorial de Demanda, No. 206.

del RLOPSRM y, sobre todo, con las disposiciones de la LOPSRM, norma jerárquicamente superior[428].

538. Señala que el artículo 46 de la LOPSRM dispone en su fracción X que los contratos de obras públicas deberán incluir los términos, condiciones y el procedimiento para la aplicación de penas convencionales, retenciones y/o descuentos[429]. Agrega que, de la misma manera, el artículo 46 bis de la LOPSRM contempla en su primer párrafo la forma en que deben aplicarse las penas convencionales, las cuales son determinadas en función del importe de los trabajos no ejecutados en la fecha pactada en el contrato para la conclusión total de las obras[430].

539. Añade que el propio RLOPSRM contiene en su artículo 86 una disposición similar a la LOPSRM, y en el último párrafo de su artículo 87 dispone que, las penas deben establecerse atendiendo a las características, complejidad y magnitud de los trabajos a contratar, al tipo de contrato, a los grados de avance y a la posibilidad de establecer fechas críticas para el cumplimiento de los trabajos[431]. DUNOR, también señala que, de conformidad con lo dispuesto en el artículo 2117 del CCF "[l*]a responsabilidad civil puede ser regulada por convenio de las partes, salvo aquellos casos en que la ley disponga expresamente otra cosa*".

540. Expresa DUNOR que en este caso, la intención de las Partes quedó claramente reflejada en el Contrato y su Anexo 3, en donde se pactaron las consecuencias de cada uno de los posibles incumplimientos del Contratista y, para el caso de las Partes de Repuesto y Equipos Especiales, la consecuencia legal de dicho incumplimiento es la aplicación de los descuentos ahí contemplados. Expresa que, además, la reglamentación del Contrato se ajusta plena y exactamente a lo dispuesto en los artículos 46 y 46 bis de la LOPSRM y al artículo 87 del RLOPSRM[432].

[428] Réplica y Contestación Reconvención, No. 212.
[429] Réplica y Contestación Reconvención, No. 213.
[430] Réplica y Contestación Reconvención, No.214.
[431] Réplica y Contestación Reconvención, No. 215.
[432] Réplica y Contestación Reconvención, No. 216.

541. Así las cosas, DUNOR sostiene que el descuento pretendido por CFE, por obra no ejecutada, únicamente tendría cabida si las Partes no hubiesen pactado expresamente la forma de resarcir el incumplimiento en cuestión[433]. Por lo que el artículo 231 RLOPSRM no resulta procedente.

542. Por otra parte, DUNOR señala que en todo caso el último apartado de la norma regula expresamente una excepción a la obligación de aplicar descuentos al monto inicialmente convenido en el Contrato siempre que "*a la conclusión de los trabajos contratados, se acredite… que atendiendo a las características… así como a la convocatoria... se alcanzaron los objetivos y finalidad de las obras*". Señala entonces que esto es exactamente lo ocurrido en el supuesto que el Tribunal Arbitral está enjuiciando[434].

543. A lo anterior agrega que CFE ha descontado íntegramente del Precio del Contrato el valor de las Partes de Repuesto no entregadas por DUNOR (US$ 1'667,781.48) (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy). Con el importe de este descuento CFE puede comprar (si así lo decide o requiere) las piezas faltantes y por ello DUNOR ya habría indemnizado el daño producido por incumplir *"supuestamente*" los alcances del Contrato (en concreto por el coste íntegro de las mismas) que es lo que regula el párrafo tercero del artículo 231 del RLOPSRM[435].

544. Precisa que con esa indemnización (US$ 1'667,781.48) (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy), siguiendo la literalidad del precepto, se ha dado cumplimiento y se han alcanzado los objetivos y finalidades de las Obras. Señala que (i) CFE habría acreditado que se han alcanzado los objetivos de la obra cuando emitió el Certificado de Aceptación Provisional; y (ii) que se ha alcanzado la finalidad de la obra y además ello queda acreditado por el hecho de que la Central se encuentra generando a demanda de la Red[436].

[433] Réplica y Contestación Reconvención, No. 219.
[434] Réplica y Contestación Reconvención, No. 225.
[435] Réplica y Contestación Reconvención, No. 226.
[436] Réplica y Contestación Reconvención, No. 227.

545. Agrega la Demandante que aún asumiendo que (i) DUNOR ha incumplido su obligación de entregar las Partes de Repuesto Solicitadas que CFE ahora reclama (*quod non*); (ii) que es admisible la aplicación de dos descuentos al Precio del Contrato por unos mismos hechos (*quod non*); y (iii) que es procedente el doble descuento aplicado por CFE segun el artículo 231 del RLOPSRM (*quod non*), no procede disminuir el Precio del Contrato, además de la penalidad pactada, al no haber acreditado CFE el daño que la falta de entrega de las Partes de Repuesto le ha irrogado y cuya indemnización pueda exceder a los descuentos o penas pactadas por las Partes[437].

546. Expresa DUNOR que de conformidad con el artículo 2110 del CCF *"[l]os daños y perjuicios deben ser consecuencia inmediata y directa de la falta de cumplimiento de la obligación, ya sea que se hayan causado o que necesariamente deban causarse*". Esta disposición resulta aplicable tanto en términos de la cláusula 30.1 del Contrato como del artículo 13 de la LOPSRM. Expresa que, en el presente caso, el descuento que CFE pretende aplicar por Obra No Ejecutada no puede considerarse una consecuencia inmediata y directa del incumplimiento, sobre todo, porque ya hay una pena pactada para el mismo[438]. Por lo que, cualquier indemnización o descuento reclamado por CFE en atención a la supuesta Obra No Ejecutada debe obedecer a un daño real que además debe ser probado y acreditado tanto en su concepto como en su importe.

547. Por último, sostiene DUNOR que en el improbable caso que el Tribunal Arbitral entendiese que sí se le ha irrogado a CFE un daño distinto al ya indemnizado con la Primera Partida, la penalidad aplicada debería reducirse drásticamente en atención al daño efectivamente producido, de conformidad con el principio "*restitutio in integrum*".

#### 12.1.3.2 Posición de la Demandada

548. Por su lado, la Comisión señala que la Convocatoria de este Proyecto, de conformidad con el artículo 31 de la LOPSRM, contenía una descripción sucinta

[437] Réplica y Contestación Reconvención, No. 228.
[438] Réplica y Contestación Reconvención, No. 231.

del objeto de la Licitación Pública indicando la descripción general de los trabajos a contratar, sin que resulte necesario especificar detalladamente el número de piezas que contendrían los conceptos a ejecutar, ya que la modalidad del Contrato es a Precio Alzado[439].

549. Agrega que la Comisión acompañó a su convocatoria las Especificaciones Técnicas que describen los requisitos a considerar por los participantes para la elaboración de su oferta, es decir entregó una ingeniería básica, definiendo claramente que la elaboración de la Ingeniería básica complementaria y la Ingeniería de Detalle correría a cargo del licitante ganador[440].

550. Con base a lo anterior, señala la Comisión que la Demandante, en su Propuesta Técnica, en la parte relacionada con el ALCANCE DE SUMINISTRO, manifestó textualmente que *"En caso de que exista alguna deficiencia, olvido, error o falta de claridad en la proposición, en los aspectos técnicos prevalecerá lo indicado en las especificaciones técnicas contenidas en la Sección 7 de la Convocatoria*"[441].

551. Agrega que la Demandante en su calidad de licitante jamás hizo un detalle pieza a pieza de los suministros que conformarían su oferta (tal es el caso de las Partes de Repuesto, Herramientas y Equipos Especiales), ya que esta se desarrolla a partir de lo que se conoce como Ingeniería de Detalle por el licitante ganador[442].

552. Aclara la CFE que la controversia planteada es únicamente con relación a las Partes de Repuesto solicitadas que forman parte del Turbogenerador de Gas las cuales se establecen en la sección 7.2.11.1 de la Convocatoria "*PARTES DE REPUESTO*"[443].

553. La Comisión señala que DUNOR desconoce su obligación de entregar las Partes Solicitadas, derivado de su entendimiento de que el refaccionamiento correría a cargo del Proveedor del Servicio del Contrato SGF. Expresa CFE que

[439] Memorial de Contestación y Reconvención, No. 74.
[440] Memorial de Contestación y Reconvención, No. 75 y 76.
[441] Memorial de Contestación y Reconvención, No 77.
[442] Memorial de Contestación y Reconvención, No 78.
[443] Memorial de Contestación y Reconvención, No 79.

resulta difícil de creer que la Comisión hubiera adquirido una Turbina de Gas sin partes de Repuesto, y esperar a que el proveedor del Contrato de SGF sea el responsable de suministrarlas, cuando la función de este último es únicamente prestar un servicio de mantenimiento a la propia Turbina[444].

554. Señala que, contrario a lo que sostiene la Demandante, en ningún apartado del Contrato de SGF se establece la obligación del proveedor de esos servicios de proporcionar las Partes de Repuesto Solicitadas en la Sección 7 de la Convocatoria, puesto que su alcance únicamente refiere a los servicios de reparar, mantener, sustituir componentes cuando estos alcancen su vida útil, el monitoreo continuo y garantías técnicas por desempeño funcional, sin que en ninguno de sus anexos pueda desprenderse ni meridianamente esa posibilidad[445].

555. Así las cosas, la CFE sostiene que la Demandante desconoce su obligación de entregar las Partes de Repuesto Solicitadas para el Turbogenerador de Gas, las cuales se establecen en la sección 7.2.11.1 de la convocatoria.

556. Agrega que durante la fase de junta de aclaraciones de la Licitación surgieron dos preguntas sobre la Sección 7 relacionada con el contrato SGF. La Comisión hizo las aclaraciones correspondientes (preguntas No. 85 y No. 368), sin embargo, contrario a lo que sostiene DUNOR entre ellas no existe ninguna contradicción, sino que corresponden a situaciones de hecho diferentes y por ende, aclaran dos aspectos contractuales del Contrato OPF y el de SGF que no tienen ninguna relación entre sí.

557. En este sentido, señala que en la pregunta No. 85 de la Junta de Aclaraciones, se solicita se defina que *“TODOS*” los repuestos y herramientas especiales del turbogenerador de gas y sus auxiliares se encuentran dentro del alcance del Contrato de Servicio de Garantías de Funcionamiento (SGF). A tal efecto la Comisión responde y se refiere únicamente para las refacciones y herramientas de los Turbogeneradores de Gas inherentes al área mecánica,

[444] Memorial de Contestación y Reconvención, No 81 y 84.
[445] Memorial de Contestación y Reconvención, No 85.

manteniendo el requerimiento de la entrega de las refacciones y herramientas de las otras áreas Eléctrica e Instrumentación y Control[446].

558. Por otra parte, en la pregunta No. 368 el Licitante propone a la Comisión que tanto las Refacciones (Partes de Repuesto) como las Herramientas Especiales RECOMENDADAS (destaca la CFE) para el paquete del turbogenerador sean incluidas solamente dentro del Contrato SGF[447]. Señala la Comisión que el planteamiento se encuentra dirigido claramente a los subgrupos de las "*RECOMENDADAS*" tanto para las Refacciones como para las Herramientas Especiales. Agrega que, en las respuestas que dio la Comisión en la Junta de Aclaraciones, jamás hizo una afirmación en el sentido de que las partes de Repuesto Solicitadas formaban parte del Contrato de SGF[448].

559. Aclara la CFE que en la Sección 7 de la Convocatoria, 7.2.11 Partes de Repuesto, Herramientas y Equipos Especiales – se hace referencia a dos grupos dentro del alcance de suministros: 1) Partes de Repuesto y, 2) Herramientas y Equipos Especiales. Estos, a su vez, están divididos en:

1.1. Partes de Repuesto Solicitadas.

1.2. Partes de Repuesto Recomendadas.

2.1. Herramientas y Equipos Especiales Solicitados.

2.2. Herramientas y Equipos Especiales Recomendados[449]

560. Así las cosas, señala que de conformidad con la sección 7.2.11 y la respuesta a las Preguntas No. 85 y 368, el alcance de la obligación de DUNOR es la siguiente según la gráfica que incorpora[450]: las refacciones y herramientas solicitadas están dentro del Contrato y las recomendadas fuera del mismo.

561. La Comisión agrega que, a su vez, esta sección abarca tres disciplinas: a) Área Mecánica, b) Área Eléctrica y, c) Área de Instrumentación y Control.

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[446] Memorial de Contestación y Reconvención, No. 89 y 90.
[447] Memorial de Contestación y Reconvención, No. 91.
[448] Memorial de Contestación y Reconvención, No. 92 y 94.
[449] Memorial de Contestación y Reconvención, No, 97 y 98.
[450] Memorial de Contestación y Reconvención, No. 99.

562. Adicionalmente, señala que la Sección 7 establece criterios de Ingeniería Básica necesarios para que el Contratista desarrolle la Ingeniería de Detalle (Alcance del Contrato). Por lo tanto, es hasta ese momento que se define la totalidad de las Partes de Repuesto, Herramientas y Equipos Especiales Solicitados, de conformidad con el alcance de la definición de ingeniería del Contrato en su cláusula 1.1., sin que esto signifique que el Contratista no lo hubiera considerado en su oferta[451].

563. Al respecto, señala que esta obligación se corrobora en el documento "*Precisiones Técnicas que deben resolverse antes de la firma del Contrato*", documento que, a la postre, formó parte del Anexo 20 del Contrato [452].

564. Agrega que tan es cierto que se pactó que las Partes de Repuesto Solicitadas formaban parte del alcance de las obligaciones del Contrato, que existen cláusulas sobre las: i) condiciones de entrega (cláusula 21.5), y ii) consecuencias de incumplimiento (cláusula 21.6 en relación con el Anexo 3 del Contrato)[453].

565. La Comisión precisa que el 06 de diciembre de 2017 mediante oficio No. 742.161-JALV-420-22717, le manifestó al Contratista que derivado de la revisión realizada a los listados de Partes de Repuesto, Herramientas y Equipos Especiales Solicitados y Recomendados que habría entregado para el desarrollo de la Ingeniería de Detalle, en particular en el Área de Instrumentación y Control, se identificó una serie de partidas faltantes de Partes de Repuesto Solicitadas en la Sección 7.2.11.1 así como Herramientas y Equipos Especiales Solicitados en la Sección 7.2.11.2. Advierte que la mayor cantidad de faltantes solicitados están relacionadas para el equipo de la Turbina de Gas.

566. Agrega la Comisión que el 13 de marzo de 2018 mediante oficio DUNOR-CFE-413, el Contratista por primera vez establece su postura respecto a los comentarios esgrimidos por la Comisión, en relación con las partidas faltantes de Partes de Repuesto solicitadas en la Sección 7.2.11.1 de la Convocatoria y a las Herramientas y Equipos Especiales Solicitadas en la sección 7.2.11.2,

[451] Memorial de Contestación y Reconvención, No. 101.
[452] Memorial de Contestación y Reconvención, No. 104.
[453] Memorial de Contestación y Reconvención, No. 108.

manifestando que no es su obligación entregarlas escudándose en la respuesta de la pregunta No. 368 de juntas de aclaraciones[454].

567. La Comisión señala que, mediante el oficio No. 742.161-JALV-127-18 del 12 de mayo de 2018, se hicieron las siguientes precisiones: i). La respuesta a la Pregunta No. 85, aclara que únicamente las refacciones y herramientas para el turbogenerador de gas correspondiente al área mecánica serán parte del alcance del Contrato de Servicio de Garantías de Funcionamiento, en este sentido, se recalca que las refacciones y herramientas de las otras disciplinas deberán considerarse dentro del presente Contrato. ii). La respuesta a la Pregunta No. 368, está enfocada únicamente tanto a las Refacciones como herramientas especiales recomendadas. De lo anterior, se desprende que no existe controversia alguna, toda vez que la exigencia de la Comisión está basada únicamente en las Partes de Repuesto y herramientas especiales indicadas en las Bases de Licitación como *"solicitadas*", cuyo suministro es de forma obligatoria[455].

568. Sostiene también que, mediante comunicado DUNOR-CFE-446 del 15 de junio de 2018, el Contratista responde al oficio No. 742.161-JALV-127-056-18 del 12 de junio de 2018, y nuevamente reitera su postura, sobre la no obligación de suministrar las Partes de Repuesto, Herramientas y Equipos Especiales Solicitados para los Turbogeneradores de Gas, debido a su entender de la respuesta a la pregunta No. 368. Frente a esto, la Comisión, a través de oficio No. 742.161-JALV-139-056-18 del 09 de julio de 2018, contesta indicando de forma clara y concisa que la pregunta No. 368 solo considera las refacciones y las Herramientas Especiales recomendadas para el paquete del turbogenerador y que sean incluidas solamente dentro del contrato SGF, pero no alude a las partes de repuesto solicitadas[456].

569. Posteriormente, mediante Oficio No. 7B/2019/RJMN-00166 del 29 de abril de 2019, la Comisión solicita al Contratista la entrega de las Partes de Repuesto, Herramientas y Equipos Especiales Solicitadas dentro del Contrato, y

[454] Memorial de Contestación y Reconvención, No. 110.
[455] Memorial de Contestación y Reconvención, No. 111.
[456] Memorial de Contestación y Reconvención, No. 113 y 114.

nuevamente le brinda claras explicaciones sobre la obligación contractual del Contratista en el suministro de las mismas[457].

570. La Comisión señala que la Demandante reitera su postura en el sentido de no suministrar las Parte de Repuesto, Herramientas y Equipos Especiales solicitadas en cuestión por medio del comunicado DUNOR-CFE-545 del 09 de mayo de 2019[458].

571. Finalmente, con el Oficio No. 7B/2019/RJMN-00238 del 31 de mayo de 2019, la Comisión da respuesta al comunicado referido en el párrafo anterior, reiterando la obligación del Contratista en el suministro de las Partes de Repuesto, Herramientas y Equipos Especiales Solicitados, específicamente los de las Áreas Eléctrica y de Instrumentación y Control de las Turbinas de Gas, por lo que se ratifica el contenido del oficio No. 7B/2019/RJMN-00166. Así mismo, se indica que de no cumplirse con la obligación se procedería con los descuentos correspondientes de conformidad con la Cláusula 20.11 del Contrato[459].

572. Señala la Comisión que la Demandante pretende confundir al Tribunal, argumentando que únicamente los documentos donde se fijan detalladamente todas las piezas a suministrar están contenidos en el Anexo OT-10 y 11, lo que es falso ya que es hasta que el licitante Ganador se convierte en Contratista que desarrolla la Ingeniería de Detalle y hasta ese momento desglosa la lista final de Partes de Repuesto Solicitadas, lo que inclusive se confirmó por la Demandante en el documento denominado "*Precisiones Técnicas que deben resolverse antes de la firma del Contrato*", el cual forma parte del Anexo 20 del Contrato[460].

573. También, agrega que un actuar de mala fe por parte de la Demandante, es la afirmación en el sentido que el 18 de febrero de 2019, las Partes conciliaron un listado de Partes de Repuesto, señalando que solo 6 piezas estaban pendientes de entrega. A este respecto advierte que se trata de un documento unilateral desarrollado por el Contratista de las piezas que a su entender eran

[457] Memorial de Contestación y Reconvención, No. 116.
[458] Memorial de Contestación y Reconvención, No. 117.
[459] Memorial de Contestación y Reconvención, No. 118.
[460] Memorial de Contestación y Reconvención, No. 121.

las que faltaba de entregar, pero desde diciembre de 2017 y en varios oficios la Demandada le señaló que las Partes de Repuesto Solicitadas de los Turbogeneradores de Gas, no estaban integrados en la Ingeniería de Detalle, puntualizando que DUNOR tenía la obligación de suministrarlas, de conformidad con el Contrato[461].

574. Destaca la Comisión que tanto la Sección 7.2.11 de la Convocatoria como el OT-10, están compuestos por 19 conceptos a suministrar; sin embargo, las cantidades a suministrar deben ser verificadas por la Comisión una vez desarrollada la Ingeniería de Detalle. Lo anterior ha sido confirmado por el propio DUNOR[462].

575. Al respecto, la Comisión se cuestiona el siguiente caso: si la OT-10 contempla el suministro de 1 pieza para el Concepto I&C-01, ¿por qué DUNOR entregó a la Comisión un total de 12 piezas para dicho Concepto? A lo anterior, responde: porque la cantidad de piezas a suministrar para el Concepto I&C-01, resulta del desarrollo de Ingeniería de Detalle, por lo cual DUNOR suministró a CFE 1 (una) Estación de Operación completa por cada tipo suministrada, resultando en un total de 12 piezas, teniendo en cuenta la cantidad de Estaciones suministradas[463].

576. Respecto de la legitimidad de los descuentos aplicados, señala que la Comisión se vio obligada a proceder con ellos para estar en condiciones de emitir el CP, evitando agravar las consecuencias del incumplimiento de la Demandante, ya que la Cláusula 18.1 Aceptación Provisional del Contrato, establece como condicionante para su emisión "*el suministro de la totalidad de las Partes de Repuesto*"[464].

577. Señala la Comisión en relación con el descuento identificado por el Demandante como la **Primera Partida** (US$ 1'667,781.48) (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy), que este tiene como fundamento lo pactado en el Contrato,

[461] Memorial de Dúplica y Réplica a la Reconvención, No. 214.
[462] Memorial de Dúplica y Réplica a la Reconvención, No. 216.
[463] Memorial de Dúplica y Réplica a la Reconvención, No. 221.
[464] Memorial de Contestación y Reconvención, No. 123.

exactamente en las cláusulas 21.5, 21.6 en relación con el Anexo 3 del Contrato hasta por el límite que establece la cláusula 20.11 inciso d) y 21.7[465] y para proceder a su cálculo se tomó en consideración la Fecha Programada de Aceptación Provisional que finalmente fue prorrogada mediante el Convenio Modificatorio No. 3, que es la del 14 de marzo de 2019[466].

578. Por lo anterior, expresa la Comisión que, mediante el Oficio 7B/2019/RJMN-00364 del 20 de agosto de 2019, informó a la Demandante que procedería hacer descuentos por incumplimientos en la entrega de las Partes de Repuesto y un descuento por Obra no ejecutada, pues ya habían sido satisfecho los requisitos para ello, esto es, i) había llegado la Fecha de Aceptación Provisional tanto la del Convenio 2, como la que finalmente se formalizó en el Convenio 3. ii) La Demandante no había entregado las Partes de Repuesto Solicitadas. iii) La Comisión adquirió el derecho de cobrar un descuento no reembolsable. iv) La Comisión procedió a valorizar las Partes de Repuesto Solicitadas no entregadas con el tecnólogo fabricante de la Turbina de Gas SIEMENS. v) Después de la Fecha de Aceptación Provisional contabilizó por cada semana de atraso un equivalente al 10% del valor de mercado de las Partes de Repuesto Solicitadas no suministradas. vi) Del 14 de marzo de 2019 al 23 de mayo de 2019, transcurrieron 10 semanas y por lo tanto se llegó al 100% del valor de mercado de las Partes de Repuesto Solicitadas no suministradas[467].

579. Señala la Comisión que requirió a Siemens la cotización del listado de Partes de Repuesto, Herramientas y Equipos Especiales Solicitados faltantes para sustentar el valor de mercado de las refacciones faltantes, de conformidad con lo establecido en el numeral D "*DESCUENTOS POR INCUMPLIMIENTO EN LA ENTREGA DE PARTES DE REPUESTO Y HERRAMIENTAS ESPECIALES*", del Anexo 3 del Contrato[468].

580. Agrega que no tiene mérito la argumentación del Contratista de que el documento enviado por Siemens (julio de 2019) a la Comisión, no puede ser tomado como referencia del valor de mercado de las Partes de Repuesto

[465] Memorial de Contestación y Reconvención, No. 124.
[466] Memorial de Contestación y Reconvención, No. 125-126.
[467] Memorial de Contestación y Reconvención, No. 129.
[468] Memorial de Dúplica y Réplica a la Reconvención, No. 236.

Solicitadas de los Turbogeneradores de Gas no suministradas porque se trata de un documento emitido por el fabricante SIEMENS a solicitud expresa de "*Cotización*" por parte de la Comisión[469].

581. Concluye la Comisión que resulta incongruente la postura de la Demandante, al considerar erróneamente que el valor de mercado no puede ser acreditado con las ofertas realizadas por el fabricante en 2 momentos distintos con importes semejantes, requiriendo formalismos que sencillamente resultan incomprensibles y que por supuesto no se encuentran establecidos en el Contrato para realizar una acción tan específica como obtener el valor de mercado de las Partes de Repuesto Solicitadas de los Turbogeneradores de Gas no suministradas[470].

582. Ahora, en cuanto al descuento identificado como Segunda Partida (US$ 1'393,106.70) (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy), la Comisión indica que este tiene como fundamento lo pactado en el Contrato, particularmente en las cláusulas 4.1 inciso p) en relación con la 1.1 y 9.1.

583. Agrega que "*Obras*" conforme a la definición de la cláusula 1.1 del Contrato son todos los Materiales que deben ser proporcionados por el Contratista y por los que se paga un Precio[471].

584. Además, señala que de acuerdo con la cláusula 9.1 "*el precio del Contrato cubre todas las Obras a ser suministradas o realizadas de conformidad con el presente Contrato, …*"[472].

585. Por todo lo anterior, la Demandada sostiene que al haber incumplido DUNOR entregar las Partes de Repuesto, Herramientas y Equipos Especiales, que forman parte del Precio del Contrato, trae como consecuencia la ejecución incompleta de las Obras, por lo que con fundamento en el artículo 231 del RLOPSRM, se procedió hacer el descuento por Obra No Ejecutada del Precio del Contrato, por la cantidad que resultó del valor de mercado presente,

[469] Memorial de Dúplica y Réplica a la Reconvención, No. 237.
[470] Memorial de Dúplica y Réplica a la Reconvención, No. 239.
[471] Memorial de Contestación y Reconvención, No131.
[472] Memorial de Contestación y Reconvención, No 132.

deflactado a la fecha en que el Contratista presentó su proposición técnica y económica[473].

586. Agrega la Demandada, en su Memorial de Dúplica, que el hecho de que Siemens, como tecnólogo de los turbogeneradores suministrados en el Proyecto Empalme II, sea quien cuente con todas las licencias y patentes necesarias, y disponga de las refacciones originales y por ello sea el idóneo para ofrecer los servicios del Contrato SGF, no implica de forma alguna que no sean refacciones a suministrar por DUNOR. En tal caso, el Contratista debió adquirirlas con el proveedor de los Turbogeneradores de Gas, para que éstas pudieran garantizar la condición de originales conforme a lo establecido en la Sección 1.[474]

587. Agrega que el Contrato no prevé sancionar dos veces un incumplimiento, sino que se está ante una situación en la que se conjugan y sancionan dos incumplimientos de diferente naturaleza, como lo son, por un lado, la "*no entrega oportuna*" y, por otra parte, el "*no suministro*", en ambos casos, de las Partes de Repuesto Solicitadas de los Turbogeneradores de Gas. A tal efecto, se refiere a la consecuencia prevista para la no entrega oportuna y agrega que no obstante, el retraso por más de 10 semanas en la entrega de las Partes de Repuesto, Herramientas y Equipos Especiales por parte del Contratista que se traduciría en un cobro del 100% del Valor comercial de la mismas conforme a lo establecido en la cláusula 21.5 y 20.11, ello no extingue la obligación de este último en su suministro, por lo que, teniendo que las Partes de Repuesto, Herramientas y Equipos Especiales son parte de las Obras que deben ser pagadas en el Pago del Precio del Contrato, la Comisión mantiene total derecho, de igual forma, en descontar el costo de las mismas del Pago del Precio[475].

588. En ese orden de ideas, sostiene la Demandada que entender la obligación contractual conforme al razonamiento del Contratista, únicamente promovería que contratistas ventajosos dejaran de suministrar las Partes de Repuesto, Herramientas y Equipos Especiales una vez que incurrieron en la primera

[473] Memorial de Contestación y Reconvención, No 133.
[474] Memorial de Dúplica y Réplica a la Reconvención, No. 201.
[475] Memorial de Dúplica y Réplica a la Reconvención, No. 244-248.

semana de retraso en la entrega de las mismas, lo que significaría premiar el incumplimiento de sus obligaciones del Contrato[476].

589. Por todo lo anterior, agrega que las sanciones por el incumplimiento del Contratista en el suministro de las Partes de Repuesto Solicitadas para los Turbogeneradores de Gas, han sido aplicadas correctamente[477].

590. También, sostiene que ninguno de estos descuentos se trata de daños y mucho menos perjuicios que pretenda reclamar a la Comisión, sino de descuentos pactados en el Contrato por el incumplimiento en la entrega oportuna, así como por la no ejecución de Obra contemplada en las Especificaciones del Contrato, perfectamente determinados[478].

#### 12.1.3.3 Consideraciones del Tribunal

591. En relación con la controversia existente entre las Partes sobre el cumplimiento o no de la obligación del Contratista de entregar determinadas Partes de Repuesto, Herramientas y Equipos Especiales por razón del Contrato en primer lugar este Tribunal considera necesario precisar cuál fue el alcance de la obligación pactada en el Contrato, para posteriormente y en segundo lugar, determinar cuáles son, en su caso, las consecuencias del incumplimiento de dicha obligación.

592. En primer lugar, es claro que el Contrato prevé la obligación a cargo del Contratista de suministrar Partes de Repuesto y Herramientas y Equipos Especiales. A este respecto la cláusula 4.1 del Contrato, denominada "Obligaciones Básicas", establece que "*Las Obras a ser realizadas por el Contratista de conformidad con el presente Contrato incluirá, de manera enunciativa más no limitativa, las siguientes:..(p) entregar las Partes de*

[476] Memorial de Dúplica y Réplica a la Reconvención, No. 249.
[477] Memorial de Dúplica y Réplica a la Reconvención, No. 250.
[478] Memorial de Dúplica y Réplica a la Reconvención, No. 260.

*Repuesto y Herramientas y Equipos Especiales conforme a la Cláusula 21.5 del Contrato*".

593. Por su parte la cláusula 21.5 del Contrato dispuso:

> *"21.5 Condiciones de Entrega de las Partes de Repuesto v Herramientas y Equipos Especiales. Las Partes de Repuesto y Herramientas y Equipos Especiales se deberán entregar en condiciones adecuadas para su almacenamiento a más tardar en la Fecha Programada de Aceptación Provisional de la Central de acuerdo con el Programa de Ejecución. La entrega ha de hacerse en los almacenes ubicados en el Sitio que la Comisión señale por escrito para tales efectos, señalamiento que deberá hacerse oportunamente para permitir al Contratista hacer los arreglos necesarios para el transporte de las Partes de Repuesto y Herramientas y Equipos Especiales. Todos los gastos de entrega correrán por cuenta del Contratista."*

594. De esta manera, el Contrato estableció una obligación de entregar Partes de Repuestos y Herramientas y Equipos Especiales a más tardar en la Fecha Programada de Aceptación Provisional.

595. Ahora bien, la controversia que se ha planteado entre las Partes deriva de que CFE considera que DUNOR no entregó todas las partes de repuesto que la primera afirma que la segunda debía entregar, en la forma que se señala a continuación.

596. La CFE hace referencia[479] en su contestación al oficio 742.161-JALV-420-227- 17 por el cual le informó a DUNOR "*que derivado de la revisión realizada a los listados de Partes de Repuesto, Herramientas y Equipos Especiales Solicitados y Recomendados mismos que habría entregado para el desarrollo de la Ingeniería de Detalle, en particular en el Área de Instrumentación y Control se identificó una serie de partidas faltantes de Partes de Repuesto Solicitadas en la Sección 7.2.11.1 así como Herramientas y Equipos Especiales Solicitados en la Sección 7.2.11.2, la mayor cantidad de faltantes solicitados están relacionadas para el equipo de la Turbina de Gas*"[480].

[479] Contestación de CFE, párrafo 106.
[480] La CFE identifica este oficio anexo R- 017. Sin embargo el anexo R-017 no contiene esta comunicación sino una hoja que identifica un "Trasmital" Dunor-CFE-372.

597. Ahora bien, por correo electrónico del 7 de febrero de 2018 enviado por Elecnor a la CFE se hicieron consideraciones sobre el alcance de las obligaciones en materia de Partes de Repuestos Solicitadas y se alude a la repuesta a la pregunta No 368 en la fase de licitación[481].

598. El 13 de marzo de 2018 mediante oficio DUNOR-CFE-413[482], la Demandante expresó que no tenía la obligación de entregar las partidas faltantes de Partes de Repuesto solicitadas en la Sección 7.2.11.1 y las Herramientas y Equipos Especiales Solicitadas en la sección 7.2.11.2, para lo cual invocó la respuesta de la pregunta No. 368 de la etapa de las juntas de aclaraciones.

599. Por Oficio 742.161JALV-12718, de 12 de mayo de 2018[483] la Comisión señaló que no existe contradicción entre las Sección 7.2.11.1 y 7.2.11.2 del Contrato y las preguntas No 85 y 368 de las juntas de aclaraciones y agregó que las partes de repuesto y herramientas de los Turbogeneradores de Gas para el área de instrumentación y control fueron consideradas en la Oferta Técnica y en la Oferta Económica. Concluyó la Comisión que se debían suministrar las partes de repuesto para los Turbogeneradores.

600. Por su parte DUNOR por oficio DUNOR-CFE-446 del 15 de junio de 2018[484], respondió al oficio No. 742.161-JALV-127-056-18 del 12 de junio de 2018, y reiteró su postura, sobre la no obligación de suministrar las Partes de Repuesto, Herramientas y Equipos Especiales Solicitados para los Turbogeneradores de Gas, debido a la respuesta a la pregunta No. 368

601. Por oficio 7B2019RJMN-00166 del 29 de abril de 2019[485] la Comisión instruyó al contratista para *"realizar la 'entrega total de las Partes de Repuesto, Herramientas y Equipos Especiales (solicitadas)' del área eléctrica y de instrumentación y control, indicadas en la Sección 7 de la Convocatoria y confirmadas en el OT-9 de su Proposición Técnica, de forma particular las requeridas para los turbogeneradores de gas del fabricante SIEMENS, ya que*

[481] Doc. C-099.
[482] Doc. C-103.
[483] Doc. C-100.
[484] Doc. C-104.
[485] Doc. C-102.

*estas si forman parte del alcance del presente Contrato OPC*". Igualmente la Comisión aclaró que la pregunta 368 hace referencia a la Sección 7.2.11.2 "*Herramientas y Equipos Especiales*", "*y la pregunta está claramente enfocada a las refacciones recomendadas*", a la cláusula 31.2 del Contrato, a la OT-9 y, finalmente, exigió dar cumplimiento al alcance del suministro de la totalidad de las Partes de Repuestos y Herramientas Especiales, o en caso contrario se procederá a aplicar los descuentos correspondientes en los términos de la cláusula 20.11.

602. Por oficio No. 7B2019RJMN-00364[486] del 20 de agosto de 2019, la Comisión hizo referencia a las Partes de Repuesto Solicitadas para las Turbinas de Gas e indicó: 1. que de conformidad con el Anexo 3 del Contrato procedería a hacer un descuento de US$ 1'667,781,48 (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy) , y 2. que procedería a un descuento al Precio del Contrato como Obra no ejecutada por US$ 1'393,106.70 (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy).

603. De esta manera la Controversia que ha de resolverse es si DUNOR estaba o no obligado a suministrar las partes de repuesto y herramientas específicas solicitadas por CFE.

604. A este respecto es pertinente señalar que el Contrato establece en sus definiciones lo siguiente respecto de las Partes de Repuesto:

> *"'Partes de Repuesto': son las refacciones y Herramientas y Equipos Especiales indicados en la Sección 7 de la Convocatoria y en la Proposición Técnica, que deben ser suministrados por el Contratista en los términos de la cláusula 21.5."*

605. Ahora bien, en la Sección 7 de la Convocatoria se expresó:

> *"7.2.11 Partes de Repuesto, Herramientas y Equipos Especiales*

[486] Doc. C-006.

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*"La Comisión requiere le sean suministrados las Partes de Repuesto, Herramientas y Equipos Especiales necesarias para la operación, los trabajos de conservación y mantenimiento preventivos y correctivos de la Central.*

*"Las Partes de Repuesto estarán divididas en dos grupos:*

*"a) Las Solicitadas*

*"Estas son especificadas por la Comisión, deben ser suministradas en forma obligatoria y su precio debe estar incluido en el Costo Total del Proyecto.*

*"b) Las Recomendadas*

*"Estas son las Partes de Repuesto que complementan a las solicitadas y que son necesarias para realizar los trabajos de mantenimiento indicados por los proveedores de los equipos y sistemas en el periodo que abarca desde la fecha de la Aceptación Provisional hasta la fecha de Aceptación Definitiva de la Central. Si al realizar algún mantenimiento dentro del periodo antes indicado se requieren de Partes de Repuesto que no fueron suministradas por parte del Contratista será su obligación entregarlas a la Comisión sin cargos para la misma.*

*"Las Partes de Repuesto Solicitadas y Recomendadas deben ser completamente nuevas e iguales a las partes originales, ser intercambiables y tener la misma calidad en materiales que las partes originales requerido por la Comisión*

*"…*

*"El precio de todas las Partes de Repuesto (solicitadas y recomendadas), Herramientas y Equipos especiales debe estar incluido en el Costo Total del Proyecto*

*"Las Partes de Repuesto, Solicitadas y Recomendadas (incisos a y b anteriores), deberán ser presentadas enlistadas en el formato OT-10, indicando, la descripción, cantidad de piezas a suministrar y unidad de medida, de acuerdo a lo indicado en la Sección 7.2.1 1"* (se subraya).

606. De esta manera, en tanto que las Partes de Repuesto solicitadas deben proveerse en todo caso, las Partes de Repuesto Recomendadas son las necesarias para trabajos de mantenimiento indicados por los proveedores de los equipos y sistemas en el periodo que abarca desde la fecha de la Aceptación Provisional hasta la fecha de Aceptación Definitiva de la Central.

607. Ahora bien, la controversia de las Partes surge de las respuestas dadas en la junta de aclaraciones, pues DUNOR considera que de las respuestas dadas se desprende que no debería proveer las partes de repuestos solicitadas o recomendadas, en tanto que la CFE considera que la respuesta que invoca DUNOR sólo se refiere a las partes de repuestos recomendadas.

608. La razón de la discrepancia está vinculada al hecho de que dentro de la Licitación que tenía por objeto la celebración del Contrato a que se refiere este proceso, también se estableció que el proponente debería incluir en su Proposición una oferta para el Servicio de Garantías de Funcionamiento (SGF) de los turbogeneradores de gas, con fundamento en el cual la Comisión celebraría el Contrato de Servicios de Garantía de Funcionamiento. La futura coexistencia de estos dos contratos generó dudas entre los participantes en la licitación acerca de las Partes de repuestos y herramientas que debía proveer el Contratista, por lo que formularon las preguntas durante la etapa de las juntas de aclaraciones cuyas respuestas generan la controversia que se resuelve.

609. Por consiguiente, debe el Tribunal examinar las respuestas dadas por la Comisión a las preguntas 85 y 368.

610. En cuanto se refiere a la respuesta a la pregunta 85 se encuentra que en ella se indicó:

"…

| | | | | |
|---|---|---|---|---|
| 85 | ABE. 1.49 | Sección 7.2.11.2 | Repuestos y Herramientas especiales de los turbogeneradores de gas | Pregunta:<br>Se solicita amablemente a la Comisión confirmar que todas los repuestos y herramientas especiales del turbogenerador y sus auxiliares se encuentran dentro del alcance del contrato de Servicios de Garantías de Funcionamiento.<br>Respuesta:<br>La Comisión aclara que el CSGF debe incluir las refacciones y herramientas de los Turbogeneradores de Gas inherentes al área mecánica únicamente; sin embargo, de forma adicional, la Comisión requiere que sean suministradas las herramientas especiales que se incluyen dentro de paquete de la turbina de gas, mismas que deberán ser entregadas a la Comisión.<br>En lo que respecta a las refacciones y herramientas de las otras disciplinas (Eléctrica, Instrumentación y Control, protección ambiental, entre otras) estas deben incluirse en el presente Contrato de OPF de acuerdo a lo solicitado en las Secciones 7.2.11, OT-10 OT-11 de la Convocatoria. |

"…" (se subraya).

611. De esta manera, de acuerdo con la respuesta a la pregunta 85, el Contrato de Servicio de Garantías de Funcionamiento a Largo Plazo de los Turbogeneradores (CSGF), debía incluir las refacciones y herramientas de los turbogeneradores de gas inherentes al área mecánica. Las otras refacciones y herramientas (Eléctrica, Instrumentación y Control, protección ambiental, entre otras), debían incluirse en el Contrato de OPF, es decir en el Contrato objeto del presente proceso.

612. Posteriormente se preguntó:

"…

| | | | | |
|---|---|---|---|---|
| 368 | ABE. 3.11 | Sección 7.2.1 1.2 | Repuestos y Herramientas especiales | Pregunta:<br>Se solicita amablemente considerar que tanto las refacciones como las herramientas especiales **recomendadas** para el paquete del turbogenerador sean incluidas solamente dentro del contrato SGF. De esta forma se asegura que el responsable de dicho contrato, suministra dichas refracciones y herramientas especiales para garantizar los servicios del mismo y evitar mezclar alcance con el Contratista del contrato OPF. Así mismo entendemos que las herramientas especiales para el montaje de los turbogeneradores de gas deben ir dentro del contrato OPF.<br>Respuesta:<br>Su apreciación es correcta siempre y cuando el paquete del turbogenerador al que se refiere la pregunta sea el de gas y se consideren las herramientas especiales para el montaje de los turbo generadores dentro del contrato OPF. |

"…" (se subraya)

613. Como se puede apreciar, en la pregunta 368 se solicitó se precisara por la CFE que tanto las refacciones como las herramientas especiales recomendadas para el turbogenerador serían incluidas solamente dentro del contrato SGF y solicitó que se confirmara que "*las herramientas especiales para el montaje de los turbogeneradores de gas deben de ir dentro del contrato OPF*". En su respuesta la CFE manifestó que dicha apreciación era correcta, siempre que se tratara del turbogenerador de gas. Igualmente señaló que las herramientas especiales para el montaje del turbogenerador se consideran dentro del contrato OPF.

614. DUNOR invoca esta última respuesta para sostener que esta debe prevalecer sobre la respuesta a la pregunta No 85 y que no está obligada a entregar las refacciones y herramientas especiales del turbogenerador, salvo aquellas destinadas al montaje de los mismos. Sin embargo, la Comisión

considera que la respuesta 368 es sólo respecto de las refacciones y herramientas especiales recomendadas y no respecto de las solicitadas, y que por ello no hay contradicción entre la respuesta 85 y la 368.

615. Al respecto, el Tribunal comparte la apreciación de la CFE en la medida en que la pregunta 85 no distingue entre refacciones y herramientas solicitadas y refacciones recomendadas, y por el contrario la pregunta 368 se refiere específicamente a refacciones y herramientas recomendadas. Como quiera que la respuesta se limita a confirmar la apreciación de quien pregunta, al indicar "(*s)u apreciación es correcta*" es claro que ella se refiere a las refacciones y herramientas especiales recomendadas.

616. Por consiguiente, en relación con las refacciones y herramientas solicitadas debe aplicarse la respuesta a la pregunta 85. De esta manera, lo que se excluye de la obligación del Contratista son las refacciones solicitadas inherentes al área mecánica. Por el contrario, en el Contrato de OPF deben incluirse las refacciones y herramientas de las otras áreas disciplinas (Eléctrica, Instrumentación y Control, protección ambiental, entre otras) en virtud de existir una instrucción expresa en la Convocatoria y ninguna disposición en contrario sobre el particular.

617. En todo caso, como quiera que DUNOR invoca otros argumentos para soportar su tesis de que debe aplicarse la respuesta 368 a las refacciones y herramientas solicitadas, debe el Tribunal examinarlos para establecer si ellos confirman o desmienten la conclusión que resulta del texto de las respuestas.

618. Por una parte, DUNOR señala que su tesis guarda relación con el hecho de que las refacciones y herramientas de las turbinas de generación de gas están incluidas en el contrato SGF. La Comisión señala que el Contrato SGF únicamente se refiere a los servicios a reparar, mantener y sustituir componentes cuando estos alcancen su vida útil. Frente a lo anterior, DUNOR señala que las Instrucciones para los Licitantes estipulaban que "*el refaccionamiento correrá a cargo del Proveedor del Servicio*", que sólo debe ser prestado por los tecnólogos o fabricantes de estos equipos, por ser éstos "*los únicos capaces de incluir las refacciones originales*" que en su caso se requieran. Agrega que la cláusula primera del Contrato SGF indica expresamente que: "*la disponibilidad de las*

*piezas de repuesto será responsabilidad del PROVEEDOR"*. Señala DUNOR que el Contrato SGF también prevé la obligación del Proveedor SGF de entregar las piezas de repuesto de las TGs, por lo que no es cierta la afirmación de la Comisión de que el Contrato SGF no incluye tal obligación y, tampoco cabe sostener – como afirma la Comisión – que no existía riesgo de que el refaccionamiento de las TGs fuese entregado por duplicado.

619. Al respecto encuentra el Tribunal que en la Convocatoria[487] se expresa:

> *"Asimismo, el Licitante deberá incluir en su Proposición una oferta para el Servicio de Garantías de Funcionamiento (SGF) de los turbogeneradores de gas, tomando en cuenta lo siguiente:*
>
> *"La Comisión requiere de la realización de diversos proyectos que incluyen la construcción de centrales de generación eléctrica que se estructuran como proyectos PIDIREGAS, de inversión directa, en la modalidad de Obra Pública Financiada (OPF).*
>
> *"Algunas de estas centrales de generación eléctrica funcionan con base en turbogeneradores de gas o motores de combustión interna, tecnologías que, con el fin de garantizar su eficiencia, disponibilidad y capacidad, requieren de un adecuado mantenimiento de largo plazo, conocido como "Servicio de Garantías de Funcionamiento", los cuales sólo deben ser prestados por los tecnólogos, fabricantes o filiales de los equipos, quienes resultan ser los titulares o tener las licencias exclusivas de las patentes correspondientes y los únicos capaces de incluir las refacciones originales que en su caso se requieran para garantizar estos servicios.*
>
> *"Para el 'Servicio de Garantías de Funcionamiento' de largo plazo, el refaccionamiento correrá a cargo del Proveedor del Servicio.*
>
> *"Con base en lo anterior, el tecnólogo, fabricante o filial de los turbogeneradores de gas, deberá incluir en la Proposición una oferta para el Servicio de Garantías de Funcionamiento (SGF) de los turbogeneradores de gas (la cual no podrá ser modificada en caso de resultar ganador) incluyendo todos los mantenimientos tipo A, B y C, de acuerdo al anexo 14 del anexo 24 de la Sección 6, para garantizar la eficiencia, disponibilidad y capacidad, comprendiendo hasta el segundo mantenimiento mayor tipo C. La fecha de inicio para el Contrato del*

[487] Doc. C-49.

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*Servicio de Garantías de Funcionamiento será la Fecha de Aceptación Provisional de la Central"* (se subraya).

620. En el Modelo de Contrato SGF de Largo Plazo de los turbogeneradores de Gas[488] se expresó:

*"EL PROVEEDOR DE SERVICIOS se obliga a prestar a LA COMISION el Servicio de Garantías de Funcionamiento de Largo Plazo de los Turbogeneradores de Gas del Proyecto 313 CC Empalme II".*

621. En la misma cláusula se dispuso:

*"El alcance del Servicio de Garantías contempla de manera enunciativa más no limitativa, lo siguiente:*

• *Realizar Dos (2) Mantenimientos Programados tipo "C" ó "mayor" y, los Mantenimientos Programados tipo "A" y "B" necesarios, de acuerdo a lo establecido en el Anexo 14 de este Contrato;*

• *Sustitución de componentes cuando alcancen su vida útil. Las partes que sean sustituidas como parte de los Servicio de Garantías podrán ser nuevas, o rehabilitadas;*

*"En caso de falla de los componentes del(os) equipo(s) cubierto(s), en este Contrato, estos serán restituidos por EL PROVEEDOR DE SERVICIOS, incluyendo las actividades requeridas para restablecer la Unidad a sus condiciones originales operativas, sin costo para LA COMISIÓN…*

*"LA COMISIÓN no fungirá como dueño de las piezas de intercambio, sino que será dueño de las piezas que están instaladas y en operación, por lo que, las piezas como tales no serán parte del activo fijo de la Comisión, sino que el activo fijo en lo que respecta a los Turbogeneradores de Gas será como elemento completo, lo anterior, deberá ser tomado en cuenta por EL PROVEEDOR DE SERVICIOS, ya que LA COMISIÓN no tendrá control sobre propiedad y número de serie de las piezas por individual, de ahí que la disponibilidad de las piezas de repuesto, el control de las mismas en el proceso de importación, exportación, reparación y/o reacondicionamiento, transporte, resguardo y disponibilidad en Sitio, será responsabilidad de EL PROVEEDOR DE SERVICIOS. Dentro de su*

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[488] Doc. C-050.

*Propuesta, EL PROVEEDOR DE SERVICIOS debe entregar los criterios de estimación de vida útil de todas las piezas cubiertas por el Contrato"* (se subraya).

622. Del texto del Modelo de Contrato de SGF aportado al expediente se desprende que fundamentalmente el prestador de la garantía debe realizar los mantenimientos programados y sustituir componentes que alcance su vida útil.

623. Por otra parte, el Contratista hace referencia a su propia conducta al presentar su oferta y a la conducta de la Comisión al adjudicarle el Contrato. A tal efecto destaca que en la Convocatoria se previó que las partes de repuesto debían ser presentadas en el formato OT-10. Agrega que el Contratista incluyó en su OT 10 las partes de repuesto que iba a proveer. Destaca que la propuesta de DUNOR fue aceptada por la Comisión, por considerar que cumplía los requisitos de la Convocatoria, pues de lo contrario la habría desechado, "*existiendo, por tanto, acuerdo de voluntades al respecto*"[489].

624. En relación con lo anterior la CFE señala que las Especificaciones Técnicas contienen la ingeniería básica y que le corresponde a DUNOR precisar las Partes de Repuesto en la ingeniería de Detalle[490]. Agrega que en la Propuesta Técnica de Dunor se señala que "*en caso de que exista alguna deficiencia, olvido o error en la proposición, prevalecerá lo indicado en las Especificaciones Técnicas"*.

625. Al respecto advierte el Tribunal que en el presente caso se dispone en la OT-9 Alcance del Suministro "*III. En caso de que exista alguna deficiencia, olvido, error o falta de claridad en la proposición, en los aspectos técnicos prevalecerá lo indicado en las especificaciones técnicas contenidas en la Sección 7 de la Convocatoria* [491]*.*"

626. Lo anterior implica que no se puede considerar que por el hecho de que se haya omitido algo en la oferta y se adjudique el Contrato, ello significa que el

[489]Contestación y Réplica de Dunor, párrafo 186.
[490] Contestación de CFE, párrafos 75,78 y 101.
[491] Contestación de CFE, párrafo 77. La imagen del texto de la parte pertinente de la OT-9, aparece en el Doc. C-102, Oficio 7B2019RJMN-00166, de 29 de abril de 2019.

Contratista no está obligado a cumplir con las prestaciones que se derivan de la convocatoria y que exista un consentimiento de la CFE.

627. A lo anterior vale la pena agregar el contenido del documento de PRECISIONES TECNICAS QUE DEBEN RESOLVERSE ANTES DE LA FIRMA DEL CONTRATO[492] (anexo 20 del Contrato)[493], en el cual se incluye lo siguiente:

| PRECISIONES TECNICAS QUE DEBEN DE RESOLVERSE ANTES DE LA FIRMA DEL CONTRATO | | | | | |
|---|---|---|---|---|---|
| No. | Concepto | Referencia CFE | Precisión Requerida de Acuerdo a lo especificado por CFE | Referencia Proposición | Acuerdo entre CFE y |
| DIYC-OI | Partes De Repuesto Solicitadas Y Recomendadas | Sección 2.1.1.13 Sección 3,3.9.2 Sección 7.2 Inciso 7.2.11.1 | Precisar que la lista final de Partes de Repuesto solicitadas por La Comisión y las recomendadas por los fabricantes de los equipos, para todos los equipos y Sistemas de Control e Instrumentación de este Proyecto que serán | Propuesta Técnica Proposición Técnica Carpeta 1 de 1 Folios 000219 al 000220 y 000234, 000238 | DURO FELGUERA, S.A./ELECNO S.A/ ELECNOR MEXICO S.A. DE C. precisa que el listado final de partes de repuesto solicitadas por La Comisión y las recomendadas por los fabricantes de los equipos, para todos los equipos |

[492] Doc. R.016.
[493] Anexo R-016.

| | | | | | |
|---|---|---|---|---|---|
| | | | suministrados, será definida desglosada durante la Ingeniería de Detalle, apegándose a las cantidades especificadas en la Sección 7.2.11.1 de la Convocatoria. | | y Sistemas de Control e Instrumentación de este Proyecto que serán suministrados, será definida desglosada durante la Ingeniería de Detalle, de acuerdo a lo indicado en la sección 7.2.11.1 de la Convocatoria. |
| DIYC-02 | Herramientas Y Equipos Especiales Solicitadas Y Recomendadas | Sección 2,1.1.13 Sección 3.3.9.3 Sección 7.2 Inciso 7.2.11.2. | Precisar que la lista final de Herramientas y Equipos Especiales solicitadas por La Comisión y las recomendadas por los fabricantes de los equipos, para todos los equipos y Sistemas de Control e Instrumentación de este Proyecto | Propuesta Técnica Proposición Técnica Carpeta 1 de I Folios 000241 y 000242 | DURO FELGUERA, S.A./ELECNO S.A./ ELECNOR MEXICO S.A. DE C.V precisa que el listado final de herramientas y equipos especiales solicitadas por La Comisión y las recomendadas por los fabricantes de los equipos, para |

| | | | | | |
|---|---|---|---|---|---|
| | | | que serán suministrados, será definida y desglosada durante la Ingeniería de Detalle, apegándose a las cantidades especificas en la Sección 7.2.11.2 de la Convocatoria. | | todos los equipos y Sistemas de Control e instrumentación de este Proyecto que serán suministrados, definida desglosada durante la Ingeniería de Detalle, de acuerdo a lo indicado en la sección 7.211 de la Convocatoria. |

628. Por consiguiente, de conformidad con este documento, la lista final de Herramientas y Equipos Especiales Solicitadas sería desglosada durante la ingeniería de detalle.

629. Es pertinente señalar que DUNOR está de acuerdo con la Comisión acerca de que las Especificaciones Técnicas sólo contienen la ingeniería básica, y que es responsabilidad del Licitante desarrollarla en fase de ingeniería de detalle[494].

630. Por lo anterior, para el Tribunal es claro que lo que se haya incluido en relación con los repuestos y herramientas especiales en la OT 10 y en la OT 11 respecto de los repuestos no era definitivo, pues ello dependía de la ingeniería de detalle.

[494] Réplica y Contestación Reconvención, párrafo 181.

631. Ahora bien, la CFE hace referencia[495] en su contestación al oficio 742.161-JALV-420-227- 17 por el cual " *le hizo de conocimiento que derivado de la revisión realizada a los listados de Partes de Repuesto, Herramientas y Equipos Especiales Solicitados y Recomendados mismos que habría entregado para el desarrollo de la Ingeniería de Detalle, en particular en el Área de Instrumentación y Control se identificó una serie de partidas faltantes de Partes de Repuesto Solicitadas en la Sección 7.2.11.1 de la Convocatoria así como Herramientas y Equipos Especiales Solicitados en la Sección 7.2.11.2 de la Convocatoria, la mayor cantidad de faltantes solicitados están relacionadas para el equipo de la Turbina de Gas*", el cual identifica como anexo R- 017[496].

632. Por su parte, DUNOR hace referencia al mismo anexo para señalar que se trata de un listado de piezas remitido por DUNOR el 6 de diciembre de 2017 y señala que "*Como puede comprobarse, en este documento no constan, ni se identifican las Partes de Repuesto de las TGs que ahora CFE está reclamando. Y no constan, por una sencilla razón: porque estas piezas nunca fueron enumeradas ni enlistadas en la OT-10*" [497].

633. Al examinar dicho documento no encuentra el Tribunal que el mismo sea la comunicación que señala la Comisión, por otra parte lo único que dice dicho documento es "*Lista de partes de repuesto y herramientas especiales solicitadas y recomendadas"*, pero no contiene ningún detalle. Por consiguiente, el documento mencionado no suministra elementos adicionales.

634. Teniendo en cuenta todo lo anterior el Tribunal concluye que DUNOR estaba obligado a suministrar los repuestos y herramientas solicitadas en la Sección 7 de la Convocatoria, "Especificaciones técnicas", apartado 7.2.11,1 con excepción de las inherentes al área mecánica de los turbogeneradores.

635. Lo anterior, por cuanto ello es lo que se desprende del Contrato, teniendo en cuenta la respuesta a la pregunta 85, que es la pertinente para el caso concreto.

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[495] Contestación de CFE, párrafo 106.
[496] El anexo R-017 no contiene esta comunicación sino una hoja que identifica un "Trasmital" Dunor-CFE-372.
[497] Réplica y Contestación Reconvención, párrafo 180.

A lo anterior se agrega que esta conclusión no se ve desvirtuada por el hecho de que no se hubieran incluido los repuestos en la OT 10, en la medida en que expresamente se previó que en caso de omisión prevalece lo indicado en la Convocatoria.

636. Dicho lo anterior, procede entonces el Tribunal a analizar las consecuencias del incumplimiento de la obligación a cargo del Contratista.

637. A este respecto encuentra el Tribunal que la cláusula 21.6 del Contrato dispone:

> *"…*
>
> *"En caso de incumplimiento del Contratista en no suministrar a la Comisión las Partes de Repuesto de conformidad con esta Cláusula 21.6, la Comisión descontará del Precio del Contrato las sumas estipuladas en el inciso D del Anexo 3 del Contrato"* (se subraya).

638. Así mismo, el inciso D del anexo 3 dispone:

> *"En caso que el Contratista no proporcione a la Comisión las Partes de Repuesto y Herramientas Especiales de conformidad con las Cláusulas 21.5, 21.6 y 21.7 del Contrato, la Comisión tendrá derecho de cobrar y el Contratista deberá pagar, como Descuentos no reembolsables el equivalente al diez por ciento (10%) por semana de atraso del valor de mercado de las Partes de Repuesto no suministradas conforme a las Cláusulas 21.6 y 21.7 [sic] a la Fecha de Aceptación Provisional de la Central por la(s) Parte(s) de Repuesto, Herramientas Especiales no suministrada(s) de conformidad con las Cláusulas 21.5, 21.6 y 21.7 del Contrato, hasta por el límite establecido en la Cláusula 20.11"* (se subraya).

639. Por su parte la cláusula 20.11 del Contrato OPF dispone

> *"…*
>
> *"d) El monto máximo global de descuentos aplicables por incumplimiento del Contratista en el suministro de las Partes de Repuesto y Herramientas y Equipos Especiales conforme a las Cláusulas 21.5, 21.6 y 21.7, será el equivalente al 100% (cien por ciento) del valor de mercado de las Partes de Repuesto no suministradas conforme a las Cláusulas 21.6 y 21.7 del Contrato" (se subraya).*

640. Como se aprecia de los textos transcritos, el Contrato establece una sanción para el "*caso de incumplimiento del Contratista en no suministrar a la Comisión las Partes de Repuesto*", o el "*caso que el Contratista no proporcione a la Comisión las Partes de Repuesto y Herramientas Especiales"* y así mismo establece el monto máximo aplicable "*por incumplimiento del Contratista en el suministro de las Partes de Repuesto y Herramientas y Equipos Especiales*".

641. Con base en lo anterior, la Comisión mediante el Oficio 7B/2019/RJMN-00364 del 20 de agosto de 2019, informó a la DUNOR que procedería hacer descuentos por incumplimientos en la entrega de las Partes de Repuesto y un descuento por Obra no ejecutada[498] y señaló un descuento de US$ 1'667,871.48 (Un millón seiscientos sesenta y siete mil ochocientos setenta y un dólares americanos 48/100 cy) por incumplimiento en la entrega de Partes de Repuesto, y de US$ 1'393,106.70 (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy), por obra no ejecutada.

642. Procede el Tribunal a analizar el primer descuento realizado por la Comisión por incumplimiento en la entrega de las Partes de Repuesto.

643. DUNOR cuestiona la aplicación del descuento por parte de la Comisión para lo cual señala que la cotización de Siemens no es una cotización vinculante sino una mera Carta Informativa, con una vigencia de 90 días[499], por lo que no se cumple el requisito que el descuento se calcula conforme al valor de mercado de las piezas suministradas.

644. En relación con lo anterior encuentra el Tribunal que la Comisión se funda en la Carta Informativa de Siemens del 23 de julio de 2019, que aparece como anexo al Oficio 7B2019RJMN-00364[500].

645. Si se examina la Comunicación de Siemens se aprecia que la misma expresa "*Siemens Energy, Inc. (de aquí en adelante como Siemens) se complace en*

[498] Doc. C-006.
[499] Réplica y Contestación Reconvención de Dunor, párrafo 201.
[500] Doc. C-110, Carta Informativa Siemens, de 23 de julio de 2019, Adjunto Oficio 7B2019RJMN-00364.

*presentarle esta Carta informativa en base a su correo electrónico recibido el 14 de mayo del presente año para propósitos de solicitud de presupuesto, en la cual Siemens suministrará Componentes para la Turbina de Gas del Central Ciclo Combinado Empalme II*". Es pertinente señalar que en la misma comunicación se indica que "*Siemens no aceptara una Orden de Compra basada en esta Carta Informativa, por lo que agradecemos nos brinden la oportunidad de discutir. El alcance especifico, programa requerimientos técnicos y comerciales con ustedes en mas detalle para alcanzar un acuerdo mutuo*" (se subraya). Igualmente se señala que los precios "*no incluyen IVA y que los precios cotizados están basados bajo una condición de entrega DDP, sin incluir los impuestos de importación y utilizando el Registro de Importador de la Comisión Federal de Electricidad*" (se subraya).También expresa que esta "*Carta Informativa es un precio presupuestal y no puede ser considerado como una promesa de precio final, ni tampoco excedería el precio aquí indicado. Este precio y/o alcance son solo como referencia y están sujetos a cambios…*" (se subraya). Adicionalmente señala que "*La vigencia de esta carta informativa es de 90 días desde la presentación*".

646. A la luz de lo anterior considera el Tribunal que, si bien el precio suministrado por Siemens no es un precio definitivo, porque el mismo está sujeto a negociaciones, en principio si refleja el valor de las partes de repuesto que en el mismo se señalan, pues tiene por objeto permitir realizar un presupuesto, además que se indica que no se excedería el precio indicado. Es pertinente además señalar que la carta informativa tiene vigencia de 90 días, lo que indica que aunque el precio que allí se indica no es definitivo el mismo sirve para realizar un presupuesto en ese plazo.

647. Por consiguiente, el Tribunal considera procedente la suma descontada por la Comisión de US $1'667,781.48 (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos 48/100 cy).

648. Ahora bien, la Comisión mediante el Oficio 7B/2019/RJMN-00364 del 20 de agosto de 2019, ya citado, señaló "*que la no entrega de las Partes de Repuestos constituye un no entrega de las Partes de Repuesto solicitadas en la sección 7.2.11 de las Bases de Licitación constituye un incumplimiento a las*

*Especificaciones del Contrato, que se traduce en una ejecución incompleta de las Obras…motivo por el cual la Comisión le aplicará al Contratista el correspondiente descuento al Precio del Contrato como Obra no ejecutada*". A tal efecto señaló la Comisión que el descuento en este caso equivale a US$ 1'393,106.70 (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy).

649. A este respecto encuentra el Tribunal que las Partes expresamente pactaron que en "*caso de incumplimiento del Contratista en no suministrar a la Comisión las Partes de Repuesto de conformidad con esta Cláusula 21.6, la Comisión descontará del Precio del Contrato las sumas estipuladas en el inciso D del Anexo 3 del Contrato*." Como se puede observar esta cláusula en forma clara precisa que, en caso de incumplimiento, sin distinción entre un incumplimiento definitivo o un retraso, la sanción aplicable es la prevista en la cláusula 21.6. En concordancia con lo anterior el inciso D del anexo 3 dispone que en "*caso que el Contratista no proporcione a la Comisión las Partes de Repuesto y Herramientas Especiales*" se aplicará la sanción prevista en dicha cláusula. En este caso tampoco la cláusula señala que dicha sanción sólo se aplica en caso de retraso. Finalmente, la cláusula 20.11 del Contrato establece que el "*El **monto máximo global de descuentos aplicables por incumplimiento del Contratista en el suministro de las Partes de Repuesto y Herramientas y Equipos Especiales** conforme a las Cláusulas 21.5, 21.6 y 21.7, será el equivalente al 100% (cien por ciento) del valor de mercado de las Partes de Repuesto no suministradas conforme a las Cláusulas 21.6 y 21.7 del Contrato*" (se subraya). Al igual que en los casos anteriores esta cláusula no distingue entre el incumplimiento definitivo o el retraso en el cumplimiento.

650. Por consiguiente, para el Tribunal es claro que desde el punto de vista del Contrato la sanción aplicable por la no entrega de las Partes de Repuesto es la prevista en el Anexo 3 del Contrato, que es, según el texto del Contrato, el monto máximo global.

651. Es pertinente señalar que para pretender justificar los dos descuentos que aplica la Comisión, ella señala que no existe una doble sanción pues se sancionan incumplimientos diferentes por un lado, la "*no entrega oportuna*" y,

por otra parte, el "*no suministro*"[501]. Sin embargo si se revisa el texto del Contrato, se aprecia que el mismo no hace la distinción que indica la Comisión, pues prevé el descuento para el "*caso de incumplimiento del Contratista en no suministrar a la Comisión las Partes de Repuesto",* o para el *"caso que el Contratista no proporcione a la Comisión las Partes de Repuesto y Herramientas Especiales*". Igualmente dispone el Contrato que "*El monto máximo global de descuentos aplicables por incumplimiento del Contratista en el suministro de las Partes de Repuesto….*".

652. De esta manera, el contrato prevé un descuento que se puede aplicar tanto en el retardo en la entrega, como en el caso de la no entrega definitiva.

653. El hecho de que la forma como se calcula el descuento tome en cuenta las semanas de retardo no determina que el descuento solo busca reprimir el retardo, sino más bien que, a partir de un número de semanas de retardo, el incumplimiento tiene tal trascendencia que equivale a un incumplimiento definitivo.

654. Vale la pena observar que las sanciones contractualmente previstas se fundan en el artículo 2117 del CCF el cual establece que "*[l]a responsabilidad civil puede ser regulada por convenio de las partes, salvo aquellos casos en que la ley disponga expresamente otra cosa*".

655. Ahora bien, la Comisión invoca el artículo 231 del RLOPSRM que en su último inciso dispone:

> *"Cuando los trabajos ejecutados no correspondan a los alcances, a la cantidad o a los volúmenes requeridos en la convocatoria a la licitación pública, en las especificaciones del contrato o en la propuesta del contratista, las dependencias y entidades contratantes realizarán descuentos al monto inicialmente convenido en el contrato original a precio alzado o en la parte del mixto de la misma naturaleza, salvo que a la conclusión de los trabajos contratados, se acredite por la dependencia o entidad y por el contratista que atendiendo a las características, complejidad y magnitud de los trabajos, así como a la convocatoria a la licitación pública, se alcanzaron los objetivos y finalidad de las obras o servicios*

[501] Dúplica y Réplica a la Reconvención de la CFE, párrafo 244.

*contratados".*

656. A este respecto se aprecia que el artículo 231 del RLOPSRM establece la posibilidad de aplicar descuentos cuando los trabajos no correspondan a lo requerido en la convocatoria, pero para el Tribunal ello no debe interpretarse en el sentido que este descuento sea adicional al previsto en el Contrato por dos razones fundamentales. Por una parte, el Código Civil Federal permite estipular lo que se previó en el Contrato, incluyendo el límite de la indemnización y las Partes no han cuestionado la licitud de dicha estipulación. Por otra parte, el descuento previsto en el Contrato, en los casos en que definitivamente no se entregaron los repuestos, cumple la misma función del descuento previsto por el artículo 231 del RLOPSRM, al punto que puede considerarse un desarrollo del mismo. Es pertinente destacar que tanto la cláusula contractual como el artículo 231 del RLOPSRM hablan de descuento.

657. Sirve como apoyo la siguiente jurisprudencia:

*Suprema Corte de Justicia de la Nación*

*Registro digital: 189919*

*Instancia: Tribunales Colegiados de Circuito*

*Novena Época*

*Materias(s): Civil*

*Tesis: I.4o.C.39 C*

*Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo XIII, Abril de 2001, página 1101*

*Tipo: Aislada*

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*PENA CONVENCIONAL. LA DUPLICIDAD PROHIBIDA SÓLO EXISTE CUANDO SE REFIERE A LA MISMA OBLIGACIÓN (ARTÍCULO 1840 DEL CÓDIGO CIVIL DEL DISTRITO FEDERAL).*

*De la lectura de los artículos relativos a las cláusulas que pueden contener los contratos, en relación al pacto de pena convencional, se advierte que regulan la relación existente entre la obligación incumplida y la obligación de pagar aquélla, como consecuencia del incumplimiento, el cual puede ser total o parcial; además, el artículo 1840 del Código Civil del Distrito Federal establece la posibilidad de pactar una pena, para el caso de que la obligación no se cumpla o no se cumpla de la manera convenida, pero agrega que si tal estipulación se hace, no podrán reclamarse, además, daños y perjuicios, de lo que se infiere la prohibición de pactar doble pena convencional. Los artículos 1844 y 1845 se refieren a la modificación de la pena por incumplimiento parcial de la obligación, y el 1846 dispone la imposibilidad de exigir simultáneamente el cumplimiento de la obligación y el pago de la pena, a no ser que ésta se pacte por el simple retardo o porque no se cumpla de la manera convenida. Ahora, el hecho de que se condene al demandado al pago de dos o más penas convencionales, pactadas cada una de ellas respecto del incumplimiento de obligaciones diferentes, convenidas de manera simultánea, como sería, por ejemplo, no hacer el pago por el uso de la línea telefónica o por el suministro de la energía eléctrica, hacer uso del inmueble en una forma no convenida, entregar el inmueble en condiciones no pactadas, dar por terminado anticipadamente el contrato, entre otras, no significa que la condena se duplique, pues dichas cláusulas penales no están dirigidas a la misma obligación; por lo tanto, al no existir impedimento legal para pactar diversas penas convencionales, no se puede estimar que una condena se duplique, cuando éstas se hayan pactado respecto de distintas obligaciones, sino sólo en el caso de que dichas penas sancionen el mismo incumplimiento, pues en ese caso la ley sí prescribe su ilegalidad, con el objeto de evitar una doble sanción.*

*CUARTO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO.*

*Amparo directo 6874/2000. María de la Luz Martínez Guevara y otro. 13 de octubre de 2000. Unanimidad de votos. Ponente: Gilda Rincón Orta. Secretaria: Gloria Esther Sánchez Quintos.*

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*Véase: Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XI, abril de 2000, página 978, tesis I.6o.C.195 C, de rubro: "PENA CONVENCIONAL. NO HAY DUPLICIDAD, CUANDO SE PACTA EN DOS CLÁUSULAS, SOBRE CUESTIONES DISTINTAS EN UN CONTRATO DE ARRENDAMIENTO.*

*Nota: Por ejecutoria del 2 de septiembre de 2015, la Primera Sala declaró inexistente la contradicción de tesis 80/2014 derivada de la denuncia de la que fue objeto el criterio contenido en esta tesis, al estimarse que no son discrepantes los criterios materia de la denuncia respectiva"* (se subraya).

658. No sobra además señalar que la última parte del inciso del artículo 231 prevé la no aplicación de descuentos cuando se acredite que se *"alcanzaron los objetivos y finalidad de las obras o servicios contratados*". En el presente caso el objetivo del Contrato era tener la planta en operación y, en particular, en relación con los repuestos, tener a disposición los solicitados para atender los requerimientos que pudiera haber. En este caso, la planta fue recibida, y los descuentos realizados en desarrollo del Contrato permiten a la CFE atender la compra de los repuestos que se necesiten, con lo cual se logran los objetivos y finalidades de las obras contratadas, por lo cual no hay lugar a los descuentos previstos por el artículo 231 del RLOPSRM.

659. Por todo lo anterior, el Tribunal concluye que, de conformidad con lo estipulado en el Contrato, en caso de incumplimiento de la obligación de entrega de las partes de repuesto solicitadas, la sanción aplicable es la prevista en el inciso D del anexo 3 del Contrato, de conformidad con la cláusula 21.6, sin que la misma pueda exceder el monto máximo global de descuentos pactado en la cláusula 20.11, esto es el equivalente al 100% (cien por ciento) del valor de mercado de las Partes de Repuesto. Por lo anterior, existiendo una regulación contractual, no procede la aplicación de descuentos adicionales en desarrollo del artículo 231 del RLOPSRM.

Por lo anterior, la suma que podía descontarla CFE por el incumplimiento en la obligación de entregar Partes de Repuestos es de US $1'667,781.48 (Un millón seiscientos sesenta y siete mil setecientos ochenta y un dólares americanos

48/100 cy). Por consiguiente, la CFE realizó un descuento indebido por US$ 1'393,106.70 (Un millón trescientos noventa y tres mil ciento seis dólares americanos 70/100 cy) que deberá reintegrar a DUNOR en términos de este laudo.

### 12.1.4 Aplicación de Curvas de Degradación al Resultado de las Pruebas de Desempeño de la Central.

#### 12.1.4.1 Posición de la Demandante

660. En relación con este reclamo, DUNOR manifiesta que garantizó a la Comisión que la Central, una vez realizadas las Pruebas de Desempeño, cumpliría con los Valores Garantizados en el Anexo 13(1), conforme a los términos establecidos en la Proposición Técnica[502].

661. Señala que la cláusula 18.5 del Contrato establece las consecuencias de que la prueba no sea satisfactoria y establece el derecho para la Comisión de realizar los descuentos que correspondan como resultado del incumplimiento de las obligaciones a cargo del Contratista sobre estos conceptos conforme al Anexo 13[503].

662. DUNOR hace referencia a la Sección 7.2(10) de la Convocatoria, en la que se definen las Pruebas de Desempeño como: "*las pruebas que deberán efectuarse una vez concluidas las Pruebas de Puesta en Servicio y de Operación de los equipos conforme a lo establecido en el Anexo 13*".

663. Agrega que las cláusulas 17.1, 17.2 y 17.3 del Contrato, referidas a las Pruebas de Puesta en Servicio, Operación y Desempeño respectivamente, disponen que todas las Pruebas "*deberán acontecer de conformidad con el Programa de Ejecución y con lo dispuesto en el Anexo 13*"[504].

664. DUNOR señala respecto del Programa de Ejecución, que las Partes acordaron que, entre la Primera Sincronización del turbogenerador de gas y la

[502] Memorial de Demanda, No. 218.
[503] Memorial de Demanda, No. 219.
[504] Memorial de Demanda, No. 211.

Fecha Programada de Aceptación Provisional, habrían de transcurrir unos 5 meses. En el transcurso de ese plazo, el Contratista debía ejecutar las Pruebas de Puesta en Servicio, Operación y Desempeño a la Central. No obstante, el Programa de Ejecución sufrió modificaciones sustanciales por causas imputables a CFE, lo que ocasionó que el intervalo de tiempo entre los hitos citados se ampliase hasta los 13 meses, es decir, 8 meses más de lo previsto inicialmente[505]. Igualmente, expresa que la ejecución de todas las Pruebas a la Central se vio gravemente afectado por los enormes retrasos derivados de las continuas restricciones de carga impuestas por el CENACE, así como la falta de condiciones de seguridad y confiabilidad del SEN. Todo ello, son causas no imputables a DUNOR[506].

665. Agrega DUNOR que el cambio constante de instrucciones sobre la disponibilidad de la red obligó a que la Central se mantuviera en funcionamiento. Al no existir certeza ni planificación sobre el cómo y cuándo se iban a realizar las Pruebas no pudo preverse un apagado programado[507].

666. Señala que, pese a las restricciones de carga y la indisponibilidad de las condiciones de la red, DUNOR continuó realizando las pruebas estipuladas dentro de su alcance aún con las limitaciones. Al respecto, hace referencia a una tabla que muestra el resultado de la revisión que realizaron conjuntamente las Partes, que acredita que las turbinas de gas (TG21 y TG22) se mantuvieron encendidas un exceso de 2.580 y 2.359 horas, respectivamente, lo que representa un tiempo de operación muy superior al previsto[508].

667. Por otra parte, se refiere al Anexo 13 que regula de forma integral la realización de Pruebas por parte del Contratista. Señala que antes de iniciar las Pruebas, y en consonancia con la cláusula 17.4 del Contrato, DUNOR debía proporcionar a CFE para su aprobación, "*una lista de procedimientos y protocolos de pruebas y puesta en servicio, incluyendo los de Pruebas de Desempeño*"[509] y por ello, el 2 de julio de 2019, envió a la Comisión, de

[505] Memorial de Demanda, No. 213.
[506] Memorial de Demanda, No. 221.
[507] Memorial de Demanda, No. 235.
[508] Memorial de Demanda, No. 236-238.
[509] Memorial de Demanda, No. 214.

conformidad con el Anexo 13, el Procedimiento de Pruebas de Desempeño con código EMP-UEDF-YYY-01201 REV 1 (el "*Procedimiento*"), que fue revisado y aprobado por la Demandada "*sin comentarios*". Dicho Procedimiento fue, además, recogido en el Certificado de Aceptación Provisional emitido por la propia Demandada[510]. Agrega que el Anexo VIIIA del Procedimiento de Pruebas de Desempeño de las turbinas de gas proporcionado por Siemens -su fabricante- incluye las curvas de degradación para situaciones como la presente. Sobre el contenido del citado Anexo expresa que "*Como explica SGI, 'los fabricantes de los equipos, a efectos de verificar si cumplen o no con los valores garantizados, consideran [la degradación] estableciendo las EBH para cada tipo de turbina de gas y sus condiciones de operación en función de la marca, tipo y modelo… razón por la cual los mismos fabricantes proporcionan las curvas de degradación correspondientes… a fin de permitir el análisis objetivo de [su] desempeño, descontando la degradación natural que se produce por el uso de las mismas*". Así, "*la aplicación de curvas de degradación es un parámetro técnico que aplica cuando las turbinas operan por un tiempo mayor al previsto y sufren mayor degradación/ensuciamiento*" (las subrayas son del texto citado)[511].

668. Señala que, en definitiva, el Procedimiento de Pruebas de Desempeño sí prevé la aplicación de curvas de degradación para las turbinas de gas de la Central cuando las Pruebas de Desempeño no pueden realizarse en Condición Nueva Limpia (es decir, habiendo acumulado menos de 600 EBH). Manifiesta que esto es congruente con los términos definidos del Contrato donde se estipula que, al inicio de las Pruebas de Desempeño, la Central debe encontrarse en Condición Nueva Limpia.

669. Señala DUNOR que, dado que las Pruebas de Desempeño se efectuaron en una situación que no es la pactada de "Condición Nueva Limpia", es necesario aplicar las curvas de degradación a los resultados obtenidos "*para evaluar objetivamente cuales son los valores... en la condición de garantía*"[512].

670. La Demandante agrega que la Demandada sostiene que no son aplicables las curvas de degradación por dos motivos: (i) porque el Anexo 13 indica que

[510] Memorial de Demanda, No. 242.
[511] Memorial de Demanda, No. 244 y 245.
[512] Memorial de Demanda, No. 250.

"*no se acepta aplicar curvas por envejecimiento y/o ensuciamiento, por lo cual los valores garantizados deben considerar la degradación de los equipos que pudiera existir por las etapas de Pruebas previas a las Pruebas de Desempeño*", y (ii) porque el Procedimiento de Pruebas de Desempeño no incluye en su punto 7.8.1 el factor de corrección por degradación, sino únicamente correcciones por condiciones de operación[513].

671. Añade DUNOR que la Comisión sostiene que el haber obtenido unos resultados distintos a los Valores Garantizados supone un incumplimiento de las Especificaciones Técnicas. En concreto por la (i) discrepancia entre la Capacidad Neta Demostrada ("CND") y Capacidad Neta Garantizada ("CNG"), la Comisión alega que, según los resultados obtenidos de las Pruebas de Desempeño, la CND resultó ser 653.17 kW menor que la CNG. (ii) Discrepancia entre el Consumo Térmico Unitario Neto Medio Pesado Demostrado ("CTUNMPD") y el Consumo Térmico Unitario Neto Medio Garantizado ("CTUNMPG"): la Comisión alega que el CTUNMPD fue 7.38 kJ/kWh mayor que el CTUNMPG[514].

672. Señala DUNOR que la Comisión ha aplicado unilateralmente una serie de penas convencionales, descontando del Precio del Contrato las cantidades que a continuación se detallan como consecuencia del resultado de las pruebas de desempeño: (i) Por la discrepancia en la CND, US$ 370,048.43 (Trescientos setenta mil cuarenta y ocho dólares americanos 43/100 cy). (ii) Por la discrepancia en el CTUNMP, US$ 3'623,871.88 (Tres millones seiscientos veintitrés mil ochocientos setenta y un dólares americanos 88/100 cy), es decir, un total de US$ 3'993,920.31 (Tres millones novecientos noventa y tres mil novecientos veinte dólares americanos 31/100 cy)[515].

673. Por otra parte, señala DUNOR que la Demandada calculó dichos descuentos sobre la base del Informe LAPEM K3323-105-19, de 14 de agosto de 2019, que se incluyó en el Acta de Aceptación Provisional con la mención específica de que era "preliminar" (que DUNOR denomina el "Informe Preliminar"). La Comisión no esperó a que se emitiera un informe definitivo. Al respecto, destaca

[513] Memorial de Demanda, No. 251.
[514] Memorial de Demanda, No. 252.
[515] Memorial de Demanda, No. 254.

DUNOR que SGI afirmó que "*el Informe Preliminar partía de datos imprecisos y análisis no concluyentes, que arrojaron resultados incorrectos*". Por lo anterior, sostiene que la CFE aplicó Penalidades con base a un Informe No Concluyente[516].

674. Señala que dicho Informe no incluía "*factores de corrección por condiciones ambientales y otras variables que se debían aplicar … y utiliza valores de gasto másico de combustible y poder calorífico inferior*" que difieren de los valores determinados en el Informe LAPEM-K3323/95A/19, de 6 de noviembre de 2019 que DUNOR denomina el "Informe Final"). Estos valores impactan de manera considerable en el cálculo del CTUN y del CTUNMP[517].

675. Señala DUNOR que, a diferencia del "*Informe Preliminar*", en el Informe Final sí se aplicaron todas las normas establecidas en el Procedimiento de Pruebas de Desempeño (con excepción del factor por degradación ahora discutido). Por ello, tal y como concluye SGI, "*dada la gran diferencia entre los resultados del Informe Preliminar y del Informe Final, desde el punto de vista técnico, se debe optar por este último*"[518]. Además, DUNOR destaca que ambos Informes utilizaron muestras de gas tomadas en serie, es decir, tomadas en el mismo punto del proceso de ejecución de las Pruebas[519].

676. En todo caso, DUNOR señala que resulta evidente que (i) no se cumplió con lo dispuesto en la cláusula 17.3 del Contrato, que establece que las Pruebas de Desempeño deben efectuarse conforme al Programa de Ejecución, y (ii) tampoco se desarrollaron conforme al Anexo 13. En su lugar se desarrollaron con unos equipos que habían estado en uso un periodo de tiempo mucho mayor al previsto originalmente y que, por tanto, no podían arrojar los mismos resultados que en Condición Nueva Limpia[520].

677. DUNOR afirma que no tener en cuenta las horas de operación adicionales es contrario al Contrato. A tal efecto, señala que la CFE obvia lo establecido en la cláusula 17.4 párrafo 2º del Contrato que dispone "*La Comisión notificará al*

[516] Memorial de Demanda, No. 255.
[517] Memorial de Demanda, No. 256.
[518] Memorial de Demanda, No. 258.
[519] Memorial de Demanda, No.257.
[520] Memorial de Demanda, No. 261.

*Contratista dentro de los 4 (cuatro) Días siguientes al recibo de la notificación referida, si la Comisión está en condiciones de recibir la energía generada durante las Pruebas de una manera compatible con las Prácticas Prudentes de la Industria… El Contratista no será penalizado conforme al presente Contrato por el incumplimiento de las Fechas Criticas relacionadas con la sincronización de la Central en la medida en que dicho incumplimiento fuere el resultado de que la Comisión no reciba la energía generada en las Pruebas, a menos que dicha no recepción fuera causada por el Contratista, y se entenderá que el Contratista ha cumplido con las Fechas Críticas para la sincronización de la Central*"[521].

678. Señala la Demandante que el propio Contrato contiene así una disposición específica aplicable a esta situación para evitar precisamente la imposición de penalidades por el incumplimiento de las Fechas Críticas cuando éste se deriva del hecho de que CFE no haya recibido la energía de las Pruebas o, desde luego, no la suficiente energía para completar las Pruebas que requieren una mayor generación de energía. Añade que una interpretación de buena fe de la cláusula, conforme al artículo 1796 del Código Civil Federal, lleva a concluir que, si la Comisión no puede penalizar al Contratista por el incumplimiento de las Fechas Críticas en estas circunstancias, no podrá tampoco penalizar a DUNOR por la necesaria consecuencia del incumplimiento de las Fechas Críticas – esto es – el desgaste de las turbinas de gas y los consecuentes resultados de las Pruebas[522]. DUNOR señala que si las Partes reconocieron un Periodo de Afectación de 208 días a través del Convenio Modificatorio No. 3, resultaría absurdo que la Comisión pudiese penalizar a DUNOR por el efecto de dicho Periodo[523].

679. DUNOR sostiene que el hecho de no tener en cuenta las horas de operación adicionales, constituye una actuación contra los propios actos. Considera que la Comisión sencillamente no puede a la vez (i) reconocer la existencia de un Periodo de Afección resultante de causas no imputables a DUNOR, y (ii) pretender penalizar a Dunor por los efectos que este Periodo de Afección tiene

[521] Memorial de Demanda, No. 262.
[522] Memorial de Demanda, No. 263.
[523] Memorial de Demanda, No. 264.

en los resultados de las Pruebas, que son consecuencia directa del desgaste de los equipos. Su postura hasta la fecha ha sido palmariamente incoherente[524].

680. Añade que, bajo la doctrina de los propios actos *"nadie ha de estar permitido [a] ir contra sus propios actos*", conociéndose esta doctrina como *"[u]no de los principios generales del Derecho*" reconocidos también en los Principios UNIDROIT sobre los Contratos Comerciales Internacionales (2016)[525]. Señala que el principio *non venire contra factum proprium* también ha sido acogido por la jurisprudencia mexicana. A tales efectos, cita la tesis de jurisprudencia por reiteración de la Décima Época (Tesis: I.3o.C.J/11 (10a.)) de 24 de abril de 2015 del Tercer Tribunal Colegiado del Primer Circuito y la resolución del Amparo Directo 614/2011 de 8 de diciembre de 2011 del Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Ésta última concluye que para que para que se pueda aplicar la doctrina de los actos propios, se deben dar los siguientes elementos: a) Una conducta jurídicamente anterior, relevante y eficaz…que sea trascendental, relevante… b) Un comportamiento posterior contradictorio que afecta las expectativas que surgen del anterior…esta conducta importa ejercer una pretensión que en otro contexto es lícita, pero resulta inadmisible por ser contradictoria con la primera… c) La identidad del sujeto o centros de interés que se vinculan en ambas conductas[526].

681. Expresa DUNOR que aplicando este marco teórico identifica que (i) Primero, la Comisión aprobó "*sin comentarios*" el Procedimiento de Pruebas de Desempeño elaborado por DUNOR, en el cual se incluían en el Anexo VIIIA, apéndice D, las curvas de degradación ahora discutidas. No cabe duda de que, al aprobar dicho Procedimiento, la Demandada también aceptaba la aplicabilidad de sus Anexos. ii) Segundo, la Comisión reconoció que el Periodo de Afección de 208 días no era imputable a DUNOR[527].

682. DUNOR considera que estas conductas crearon la legítima expectativa en DUNOR de que no iba a sufrir penalización alguna ni por los retrasos imputables a la Comisión ni por su necesaria consecuencia – esto es – el desgaste de las

[524] Memorial de Demanda, No. 266.
[525] Memorial de Demanda, No. 267.
[526] Memorial de Demanda, No. 268.
[527] Memorial de Demanda, No. 269.

turbinas de gas por haber funcionado más tiempo del originalmente pactado y los consecuentes resultados en las Pruebas de Desempeño[528].

683. Sin embargo, añade DUNOR que, en un momento posterior y desconociendo por completo su anterior conducta, CFE puso en duda la aplicación de curvas de degradación, imponiendo penalidades a DUNOR por no haberse alcanzado, sin la aplicación de curvas de degradación, los Valores Garantizados tras la realización de las Pruebas de Desempeño. Considera que se trata de una conducta oportunista y de mala fe de la Demandada que traiciona la impresión que su conducta previa había generado en DUNOR, consistiendo, por lo tanto, dicha conducta en el comportamiento posterior contradictorio que la jurisprudencia mexicana requiere para la aplicación de la doctrina de los actos propios[529].

684. Finalmente, sostiene DUNOR que resulta evidente que las Partes tanto de la conducta anterior como del comportamiento posterior contradictorio son las mismas: CFE y DUNOR. Así, de no considerarse que CFE ha incurrido en un incumplimiento contractual estricto (*quod non*), resulta palmaria la aplicación de la doctrina de los actos propios a este supuesto. Por lo tanto, la imposición de penalidades por parte de CFE debe estimarse inadmisible y contraria a la buena fe[530].

685. Señala que, si bien es cierto que estas curvas no fueron expresamente incluidas en el proceso de Licitación o en el Contrato, también lo es que en el momento de elaboración de esos documentos no era previsible que se produjera un retraso en la ejecución de las Pruebas de nada menos que de 208 días, que impediría que las Pruebas se realizaran en "*circunstancias normales*". En este sentido, agrega que los Valores Garantizados propuestos por DUNOR consideraron la posible degradación de los equipos conforme a lo previsto en el Programa de Ejecución, pero como es lógico y SGI afirma "*no pudieron prever la degradación adicional derivada de su mayor utilización*"[531].

[528] Memorial de Demanda, No. 270.
[529] Memorial de Demanda, No. 271.
[530] Memorial de Demanda, No. 272 y 273.
[531] Memorial de Demanda, No. 276.

686. Agrega, que la Comisión sabía cuál era el modelo de turbina de gas que se iba a incorporar a la Central, cuyas especificaciones técnicas establecían la necesidad de aplicar curvas a degradación en determinadas circunstancias. Consecuentemente, al aceptar la Proposición Técnica de DUNOR, CFE aceptó expresamente que ese modelo de turbina se instalara en la Central, siendo aplicables todas sus condiciones de operación y especificaciones técnicas, incluyendo las curvas de degradación[532].

687. Adicionalmente, indica DUNOR que el Anexo 13, apartado 13.2. establece la obligación del Contratista de presentar a CFE para su aprobación un Procedimiento de Pruebas y puesta en servicio[533]. No cabe duda de que dicho Procedimiento que fue aprobado sin comentarios, es un documento previsto contractualmente, que vincula a las Partes. En contra de lo que CFE sostiene, el hecho de que la Sección 7.8.1 del Procedimiento no se refiera al Anexo VIIIA, no implica que dicho Anexo no fuese aceptado por la Comisión y, por ende, sea igualmente aplicable al caso. Ni que decir cabe que, al aprobar la Comisión el Procedimiento, también aprobó todos sus Anexos, inclusive el Anexo VIIIA que se refiere a la aplicación de curvas de degradación. Reitera que dicho Procedimiento y sus anexos fueron incluidos en el Certificado de Aceptación Provisional emitido por la Demandada[534]. Agrega que el Anexo VIIIA establece expresamente la obligatoriedad de aplicar curvas de degradación a los resultados de las Pruebas en circunstancias como las presentes en este caso, esto es, cuando las Pruebas de Desempeño no pueden llevarse a cabo en Condición Nueva Limpia[535].

688. Señala que a juicio del Perito SGI se hace necesaria la aplicación de curvas de degradación para evaluar objetivamente el rendimiento de las turbinas y su cumplimiento con los Valores Garantizados. Estas curvas "*simulan el resultado de las Pruebas de Desempeño descontando las EBH que las turbinas de gas trabajaron en exceso a lo que sería técnicamente necesario para realizar tales*

[532] Memorial de Demanda, No. 277.
[533] Memorial de Demanda, No. 280.
[534] Memorial de Demanda, No. 281.
[535] Memorial de Demanda, No. 282.

*pruebas en circunstancias normales"*[536]. Agrega DUNOR que es habitual su aplicación en centrales de ciclo combinado. De hecho, sostiene que "*SGI ha participado en procedimientos que involucran a la Comisión, en los que se han aplicado curvas de degradación para los análisis reales del desempeño de las turbinas de gas o ciclos combinados*"[537].

689. Agrega DUNOR que si se llegare a considerar que la utilización de las Curvas de Degradación no está expresamente pactada en el Contrato, en todo caso, su aplicación resultaría de una consecuencia natural del mayor tiempo de funcionamiento de las turbinas de gas por causas imputables a CFE. Es decir, dicha aplicación estaría justificada aplicando como fuente de integración del Contrato la buena fe y el uso como lo reconoce la jurisprudencia mexicana[538].

690. Adicionalmente, DUNOR sostiene que son improcedentes la aplicación de las penalizaciones hechas por la Comisión, de conformidad con la Cláusula 18.5 del Contrato. Al respecto, señala que SGI calcula de manera independiente los valores de CN y CTUNMP obtenidos en las Pruebas de Desempeño, basándose en el Informe Final. Agrega que a partir de dichos resultados SGI aplica el factor por degradación y concluye que la Central cumplió con los Valores Garantizados, siendo improcedente dichas penalizaciones[539].

691. DUNOR indica que SGI analiza dos escenarios diferentes en los que aplica curvas de degradación, basado en las EBH imputables a CFE[540]:

- Escenario 1: se basa en las EBH aceptadas por la Comisión en el Tercer Convenio Modificatorio, esto es, 2.043 horas de la TG21 y 1.834 horas de la TG22.
- Escenario 2: se basa en la suma de las EBH correspondientes a los días aceptados por CFE de conformidad con la Minuta de 31 de julio de 2019, esto es, 3.171 horas para la TG21 y 3.470 horas para la TG22.

[536] Memorial de Demanda, No. 283.
[537] Memorial de Demanda, No. 290.
[538] Memorial de Demanda, No. 296.
[539] Memorial de Demanda, No. 297-299.
[540] Memorial de Demanda, No. 300.

692. De los resultados obtenidos en ambos escenarios, señala DUNOR que el perito SGI concluye que el Escenario 2 no solo cumple con los Valores Garantizados, sino que además es más favorable que el Escenario 1. Así, bajo cualquiera de los escenarios DUNOR cumple con los Valores Garantizados, siendo improcedente la aplicación de penalizaciones[541].

693. Por otra parte, precisa DUNOR que aún si se considerara que no procede la aplicación de curvas de degradación y que CFE puede aplicar penalizaciones a DUNOR (*quod non*), lo cierto es que la Demandada calculó los descuentos aplicados al Precio del Contrato sobre la base del "Informe Preliminar" y, por tanto, resulta incorrecto[542].

694. Señala DUNOR respecto de los resultados de los dos informes (Preliminar y Final) que resulta evidente que aún sin aplicar curvas de degradación, los resultados del Informe Final arrojan resultados distintos, que se ajustan mucho más a los Valores Garantizados. Señala DUNOR que con base a estos resultados, el perito SGI calculó los descuentos a aplicar, resultando en: (i) US$ 386,376.61 (Trescientos ochenta y seis mil trescientos setenta y seis dólares americanos 61/100 cy) por una CN inferior a la CNG, y (ii) US$ 348,586.92 (Trescientos cuarenta y ocho mil quinientos ochenta y seis dólares americanos 92/100 cy) por un CTUNMP superior al garantizado[543].

695. Concluye DUNOR que, en definitiva, las penalizaciones aplicadas por la Demandada son excesivas, pues aún si la aplicación de curvas de degradación no fuese procedente (*quod non*), del total de US$ 3'993,920.31 (Tres millones novecientos noventa y tres mil novecientos veinte dólares americanos 31/100 cy) efectivamente descontados del Precio del Contrato por CFE, únicamente deberían haberse descontado US$ 734,963.53 (Setecientos treinta y cuatro mil novecientos sesenta y tres dólares americanos 53/100 cy). En consecuencia, CFE debería reintegrar la diferencia conforme a la cláusula 9 del Contrato[544].

[541] Memorial de Demanda, No. 304.
[542] Memorial de Demanda, No. 305.
[543] Memorial de Demanda, No. 308 y 309.
[544] Memorial de Demanda, No. 310.

696. De todo lo anterior, la Demandante señala que resulta claro lo siguiente[545]:

- Primero. La cláusula 17 del Contrato prevé que las Pruebas de Puesta en Servicio, Operación y Desempeño a la Central se realicen conforme al Programa de Ejecución (Anexo 10) y al Anexo 13 del Contrato. Los Valores Garantizados (CNG y CTUNG) en el Anexo 13(1) se fijaron partiendo del supuesto de que las Pruebas de Desempeño se efectuarían en "*condiciones normales de operación*" al 100% de carga, tal y como requería el propio Anexo 13(2).
- Segundo. Las Pruebas de Desempeño no se efectuaron en condiciones normales. El Programa de Ejecución sufrió graves retrasos por las restricciones de carga impuestas por el CENACE, ampliándose los plazos entre la Primera Sincronización del turbogenerador de gas hasta las Pruebas de Desempeño en un total de 8 meses. Ello conllevó que los equipos de la Central se mantuvieran operativos mucho más tiempo del inicialmente previsto (208 días de Periodo de Afección). Todos estos retrasos no son imputables a DUNOR, tal y como ha reconocido la propia Demandada.
- Tercero. Este sobreuso provocó un desgaste en las turbinas de gas, que no se encontraban en "*Condición Nueva Limpia*" al momento de realizarse las Pruebas de Desempeño, tal y como requería el propio Contrato. Fruto de este desgaste en las turbinas de gas, no se alcanzaron los Valores Garantizados. Por este motivo, CFE impuso a DUNOR penalidades en forma de descuentos al Precio del Contrato.
- Cuarto. Estos descuentos resultan indebidos por cuanto la cláusula 17.4 del Contrato prevé que el Contratista no será penalizado por el incumplimiento de las Fechas Críticas en la medida en que dicho incumplimiento se deba a que CFE no reciba la suficiente energía generada para completar las Pruebas. Es decir, si la Comisión no puede penalizar a DUNOR por el incumplimiento de las Fechas Críticas dadas las circunstancias, tampoco podrá penalizarle por las consecuencias que de dicho incumplimiento se derivan, esto es, el desgaste de los

[545] Memorial de Demanda, No. 311.

equipos y sus consecuentes resultados. Y, aun entendiendo que la Comisión no ha incumplido el Contrato *(quod non*), la actuación posterior de CFE imponiendo a DUNOR estos descuentos es contraria a sus propios actos y, por tanto, flagrantemente infractora de la buena fe contractual.

- Quinto. Siendo claro que DUNOR no puede ser penalizada por los incumplimientos de la Comisión, es evidente que el desgaste en las turbinas de gas por el retraso en la ejecución de las Pruebas debe ser compensado a través de criterios razonables. La aplicación de curvas de degradación se incluye en las Especificaciones Técnicas elaboradas por su fabricante y, por tanto, constituyen indubitadamente un criterio experto y razonable. Así concluye también el perito SGI al afirmar que "*es procedente y técnicamente razonable aplicar curvas de degradación a los resultados de las Pruebas de Desempeño de la Central*".
- Sexto. El Anexo 13.2(A) del Contrato exige que el Contratista elabore un Procedimiento de Pruebas de Desempeño antes de la ejecución de las mismas. Dicho procedimiento debe ser aprobado por la Comisión. DUNOR presentó su Procedimiento el 2 de julio de 2019, que fue aprobado por la CFE "*sin comentarios*" y fue incluido en el Certificado de Aceptación Provisional emitido por CFE.
- Séptimo. Dicho Procedimiento prevé en su Anexo VIIIA la aplicación de curvas de degradación a los resultados de las Pruebas de Desempeño cuando no haya sido posible conducir dichas Pruebas estando las turbinas de gas en '*Condición Nueva Limpia'*.
- Octavo. Tal y como se desprende del Informe Pericial elaborado por SGI teniendo en cuenta que la degradación de las turbinas de gas es un fenómeno inevitable, consustancial a la propia operación de la Central, la aplicación de curvas de degradación resulta técnicamente razonable. La aplicación de dichas curvas a los resultados de las Pruebas de Desempeño vendría justificada aplicando como fuente de integración del Contrato la buena fe y el uso.

- Noveno. En cualquier caso, si fuese procedente la aplicación de penalidades – quod non – las penalidades aplicadas a DUNOR sobre la base de un "Informe Preliminar" con datos imprecisos que arrojaban resultados incorrectos no debe ser aceptada, por lo que no procedería aplicar los descuentos al Precio del Contrato en la cuantía que CFE pretende. En su lugar, solo procedería una penalización de cómo máximo US$ 734,963.53 (Setecientos treinta y cuatro mil novecientos sesenta y tres dólares americanos 53/100 cy). En consecuencia, CFE debería abonar la diferencia a DUNOR conforme a la cláusula 9 del Contrato.

697. Por otra parte, DUNOR se refiere a los argumentos expuestos por la Comisión en su Contestación. Así se refiere a la tesis de la Comisión en el sentido que si DUNOR tuviera algún derecho respecto de la aplicación de las curvas de degradación, al suscribir los Convenios Modificatorios renunció a las causas que dieron origen a los Convenios 2 y 3 para lo cual transcribe la cláusula tercera. Al respecto señala DUNOR que la cláusula transcrita únicamente se encuentra en el Convenio Modificatorio No. 1 de 24 de abril de 2018. Esta renuncia ni fue pactada ni consta en los Convenios Modificatorios Nos. 2 y 3. Señala que, por el contrario, la cláusula tercera del Convenio Modificatorio No. 2, de 23 de noviembre de 2018, dispone que "*El Contratista … renuncia a cualquier reclamación presente o futura para obtener una nueva prórroga derivado de las mismas causas que dieron origen al presente Convenio*"[546]. Agrega[547] que el Convenio Modificatorio No. 3, de 21 de octubre de 2019, acota aún más esta renuncia de derechos y dispone en su cláusula tercera que: "*El Contratista … renuncia a cualquier reclamación adicional para obtener una nueva prórroga derivado de las mismas causas que dieron origen al presente Convenio*".

698. Señala entonces que de la simple lectura de estas cláusulas se observa, sin lugar a duda, que DUNOR en ningún caso ha renunciado a sus derechos en relación con la aplicación de curvas de degradación sino, única y exclusivamente, a sus derechos para prorrogar las Fechas de Eventos Críticos

[546] Réplica y Contestación Reconvención, No. 252.
[547] Réplica y Contestación Reconvención, No. 253.

"*por las mismas causas*" que se recogen en cada Convenio Modificatorio. Por tanto, la afirmación de la Comisión sobre una supuesta renuncia general de derechos por parte de DUNOR, es falsa y al haber omitido a conciencia las cláusulas de los Convenios Modificatorios Nos. 2 y 3, es muestra de una absoluta mala fe. Agrega DUNOR que de acuerdo con el artículo 7 del Código Civil Federal, la renuncia de derechos no produce efecto alguno si no se hace en términos claros y precisos, de tal suerte que no quede duda del derecho que se renuncia[548].

699. En cuanto al hecho de que la Comisión sostiene que la Contratista debió haber considerado la posible afectación por degradación o envejecimiento en los valores ofertados, con independencia de las circunstancias en las que se desarrollasen las Pruebas, señala DUNOR que en primer lugar, debe tenerse en cuenta que los valores ofertados por DUNOR inicialmente en su OT-2 (incluidos posteriormente como Valores Garantizados en el Anexo 13 del Contrato) son de fecha de 10 de septiembre de 2015. El Anexo 13 estipula que *"los valores garantizados deben considerar la degradación de los equipos que pudiera existir por las etapas de Pruebas de Puesta en Servicio y Pruebas de Operación previas a las Pruebas de Desempeño*". Cómo es lógico, para entonces, DUNOR sólo podía prever la degradación y/o ensuciamiento de los Equipos correspondiente a los días inicialmente previstos para la ejecución de dichas Pruebas. Agrega que a la fecha de suscripción del Acuerdo, el 17 de septiembre de 2018, las Partes únicamente habían suscrito el Convenio Modificatorio No. 1, por el cuál tan sólo se reconocían 19 días de prórroga (de los 320 días totales de retraso). Es decir, al momento de firmar el Acuerdo, el retraso en el Programa de Pruebas era mínimo, por lo que DUNOR no tenía siquiera porqué plantearse la necesidad de aplicar curvas de degradación[549]. En segundo lugar, señala que el 13 de noviembre de 2018 en la Reunión del Comité Consultivo, si bien las Partes acordaron debatir sobre las afectaciones sufridas en el Programa de Ejecución, todavía no se habían contabilizado los días de retraso provocados por causas no imputables a DUNOR. Por lo tanto, era imposible que, a esa fecha, DUNOR hubiese previsto algo. No fue hasta el 23 de noviembre de 2018,

[548] Réplica y Contestación Reconvención, No. 254 y 255.
[549] Réplica y Contestación Reconvención, No. 261.

mediante la suscripción del Convenio Modificatorio No. 2, cuando la Comisión reconoció un retraso de 93 días. No obstante, para entonces, sólo se habían iniciado algunas de las Pruebas de Puesta en Servicio y, por tanto, DUNOR no podía prever los 208 días de retraso previos a la Prueba de Desempeño y la consecuente degradación de las TGs[550].

700. Afirma DUNOR que, de lo anterior se desprende que, en el momento de suscripción de (i) el Acuerdo, de 17 de septiembre de 2018; (ii) la Minuta de Reunión, de 13 de noviembre de 2018: y (iii) el Convenio Modificatorio No. 2, de 23 de noviembre de 2018, DUNOR no pudo de ninguna manera prever el retraso de 208 días totales que finalmente tuvo lugar (reconocido en el Convenio Modificatorio No. 3) y que impactó más severamente en el Programa de Pruebas y en el tiempo de operación de las TGs[551].

701. Agrega DUNOR que pese a que el Convenio Modificatorio No. 3 fue suscrito tras las Pruebas (esto es, cuando las Partes tuvieron conocimiento de las afectaciones sufridas), nada se incluyó porque ninguno de los Instrumentos referidos tenía por objeto regular cuestiones relativas al Procedimiento de Pruebas de Desempeño. A tal propósito señala lo siguiente: primero, que de conformidad con lo estipulado en la cláusula 25.5 del Contrato, el Acuerdo de 17 de septiembre de 2018 tenía por objeto "*acordar los términos y condiciones que razonablemente compensarán a el Contratista los gastos directamente relacionados con las obras, razonables y documentados en los que pueda incurrir…".* Este documento no tuvo por objeto tratar las cuestiones técnicas relativas a las Pruebas de Desempeño y los factores de corrección aplicables[552]. Segundo, de conformidad con la cláusula 8 del Contrato, el Comité Consultivo (conformado por representantes designados por ambas Partes) tiene el propósito de realizar consultas y planear sobre el avance del Proyecto. Se refiere entonces al Acta de Reunión de 13 de noviembre de 2018 de dicho Comité y señala que en ningún caso se planteó acordar el detalle técnico de las Pruebas de Desempeño, como lo son las curvas de degradación[553]. Tercero, en lo que

[550] Réplica y Contestación Reconvención, No. 262.
[551] Réplica y Contestación Reconvención, No. 263.
[552] Réplica y Contestación Reconvención, No. 268.
[553] Réplica y Contestación Reconvención, No. 270.

respecta a los Convenios Modificatorios Nos. 2 y 3, éstos tienen por objeto prorrogar las Fechas de Eventos Críticos y acordar así la modificación del Programa de Ejecución, de conformidad con lo dispuesto en la cláusula 12.3 del Contrato. DUNOR destaca que estos Convenios Modificatorios no tuvieron por objeto acordar cuestiones técnicas relativas a las Pruebas, como son las curvas de degradación. Por último, DUNOR señala que era innecesario considerar las curvas de degradación en los Convenios Modificatorios, puesto que ninguno de estos instrumentos tiene por objeto abordar cuestiones técnicas relativas al desarrollo y ejecución de la Prueba de Desempeño[554].

702. Adicionalmente, DUNOR manifiesta que sí se incluyó el factor por degradación en el instrumento previsto para ello. Agrega que el Anexo 13 del Contrato regula de forma integral la realización de Pruebas por parte del Contratista, incluyendo la obligación de DUNOR de entregar a CFE un Procedimiento de Pruebas de Desempeño. Por ello, el 2 de julio de 2019, DUNOR envió a la Comisión el Procedimiento de Pruebas de Desempeño EMP-UEDF-YYY-01201 REV 1 (el "*Procedimiento*"). Dicho Procedimiento, revisado y aprobado por la Demandada "*sin comentarios*", fue además recogido en el Certificado de Aceptación Provisional emitido por CFE[555]. DUNOR incluyó en el Anexo VIIIA del Procedimiento las especificaciones técnicas previstas para este equipo, que sí incluyen el factor por degradación.

703. Así mismo, el apartado 4.1 de dicho Anexo estipula que[556]: "*La prueba de rendimiento de la turbina de gas debe realizarse lo antes posible después de la sincronización inicial mientras la unidad se encuentra en condición Nueva y Limpia, como se define en la Sección 10.8.1.… Si no es posible realizar la prueba dentro del período Nuevo y limpio, se aplicarán las correcciones para la degradación de la turbina de gas según la Sección 10*"[557].

[554] Réplica y Contestación Reconvención, No. 275.
[555] Réplica y Contestación Reconvención, No. 277.
[556] El texto original en inglés señala "8 "The performance test on the gas turbine must be conducted as soon as possible after initial synchronization while the unit is in New and Clean condition, as defined in Section 10.8.1. If testing within the New and Clean period is not possible, corrections for gas turbine degradation will be applied per Section 10.8".
[557] Réplica y Contestación Reconvención, No. 282.

704. DUNOR destaca el carácter vinculante del Anexo VIIIA del Procedimiento dado que (1) utiliza un lenguaje imperativo ("*is intended for", "the performance test on the gas turbine must be conducted"* y *"corrections for gas turbine degradation will be applied"*; (ii) no pueden ignorarse las instrucciones dadas por el propio fabricante de las TGs pues, de lo contrario, se corre el riesgo de que éstas se estropeen, y (iii) el Contrato OPF no regula las cuestiones técnicas aplicables a las Pruebas y remite expresamente a otro documento – el Procedimiento de Pruebas de Desempeño – que sí tiene por objeto detallar estas cuestiones[558].

705. Con esto, concluye DUNOR que el factor por degradación sí fue incluido en el Procedimiento de Pruebas de Desempeño, siendo éste el único documento contractualmente previsto para regular las cuestiones técnicas relativas a la ejecución de estas Pruebas.[559]

706. Señala DUNOR que la CFE sostiene que "*el Contrato prohíbe de manera consistente, inequívoca, irrefutable y bajo cualquier supuesto la aplicación de curvas de degradación*". Afirma DUNOR que esta interpretación de CFE es absurda.

707. Señala que tal y como explica en el Segundo Informe SGI, si bien es cierto que el Anexo 13 estipula que no se aplicarán curvas de degradación también lo es que esta afirmación parte de supuesto, a juicio de SGI técnicamente razonable, de que las Pruebas de Desempeño deben realizarse en condiciones normales "*y no con un gran aumento en el número de horas estimado en el inicio del Contrato*". Esto es porque, aunque el Anexo 13 estipula que los Valores Garantizados deben analizarse considerando la degradación de los equipos que pudiese existir hasta la realización de las Pruebas de Desempeño, no se podía prever en dicho Anexo la existencia de un retraso de esta magnitud. Por ello, según el criterio técnico de SGI, la prohibición prevista en el Anexo 13 solo puede entenderse aplicable si las Pruebas se realizan conforme al programa convenido o bien se realizan fuera del mismo, pero por causas imputables al Contratista.

[558] Réplica y Contestación Reconvención, No. 283.
[559] Réplica y Contestación Reconvención, No. 284.

Agrega DUNOR que en el presente supuesto no concurrió ninguna de estas dos circunstancias[560].

708. Señala que el artículo 1854 del Código Civil Federal dispone que: las cláusulas de los contratos deben interpretarse las unas por las otras, atribuyendo a las dudosas el sentido que resulte del conjunto de todas[561].

709. De lo anterior y realizando una interpretación sistemática del clausulado del Anexo 13, se concluye que la exclusión de curvas de degradación estaba prevista para la realización de las Pruebas de Desempeño en "*circunstancias normales de operación*", esto es, conforme a lo previsto originalmente en el Programa de Ejecución[562].

710. Agrega que si bien fue el CENACE quien decidió los tiempos y capacidades en que se podía entregar la energía, ello no tiene por qué perjudicar en forma alguna a DUNOR, quien estuvo sujeto a las decisiones del CENACE y de la propia Comisión[563].

711. DUNOR sostiene que las Pruebas de la Central no se ejecutaron en condiciones normales de operación, tal como lo exige el Anexo 13, razón por la cual no opera la exclusión de las curvas de degradación.

712. Señala DUNOR que la Comisión afirma que los Anexos VII, VIIIA y B y IX no son parte de la información requerida por la Guía para elaborar el Procedimiento de Pruebas de Desempeño y, por tanto, no resultan aplicables al caso.

713. Sin embargo, señala DUNOR que la Guía establece en su primera página que "*se presenta de manera indicativa mas no limitativa*", y que el procedimiento "*debe ser modificado de acuerdo a las particularidades técnicas, operativas y contractuales aplicables a cada proyecto*". Esto fue exactamente lo que hizo DUNOR, completar el Procedimiento de conformidad con las particularidades técnicas requeridas por la Central, incluyendo la necesidad de aplicar curvas de degradación[564].

[560] Réplica y Contestación Reconvención, No. 295.
[561] Réplica y Contestación Reconvención, No. 296.
[562] Réplica y Contestación Reconvención, No. 297.
[563] Réplica y Contestación Reconvención, No.299.
[564] Réplica y Contestación Reconvención, No. 307.

714. Adicionalmente, DUNOR señala que la Comisión argumenta que el Anexo VIIIA del Procedimiento no es aplicable por cuanto se trata de un documento interno de Siemens emitido para DUNOR y, por tanto, no guarda relación con el Contrato firmado entre las Partes. Precisa DUNOR que esta aseveración no es correcta, porque el Procedimiento de Pruebas de Desempeño debe elaborarse siguiendo las pautas de la Guía M.E.J.2.6, conforme a la cual, es necesario adaptar el contenido y detalle del Procedimiento a las necesidades técnicas de la Central. En particular, y en lo que aquí interesa, el modelo de turbinas de gas instalado en la misma fue el modelo SGT6-8000H, del fabricante Siemens[565]. Por este motivo, DUNOR solicitó a Siemens las instrucciones sobre cómo llevar a cabo las Pruebas de Desempeño en las TGs instaladas. A tal efecto, destaca que el propio Anexo VIIIA establece que "*está destinado a ser utilizado como manual por el ingeniero de pruebas que realiza una prueba de rendimiento térmico en la turbina de gas SGT6-8000H que opera en ciclo combinado con combustible de gas natural en el proyecto 313 CC Empalme 2*"[566][567].

715. Agrega que otra prueba más de que el Anexo VIIIA sí guarda relación con lo expresamente acordado por las Partes es que, el apartado 4 del Procedimiento – cuya aplicabilidad no se cuestiona por parte de CFE – relativo a la "*Documentación Aplicable"* dispone que: "*La Prueba de Desempeño será realizada conforme a lo establecido en este Procedimiento, a los documentos de referencia y a los códigos listados a continuación*"[568]. Señala que entre las normas de referencia listadas se incluye la ASME PTC 22. Por ello, destaca que, en línea con lo anterior, el Anexo VIIIA elaborado por Siemens dispone que "*this specification is written in general accordance with ASME PTC 22*". Es decir, el Anexo VIIIA es conforme a lo dispuesto en el Procedimiento acordado entre las Partes, siendo irrelevante quién haya emitido el documento[569].

[565] Réplica y Contestación Reconvención, No. 310 y 311.
[566] Traducción del Tribunal, el texto original en inglés expresa: "it is intended for use as a manual by the test engineer conducting a thermal performance test on the SGT6-8000H gas turbine operating in combined cycle on natural gas fuel at the 313 CC Empalme 2 project".
[567] Réplica y Contestación Reconvención, No. 312.
[568] Réplica y Contestación Reconvención, No. 313.
[569] Réplica y Contestación Reconvención, No. 318.

716. De todo lo anterior, DUNOR concluye que[570]:

- La Guía M.E.J.2.6 suministrada por CFE es un documento de referencia para elaborar el Procedimiento de Pruebas de Desempeño. La misma Guía dispone que deberá modificarse conforme a las particularidades técnicas, operativas y contractuales aplicables a cada proyecto.
- Las turbinas de gas instaladas en la Central son el modelo SGT68000H, siendo su fabricante Siemens.
- El Procedimiento elaborado por DUNOR y aprobado por CFE estipulaba que la Prueba de Desempeño debía realizarse conforme a lo establecido en los códigos y normas de referencia listados en el mismo, entre los que se encuentra, el código ASME PTC 22 para las turbinas de gas.
- Conforme lo anterior, el Anexo VIIIA del Procedimiento fue elaborado por Siemens conforme a lo dispuesto en el código ASME PTC 22.

717. Adicionalmente, DUNOR señala que la Demandada sostiene que el Anexo VIIIA no es de aplicación porque indica que tiene carácter de "*Referencia*" y que, por ello, no tuvo inconveniente en que se anexara al Procedimiento. Señala DUNOR que, la postura de CFE a este respecto carece de todo fundamento legal. A este respecto recuerda en primer lugar que el Procedimiento – incluidos todos sus anexos – fueron remitidos por DUNOR a CFE, y aprobados por esta última "*sin comentarios*". Incluyéndose, además, dicho Procedimiento y sus Anexos en el Acta de Aceptación Provisional emitida por CFE, por lo que no cabe duda de que el Procedimiento (y sus anexos) son vinculantes para ambas Partes[571].

718. En segundo lugar, sostiene DUNOR que la interpretación extensiva que hace CFE sobre la nota de "*referencia*" no puede ser correcta por cuanto ello conllevaría que, sin importar las circunstancias, dicho documento nunca sería aplicable. ¿Por qué entonces acordaron las Partes incluirlo? ¿Por qué no solicitó la Comisión que se excluyera expresamente del Procedimiento? La respuesta a estas preguntas es sencilla: el Anexo VIIIA fue incluido en el Procedimiento

[570] Réplica y Contestación Reconvención, No. 319.
[571] Réplica y Contestación Reconvención, No. 322.

porque así lo acordaron las Partes. Esto mismo se refleja en la versión final del Procedimiento que no incluye la nota "referencia"[572].

719. En tercer lugar, manifiesta que esta postura de la Comisión contradice directamente lo dispuesto el artículo 1853 del CCF, esto es, que, "*si alguna cláusula de los contratos admitiere diversos sentidos, deberá entenderse en el más adecuado para que produzca efecto*". Por este motivo, la interpretación de CFE no puede ser correcta, en tanto que vaciaría por completo de contenido al Anexo VIIIA[573].

720. Por todo lo anterior, indica que sostener que el Anexo VIIIA no es aplicable al Procedimiento porque se incluye una nota que indica "*referencia*" no sólo es insuficiente per se para justificar su exclusión (en tanto en cuanto sí fue anexado al Procedimiento finalmente aprobado por las Partes), sino que, además, una interpretación conforme con la legislación mexicana exige que las cláusulas contractuales ambiguas sean interpretadas de modo que desplieguen sus efectos. Sólo la postura que mantiene DUNOR permite al Anexo VIIIA surtir eficacia. Por ende, la interpretación la Comisión no puede sostenerse, ni fáctica, ni jurídicamente[574].

721. Adicionalmente, DUNOR destaca que la Central no cumple con la Condición Nueva Limpia pactada *ab initio*. Al respecto, señala DUNOR que la Comisión argumenta que la definición de Condición Nueva Limpia incluida en el Anexo VIIIA difiere de la definición dada por el Contrato, siendo esta última la única aplicable al caso y concluye, siguiendo este criterio que, conforme al Contrato, "*la Central SIEMPRE se encuentra en 'condición nueva limpia' previo a las Pruebas de Desempeño*". Señala DUNOR que esta posición de la Comisión es errada[575].

722. A tal efecto, precisa que el Contrato contempla que al inicio de las Pruebas de Desempeño, la Central debe encontrarse en Condición Nueva Limpia, lo que conforme a los términos definidos significa: "*la condición de la Central al inicio*

[572] Réplica y Contestación Reconvención, No. 323.
[573] Réplica y Contestación Reconvención, No. 324.
[574] Réplica y Contestación Reconvención, No. 325.
[575] Réplica y Contestación Reconvención, No. 326.

*de las Pruebas de Desempeño y en la cual ya se incluye la posible degradación y ensuciamiento derivado desde el primer arranque de las Unidades, Pruebas de Puesta en Servicio y Pruebas de Operación*". Como es lógico, esta definición partía de la base de que el Proyecto se llevaría a cabo en 916 días conforme al Programa de Ejecución inicialmente acordado y con una estimación de horas de operación de las TGs de alrededor de 1110 EBH. Es decir, al momento de incluirse esta definición contractual, era imposible que las Partes previeran las circunstancias que finalmente acontecieron. Agrega que, por eso mismo, y de conformidad con lo expresado por el Segundo Informe SGI, debe aplicarse lo dispuesto por el fabricante de los equipos en el apartado 4.1 del Anexo VIIIA[576].

723. Añade DUNOR que si las Partes hubiesen querido que la Condición Nueva Limpia fuese independiente y completamente autónoma de las horas reales de funcionamiento, así se habría dicho. Bastaba con haber realizado una inserción en tal sentido en la definición de la cláusula 1.1 del Contrato[577].

724. Señala que el Segundo Informe del Perito SGI aclara que es técnicamente entendible que la definición contractual de "*Condición Nueva Limpia*" no contemplase la aplicación de factores de degradación y ensuciamiento. Esto es porque el Contrato "*contempla un escenario prototipo en donde no existen factores atribuibles a CFE que generen un alargamiento del período de pruebas y, precisamente, en ese escenario ideal correspondía al Contratista diseñar y elaborar su Programa de Pruebas y tener todas las condiciones para que las TG's funcionaran conforme a diseño*". [578]

725. Agrega DUNOR que la realidad superó aquí con mucho lo estipulado en el Contrato, cosa que lleva al Perito SGI a afirmar que "*desde el punto de vista técnico, estas condiciones fueron alteradas por los retrasos significativos que tuvieron las señaladas pruebas*", y de ahí, la necesidad de aplicar curvas de degradación, que son "*el único mecanismo que técnicamente permite evaluar el impacto de este tiempo adicional*"[579] .

[576] Réplica y Contestación Reconvención, No. 329.
[577] Réplica y Contestación Reconvención, No. 331.
[578] Réplica y Contestación Reconvención, No. 335.
[579] Réplica y Contestación Reconvención, No. 336.

726. Señala DUNOR que el Perito SGI concluye que es evidente que en el momento de la realización de las Pruebas de Desempeño, las turbinas de gas TG21 y TG22 ya no se encontraban en la Condición Nueva Limpia que el Contrato preveía, es decir, no existía la situación prototípica o ideal definida. Destaca que a la misma conclusión llega, según indica SGI, el Perito de CFE en su párrafo 472, en el cual establece "…*efectivamente las Pruebas de Desempeño no se realizaron en condiciones contractualmente previstas*".[580]

727. De todo lo anterior, se desprende que, sostener como hace la Demandada, que la Central "*siempre*" se encuentra en Condición Nueva Limpia es una entelequia. Si eso fuese así (*quod non*), no habría hecho falta definir dicho término por cuanto, sin importar las circunstancias, siempre se cumpliría con este requisito. Al contrario, el Procedimiento sí especifica y acota la definición de Condición Nueva Limpia y establece la obligación de aplicar curvas de degradación a los resultados de las Pruebas de Desempeño cuando esta condición no se da, como es el caso[581].

728. DUNOR señala que la CFE sostiene que no se habría demostrado que el incumplimiento de los Valores Garantizados obedeció a degradación de las TGs. Adicionalmente, argumenta la Comisión que con la aplicación de las curvas de degradación, DUNOR sólo busca obtener una tolerancia adicional *"ante la evidente reducción del desempeño de los valores esperados en la Turbina de Vapor*", "*por lo que existe una duda razonable causa real del incumplimiento en los Valores Garantizados*"[582].

729. Frente a lo anterior, señala DUNOR: en primer lugar, que la Comisión reconoce que las horas de operación adicionales en las TGs implican mayor degradación, lo que inevitablemente puede afectar su rendimiento. Se trata de una conclusión que la propia CFE afirma se basa "*en aspectos técnicos básicos e incluso en el mismo sentido común del tema*"[583]. Señala que la Demandada coincide con DUNOR en que las horas de operación adicionales de las TGs afectaron a su rendimiento. Tampoco cabe duda, valorando la Pericial Cámara,

[580] Réplica y Contestación Reconvención, No. 337.
[581] Réplica y Contestación Reconvención, No. 340.
[582] Réplica y Contestación Reconvención, No. 341.
[583] Réplica y Contestación Reconvención, No. 342.

de que el modo técnicamente razonable de corregir los efectos negativos de la degradación es a través de las curvas de degradación.[584]

730. Agrega que del Informe LAPEM-K3323-95A-2019, de 30 de octubre de 2019, se desprende que, en el momento en que se corrige el efecto de la degradación aplicando las curvas, DUNOR cumple holgadamente con los Valores Garantizados. Es decir, resulta evidente que la degradación es un factor lo suficientemente importante como para, por sí mismo, determinar el cumplimiento de los Valores Garantizados. En ese orden de ideas, considera que es cierto que las Pruebas de Desempeño de las TGs es el componente fundamental del Ciclo Combinado, bastando la degradación de las TGs para determinar el cumplimiento o incumplimiento de los Valores Garantizados[585].

731. DUNOR agrega que el perito SGI coincide plenamente con lo explicado, considerando además que los estudios realizados demuestran la causalidad entre el incumplimiento de los Valores Garantizados y la degradación de las TGs sin necesidad de utilizar la metodología causa raíz (RCA por sus iniciales en inglés) que reclamaba el perito de CFE[586]. A este respecto DUNOR recuerda la conclusión del perito SGI la cual señala que al no presentarse una falla durante las Pruebas de Desempeño no fue necesario y mucho menos posible, aplicar la metodología Análisis Causa Raíz (RCA por sus siglas en inglés), que es la revisión de las características y causas de las fallas de los componentes o máquinas[587]. Agrega que la innecesariedad de aplicar la metodología RCA se deriva también, según el criterio técnico del Perito SGI, de la existencia de literatura científica que acredita que la causa raíz de las disminuciones de la Capacidad Neta y aumento del Consumo Térmico Unitario se deben a la degradación de las TGs.

732. Se refiere DUNOR al RG87 que, en opinión de CFE, podría haber contribuido al incumplimiento de los Valores Garantizados. A tal efecto, precisa que se trata de un evento identificado en la turbina de vapor el 17 de octubre de 2019, esto es, aproximadamente tres meses después de finalizar las Pruebas de

[584] Réplica y Contestación Reconvención, No. 343.
[585] Réplica y Contestación Reconvención, No. 345.
[586] Réplica y Contestación Reconvención, No. 347.
[587] Réplica y Contestación Reconvención, No. 347.

Desempeño. Considera DUNOR que en nada podía impactar este defecto al desarrollo y resultado de las Pruebas de Desempeño en tanto que: (i) el RG87 se produjo mucho después de finalizadas las Pruebas de Desempeño, estando la Central disponible y habiendo prácticamente finalizado el Periodo de Garantía; (ii) se produjo en la turbina de vapor, que nada tiene que ver con las TGs y, (iii) según la información del fabricante en el Informe EMPII-RG-0087 ("Informe RG87"), se determinó que este evento no había afectado al rendimiento de la turbina de vapor ni del Ciclo Combinado[588].

733. En suma, DUNOR señala que la Demandada tan solo especula sin prueba alguna sobre posibles causas adicionales del incumplimiento de los Valores Garantizados y, aún si fuera el caso (*quod non*), correspondería a la Comisión y no a la Demandante acreditar tal extremo[589].

734. En cuanto a las razones por las cuales la Comisión defiende haberse fundado en el Informe LAPEM K3323105-19, DUNOR señala que los argumentos de CFE carecen de todo mérito por varios motivos. En primer lugar, porque por mucho que la Comisión sostenga que el Informe LAPEM K3323105-19, de 14 de agosto de 2019 debe considerarse como final, el propio informe específicamente señala que tiene carácter "*preliminar*". Siguiendo una interpretación literal (artículo 1851 Código Civil Federal), se concluye que no puede tratarse de un informe definitivo, como erróneamente pretende hacer ver la Comisión[590].

735. Segundo, señala DUNOR que la CFE defiende el carácter definitivo del "*Informe Preliminar*" sobre la base de que cumple con todos los requisitos de conformidad con el Procedimiento de Pruebas de Desempeño.[591] A tal efecto señala DUNOR que tal y como se indica en el Segundo Informe SGI, no es posible cambiar el estatus de Preliminar del informe K3323-105-19 dado que: i) como establece el mismo informe en su sección 4, en la elaboración del "*Informe Preliminar*" únicamente se consideró la Norma ASME PTC 46, mientras que el Procedimiento de Pruebas de Desempeño establece que deben ser aplicadas las Normas ASME PTC 46 Overall Plant Performance, ASME PTC 22 Norma de

[588] Réplica y Contestación Reconvención, No. 349.
[589] Réplica y Contestación Reconvención, No. 350.
[590] Réplica y Contestación Reconvención, No. 358.
[591] Réplica y Contestación Reconvención, No. 359.

Aplicación a Turbinas de Gas, ASME PTC 4.4 Norma de Aplicación, ASME PTC 19.1 Calculo de Incertidumbres y las Normas ASME PTC 19.2 al 19.17 Incertidumbre de medición de Instrumentos y Aparatos. ii) Desde un punto de vista técnico, la no aplicación de esta normativa prevista en el Procedimiento de Pruebas de Desempeño conlleva que "*el Informe Preliminar sea inadecuado e improcedente porque sus resultados se han obtenido sin ajustarse a las normas técnicas que deben validarlos*". Señala DUNOR que todo lo anterior, hace que este informe no sea válido y mucho menos pueda ser usado como base para la aplicación de descuentos[592].

736. Tercero. Expresa DUNOR que la Demandada sostiene que el "*Informe Final*" de 30 de octubre de 2019, carece de validez por ser extemporáneo (posterior a la fecha de emisión del Certificado de Aceptación Provisional) y por no haberse presentado oportunamente a la Comisión para su revisión. DUNOR considera que estos argumentos de CFE son completamente irrelevantes a efectos de la presente disputa[593]. Al respecto, aclara DUNOR que el "*Informe Final"* se presenta como un elemento probatorio más en el marco de este arbitraje. Y ello a efectos de demostrar que los resultados del "*Informe Preliminar*" son incorrectos por no seguir todas las normas del Procedimiento de Pruebas de Desempeño. Sostiene que resulta irrelevante cuándo fue emitido dicho informe. Afirma DUNOR que lo que no puede pretender la Demandada es ignorar las conclusiones materiales alcanzadas por el "*Informe Final*" amparándose en una cuestión meramente formal. CFE afirma que el "*Informe Final"* no es aceptable, pero no lo justifica en absoluto[594].

737. Añade DUNOR que, en vista de que los resultados del *"Informe Final"* demuestran que DUNOR sí cumpliría con los Valores Garantizados (ver sección IX(vi) del Informe Pericial SGI); el hecho de que la Demandada no rebata las conclusiones alcanzadas por el mismo, es indicativo de que su postura carece de mérito. Debiendo el Tribunal, consecuentemente, valorar el *"Informe Final"*[595].

[592] Réplica y Contestación Reconvención, No. 361.
[593] Réplica y Contestación Reconvención, No. 362.
[594] Réplica y Contestación Reconvención, No. 363.
[595] Réplica y Contestación Reconvención, No. 364.

738. Además, señala DUNOR que se hace notar que el *"Informe Final"* usó muestras de gas equiparables a las de CFE, obtenidas en serie, es decir, tomadas en el mismo punto de toma de muestra, en el mismo momento dentro del proceso de ejecución de las Pruebas y en el mismo día. Por ello, cuándo se haya elaborado o entregado el *"Informe Final"* no afecta en absoluto a la validez de su resultado[596].

739. En suma, DUNOR afirma que ha justificado suficientemente lo siguiente: i) El "*Informe Preliminar*" no tiene carácter de definitivo por cuanto indica expresamente que es "*preliminar*" y no siguió todas las normas estipuladas en el Procedimiento. ii) El "*Informe Preliminar*" y el "*Informe Final*" fueron realizados por el mismo experto. iii) El *"Informe Final"* sí es aplicable por cuanto, su extemporaneidad es técnicamente irrelevante dado que las muestras de gas en que se basa fueron tomadas en serie, cumple con todas las normas del Procedimiento y justifica las diferencias respecto de los resultados alcanzados por el "*Informe Preliminar*"[597].

740. Por lo anterior, reitera la Demandante que los descuentos aplicados por CFE al Precio del Contrato son improcedentes porque fueron calculados en base al "*Informe Preliminar*", que arrojó resultados incorrectos.[598]

741. Por último, señala DUNOR que teniendo en cuenta los resultados obtenidos conforme al Procedimiento pactado, SGI considera que, de no ser aplicables las curvas de degradación, procedería un descuento de como máximo US$ 348,586.92 (Trescientos cuarenta y ocho mil quinientos ochenta y seis dólares americanos 92/100 cy) por incumplimiento de CTUN y US$ 386,376.61 (Trescientos ochenta y seis mil trescientos setenta y seis dólares americanos 61/100 cy) por incumplimiento de la Capacidad Neta, excediéndose la penalización aplicada por CFE en US$ 3´275,284.96 (Tres millones doscientos setenta y cinco mil doscientos ochenta y cuatro dólares americanos 96/100 cy)[599].

[596] Réplica y Contestación Reconvención, No. 365.
[597] Réplica y Contestación Reconvención, No. 366.
[598] Réplica y Contestación Reconvención, No. 367.
[599] Réplica y Contestación Reconvención, No. 370.

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### 12.1.4.2 Posición de la Demandada

742. Destaca la Comisión que el Contrato y el Anexo 13 excluyen la aplicación de Curvas de Degradación. A tal efecto señala que el Anexo 13 establece: "*No se acepta aplicar curvas por envejecimiento y/o ensuciamiento, por lo cual los valores garantizados deben considerar la degradación de los equipos que pudiera existir por las etapas de Pruebas de Puesta en Servicio y las Pruebas de Operación previas a las Pruebas de Desempeño*"[600]. Adicionalmente, de manera insistente, indica que *"Las únicas correcciones por condiciones diferentes a las de garantía que se aplicarán a los resultados de las pruebas, serán obtenidas utilizando las Curvas de Corrección que fueron suministradas con la Proposición."*[601]. A este efecto señala la CFE que "*las Curvas de Corrección que fueron suministradas con la Proposición*" son las curvas de corrección de Capacidad Neta y CTUNG por[602]: Presión Atmosférica, Temperatura de Bulbo Seco, Humedad Relativa, Poder Calorífico Inferior del Combustible, Factor de Potencia y Temperatura de agua de mar.

743. Señala la Comisión que el Contrato y el Anexo 13 excluyen la aplicación de Curvas de Degradación durante el Periodo de Afectación reconocido de 208 días en el Tercer Convenio Modificatorio, durante el cual el Contratista fue responsable de la custodia, resguardo, operación y mantenimiento de la Central, por lo que los efectos de degradación tras la formalización de los acuerdos para compensar al Contratista y cumplir con el objeto del Contrato, deben ser asumidos por este último.

744. Expresa la Comisión que el Contratista señala que las Pruebas de Desempeño no se llevaron a cabo en condiciones normales de operación, en clara contradicción con la connotación dada en el Anexo 13 a dicho calificativo, dado que el Contratista omite indicar que dicho párrafo establece también que estas "*condiciones normales de operación*" son las relacionadas precisamente con la propia condición de la Prueba de Desempeño, toda vez que indica que se deben evaluar a diferentes cargas; es decir: al 100%, 75% y 50% de Capacidad

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[600] Dúplica y Réplica a la Reconvención, No. 311.
[601] Dúplica y Réplica a la Reconvención, No. 314.
[602] Dúplica y Réplica a la Reconvención, No. 316.

Neta Demostrada, matizando aún más, que esto debe acontecer con el control de la unidad totalmente en automático, tal como sería operada normalmente la Central[603].

745. Advierte la Comisión que en ninguno de los 3 convenios modificatorios, se hizo una reserva o salvaguarda respecto al tema curvas de degradación, sino todo lo contrario, en la cláusula tercera de cada uno se hace la manifestación que "*el contratista reconoce que con la prórroga señalada en la cláusula primera del presente convenio modificatorio se satisfacen todos sus derechos, por lo que renuncia a cualquier reclamación presente o futura de cualquier naturaleza o a cualquier costo que haya generado o se pudiera generar, derivado de las mismas que dieron origen al presente convenio*". Por lo anterior, considera que en el supuesto sin conceder que la Demandante tenga derecho respecto al tema de curvas de degradación, este fue renunciado expresamente con motivo de las causas que le dieron origen a los Convenios 2 y 3[604].

746. Agrega que la Cláusula cuarta del Tercer Convenio Modificatorio indica que las Partes reconocen que se mantienen todas y cada una de las estipulaciones y cláusulas del Contrato en pleno vigor y efecto. Ello implica, sin limitación, lo previsto en el Anexo 13 del Contrato[605].

747. Igualmente, señala que tanto en el Acuerdo como en la reunión del comité consultivo, la Demandante jamás expresó desacuerdo, ni realizó solicitud para que se incluyeran en las pruebas de desempeño la degradación en las turbinas de gas[606].

748. Bajo esta misma línea, señala que la Demandante pudo solicitar a la Comisión la inclusión de la degradación en las turbinas de gas, en la formalización de los siguientes instrumentos: i) en el Segundo Convenio Modificatorio, ii) en el acuerdo para la Aplicación de la Cláusula 25.5, iii) en la reunión del Comité Consultivo o bien, iv) en el Tercer Convenio Modificatorio, el cual fue posterior a las pruebas de desempeño realizadas por el Contratista, ya

[603] Dúplica y Réplica a la Reconvención, No. 301.
[604] Memorial de Contestación y Reconvención, No. 141 y 142.
[605] Memorial de Contestación y Reconvención No. 143.
[606] Memorial de Contestación y Reconvención No. 144.

que el convenio es de fecha 21 de octubre de 2019 y las pruebas finalizaron el 07 de julio de 2019[607].

749. Advierte que resulta inadmisible creer que una empresa como la del Contratista, que ostenta el grado de experiencia y experticia para construcción y puesta en servicio de Centrales de Ciclo Combinado, no fue capaz de vislumbrar las posibles consecuencias en términos de degradación por las afectaciones que estaban ocurriendo, las cuales ahora, según su decir, afectaron el resultado de las Pruebas de Desempeño[608]. Así las cosas, agrega que dicha conducta del Contratista obedece a que no esperaba incumplir los Valores Garantizados objeto del Contrato, generando controversia sobre una responsabilidad asumida por él mismo[609].

750. Por otra parte, señala la Comisión que todo el accionar del Contratista contraviene los principios de buena fe contractual, para lo cual la Demandada se refiriere a los argumentos contenidos en la propia tesis jurisprudencial invocada por el Contratista, correspondiente a la Décima Época (Tesis: I.3o.C.J/11 (10a.) de 24 de abril de 2015, del Tercer Tribunal Colegiado del Primer Circuito 374 y la resolución del Amparo Directo 614/2011 de 8 de diciembre de 2011 del Tercer Tribunal Colegiado en Materia Civil del Primer Circuito), cuando se indica: "*un comportamiento posterior contradictorio que afecta las expectativas que surgen del anterior… esta conducta importa ejercer una pretensión que en otro contexto es ilícita, pero resulta inadmisible por ser contradictoria con la primera…*"[610].

751. Señala que el comportamiento presentado por el Contratista, al exigir la consideración de curvas de degradación en los resultados de las Pruebas de Desempeño de los Valores Garantizados, resulta contradictorio con los acuerdos pactados entre las Partes para cumplir con el objeto del Contrato, teniendo en cuenta el reconocimiento de las afectaciones por motivos de los retrasos en los diferentes actos jurídicos[611].

[607] Memorial de Contestación y Reconvención, No. 145.
[608] Memorial de Contestación y Reconvención, No. 146.
[609] Memorial de Contestación y Reconvención, No. 148.
[610] Memorial de Contestación y Reconvención, No. 151.
[611] Memorial de Contestación y Reconvención, No. 152.

752. La Comisión señala que al excluir el Anexo 13 la aplicación de curvas de degradación los valores de Capacidad Neta Garantizada (CNG) y CTUNG ofertados en la Proposición Técnica del Contratista deben considerar las posibles pérdidas en estos valores garantizados, causados por envejecimiento, ensuciamiento o degradación, durante todo el periodo anterior a la realización de las pruebas de desempeño, con independencia de las circunstancias en las que éstas se desarrollen, máxime cuando una vez detonada la aplicación de la cláusula 25.5 del Contrato, mediante la suscripción del acuerdo para pactar los términos y condiciones que compensarían al Contratista para lograr la conclusión del Proyecto, no se estableció que durante las pruebas de desempeño se deberían considerar curvas de degradación en las turbinas de gas[612].

753. Agrega la CFE que en el Anexo 13, apartado C) "*Pruebas de Desempeño*", del Contrato, se incluye que las *"correcciones al Consumo Térmico Unitario y a la Capacidad Neta que resulten de las Pruebas por condiciones diferentes a las de diseño o garantizadas deben ser realizadas con base únicamente en las curvas de corrección proporcionadas por el Contratista en su Proposición…*" Así mismo, se indica que "*Las únicas correcciones por condiciones diferentes a las de garantía que se aplicarán a los resultados de las pruebas, serán obtenidas utilizando las Curvas de Corrección que fueron suministradas con la Proposición. No se aceptan tolerancias en las Curvas de Corrección para la determinación del CTUNG*"[613]. Expresa la Comisión que, de esta manera, es evidente que el Contrato no permite la corrección de los valores obtenidos en las Pruebas de Desempeño, mediante ningún procedimiento diferente a los Factores de Corrección obtenidos mediante las Curvas de Corrección Garantizadas, contenidas en la Proposición Técnica de la hoy Demandante[614].

754. Por otra parte, indica que la "*Condición Nueva y Limpia*", de conformidad con la definición incluida en la cláusula 1.1 del Contrato, significa: *"… la condición de la Central al inicio de las Pruebas de Desempeño y en la cual ya se incluye la posible degradación y ensuciamiento derivado desde el primer arranque de las*

[612] Memorial de Contestación y Reconvención, No. 164.
[613] Memorial de Contestación y Reconvención, No. 165.
[614] Memorial de Contestación y Reconvención, No. 166.

*unidades, pruebas de puesta en servicio y pruebas de operación; lo que implica que no se aplicarán factores por degradación y ensuciamiento a los valores de capacidad [bruta/neta] y CTU [bruto/neto] que resulten de las Pruebas de Desempeño*"[615].

755. Advierte que de esta manera, al inicio de las Pruebas de Desempeño, la Central se considera, con independencia de cualquier otro factor: "*Nueva y Limpia*"[616]. Señala que para el caso en concreto, se tiene que si las Pruebas de Capacidad Neta Garantizada y Consumo Término Unitario iniciaron el 05 de julio de 2019, la "*Condición Nueva y Limpia*" de la Central, debe considerarse justo antes del inicio de éstas[617].

756. Agrega la Demandada que las Pruebas de Desempeño deben ser efectuadas de acuerdo con la Guía M.E.J 2.6 y los códigos citados en el Anexo 13[618]. Señala la Comisión que los Anexos VII, VIII A y B y IX no son parte de la información requerida por la Comisión ni aplicables en el Procedimiento de Prueba de Desempeño conforme a lo indicado en el Anexo 13[619]. A este respecto advierte que en caso de discrepancia entre lo indicado en los códigos citados en el Anexo 13 y/o la Guía M.E.J, prevalecerá lo señalado en el Anexo 13[620].

757. Anota la Comisión que dentro del alcance de lo acordado entre las Partes (Comisión y Contratista), respecto al reconocimiento de las afectaciones derivadas de las restricciones en la autorización de Pruebas, no se contempló efecto alguno sobre el resultado de las Pruebas de Desempeño que serían realizadas una vez finalizadas las Pruebas de Puesta en Servicio, mucho menos se consideró algún posible efecto de degradación[621].

758. Adicionalmente la Comisión hace referencia al Informe del Perito Cámara y señala que no existe evidencia documental que permita constatar que el incumplimiento a los Valores Garantizados es originado por degradación en los

[615] Memorial de Contestación y Reconvención, No. 167.
[616] Memorial de Contestación y Reconvención, No. 168.
[617] Memorial de Contestación y Reconvención, No. 169.
[618] Memorial de Contestación y Reconvención, No. 174 y 175.
[619] Memorial de Contestación y Reconvención, No. 176.
[620] Memorial de Contestación y Reconvención, No. 177.
[621] Memorial de Contestación y Reconvención, No. 184.

turbogeneradores de gas. Lo que si es cierto, es que después de efectuar las Pruebas de Desempeño de la Central, se generó el Reclamo de Garantía No. 87 indicado en la Sección 7 del presente Dictamen, por lo que existió la necesidad de trabajos de rehabilitación de la Turbina de Vapor por el Contratista, por lo que existe la duda razonable de la causa real del incumplimiento en los Valores Garantizados[622].

759. Señala que, aun cuando en ninguna parte de la sección 7.8.1 del Procedimiento de Pruebas de Desempeño aprobado (documento EMP-UEDF-YYY-OP-01201_00_1) se encuentra la metodología con la que se determinará el cálculo de los valores demostrados para así verificar los Valores Garantizados en función de los factores de corrección a utilizar y en los anexos requeridos para ello, el Contratista intenta trasladar a la Comisión una condición contractual que el fabricante Siemens acordó con DUNOR para el cumplimiento de las Garantías pactadas entre ellos, las Curvas de Degradación incluidas en el Anexo VIIIA del Procedimiento de Pruebas de Desempeño, Revisión 1.[623]

760. Señala que este es un documento interno de Siemens emitido para DUNOR, el cual hace mención en todo momento al Contrato que ellos mantienen por la orden compra de las Turbinas SGT68000H (MB000064, MB000144) para el Proyecto Empalme II, tal y como se puede leer en el Alcance (Scope) de la Especificación DP21T-00002937; por lo tanto, es un documento que sólo aplica entre Siemens y DUNOR y no guarda relación con el Contrato[624].

761. Agrega que la Comisión en ningún caso ha negado que las horas de operación impliquen degradación o ensuciamiento en las turbinas de gas, lo que inevitablemente puede afectar su rendimiento, incluso está afirmación se encuentra contemplada en el propio Contrato, toda vez que se basa en aspectos técnicos básicos e incluso en el mismo sentido común del tema, lo anterior, en consonancia con "SGI" cuando indica: "*cuanto mayor es el tiempo de operación*

[622] Memorial de Contestación y Reconvención, No. 200.
[623] Memorial de Contestación y Reconvención, No. 201.
[624] Memorial de Contestación y Reconvención, No. 201.

*de los equipos, mayor es el desgaste o ensuciamiento que sufren. Esto, inevitablemente, afecta a su rendimiento*"[625].

762. Señala que, no obstante lo anterior, que el Anexo 13 del Contrato establece claramente que no se aplican curvas por envejecimiento y/o ensuciamiento.[626] Agrega que esta situación es plenamente acorde con la definición de "*Condición Nueva y Limpia*" incluida en la cláusula 1.1 de Contrato de acuerdo con la cual: "*Significa la condición de la Central al inicio de las Pruebas de Desempeño y en la cual ya se incluye la posible degradación y ensuciamiento derivado desde el primer arranque de las unidades, pruebas de puesta en servicio y pruebas de operación; lo que implica que no se aplicarán factores por degradación y ensuciamiento a los valores de capacidad [bruta/neta] y CTU [bruto/neto] que resulten de las Pruebas de Desempeño*"[627].

763. Destaca la Comisión que la definición de "*Condición Nueva y Limpia*" del Contrato es completamente diferente de la definición indicada por el fabricante SIEMENS para el mismo concepto señalada en la especificación DP21T-00002937, considerada por DUNOR en toda la argumentación de su Memorial de Demanda.

764. Precisa que la definición incluida en el ANEXO VIIIA forma parte la especificación DP21T-00002937 del Contrato entre particulares celebrado entre SIEMENS y DUNOR, por lo tanto, no tiene validez para el Contrato. Por lo tanto, advierte que prevalece la definición de la cláusula 1.1 del Contrato, como se indica en la cláusula 31.2 del Contrato[628].

765. Destaca que en el listado de "*cada variable que interviene en el desempeño de la Central*", indicado en el mismo Procedimiento de Pruebas de Desempeño aprobado, no se menciona la "*degradación*" ni alguna otra variable adicional[629].Asimismo, señala que en el Anexo II incluido en la misma Sección 9 "*Anexos*" de dicho Procedimiento, se indican los factores de Corrección aplicables, sin considerar ninguno relativo a degradación en turbinas de gas,

[625] Memorial de Contestación y Reconvención, No. 205.
[626] Memorial de Contestación y Reconvención, No. 206.
[627] Memorial de Contestación y Reconvención, No. 207.
[628] Memorial de Contestación y Reconvención, No. 213.
[629] Memorial de Contestación y Reconvención, No. 221.

demostrando así que no fue sino hasta el incumplimiento de los Valores Garantizados que el Contratista decidió manipular el contenido del Procedimiento.[630]

766. Hace referencia la Comisión a los comentarios emitidos al Procedimiento por Parte de la Comisión a la Revisión 0 del mismo, en relación con la Sección 9 "Anexos", y señala que para los anexos VIIIA para las Turbinas de Gas (Siemens), VIIIB para la Turbina de Vapor (DSPW) y Anexo IX para el Comportamiento Térmico del Recuperador de Calor (Cerrey), se puede observar en una frase la cual dice "*no aplica*". Igualmente, aparece el mensaje de eliminar de una página en adelante. Por lo anterior, es evidente que la Comisión no aceptó la aplicación del Anexo VIII A (incluidas las Curvas de Degradación) en el Procedimiento de Pruebas de Desempeño, tal como se puede constatar desde la Revisión 0[631].

767. Advierte que, no obstante, dado que en la Revisión 1 del Procedimiento se indica que esta información tiene carácter de "*Referencia*", CFE no consideró inconveniente mantener dicho anexo puesto que en la reunión del 03 de julio de 2019 convocada por personal de DUNOR para atender los comentarios de la Comisión sobre la Rev. 0 entregadas con oficio CSPPS/CCEII-0393/2019 del 10 de junio de 2019, el personal de DUNOR manifestó que los Anexos VIIIA, VIIIB, son "*sólo de Referencia*" dado que eran documentos internos entre DUNOR y los proveedores de equipos principales, que no tenían ninguna injerencia en la metodología del cálculo y validación de los Valores Garantizados indicada en la sección 7.8.1 del Procedimiento de Pruebas de Desempeño[632].

768. Agrega que, en buena fe Contractual a las manifestaciones realizadas por la Contratista, la Comisión no tuvo inconveniente de que se anexaran como documentos de "*referencia*"[633].

769. La Comisión añade que se encuentra fuera de lugar la interpretación del Contratista respecto a la obligatoriedad de aplicación de las Curvas de

[630] Memorial de Contestación y Reconvención, No. 222.
[631] Memorial de Contestación y Reconvención, No. 223-225.
[632] Memorial de Contestación y Reconvención, No. 226.
[633] Memorial de Contestación y Reconvención, No. 227.

Degradación, con base en este Anexo VIII A "*Procedimiento de Pruebas de Desempeño de Suministradores Principales*", pues el Contrato no prevé la realización de pruebas de desempeño para cada equipo principal, sino por la Central en su conjunto[634].

770. Señala también que el 18 de julio de 2019, mediante oficio No. 742.161/JALV-080/19, en respuesta a la entrega del "*Informe preliminar*" de resultados de las Pruebas de Desempeño, CFE le manifestó a DUNOR su rechazo a los resultados del "*Informe Preliminar*" entregado por el Contratista debido a la consideración de degradación, por lo que se solicitó presentar a la brevedad el informe respectivo, acorde con el procedimiento acordado[635]. Sostiene que en posteriores comunicaciones, la CFE le reiteró a DUNOR la improcedencia de considerar curvas de degradación en el Informe de la Prueba de Desempeño.

771. Asimismo, indica que el 23 de agosto de 2019, mediante oficio No. 7B/2019/RJMN-00370, CFE le informó al Contratista que, de acuerdo con los resultados obtenidos de las Pruebas de Desempeño, se hacía acreedor a los siguientes descuentos, los cuales serían deducidos del Precio del Contrato[636]:

- US$ 370,048.43 (Trescientos setenta mil cuarenta y ocho dólares americanos 43/100 cy) debido a que la Capacidad Neta Demostrada resultó ser inferior a la Capacidad Neta Garantizada.
- US$ 3'623,871.88 (Tres millones seiscientos veintitrés mil ochocientos setenta y un dólares americanos 88/100 cy) debido a que el Consumo Térmico Unitario Neto Medio Pesado Demostrado resultó ser mayor al Consumo Térmico Unitario Neto Medio Pesado Garantizado del Proyecto.
- US$ 2,009.79 (Dos mil nueve dólares americanos 79/100 cy) debido a que el Consumo Demostrado de Hidrógeno resultó ser mayor al Consumo Garantizado de Hidrógeno del Proyecto.

[634] Memorial de Contestación y Reconvención, No. 228.
[635] Memorial de Contestación y Reconvención, No. 231.
[636] Memorial de Contestación y Reconvención, No. 234.

772. Advierte la Comisión que el Contratista nunca realizó comentario alguno sobre los descuentos por el incumplimiento de los Valores Garantizados.

773. Por otra parte, se refiere la Demandada al oficio de LAPEM No. K3323-101-19 del 14 de agosto de 2019 solicitado por la Comisión, e indica que tenía carácter de "final". Agrega que informe LAPEM No. K3323-105-19 elaborado una vez se contó con el análisis cromatográfico por el Laboratorio Certificado (MOVILAB S.A. de C.V.) de las muestras de gas tomadas durante las Pruebas, es coincidente con lo indicado en el Informe LAPEM No. K3323-101-19 del 14 de agosto de 2019, incluido en el Acta de Aceptación Provisional e identificado erróneamente en el encabezado con carácter de Preliminar[637]. Por lo anterior, la Comisión señala que no debe quedar lugar a dudas que el Informe LAPEM No. K3323-105-19 tiene carácter de definitivo y fue utilizado para proceder con los respectivos descuentos aplicables, indicados en el Oficio No. 7B/2019/RJMN-00370 del 23 de agosto de 2019[638].

774. También, hace referencia la Comisión al Informe LAPEM No. K3323-95A-19 del 30 de octubre de 2019, el cual el Contratista denomina como "*Informe Final*", pero que no es aceptable para la Comisión ya que se entregó de manera posterior a la fecha de emisión del CAP de fecha 14 de agosto de 2019 y por consecuente, al Pago del Precio del Contrato[639].

775. Señala que el Informe LAPEM No. K3323-95A-19 del 30 de octubre de 2019, no fue presentado a la Comisión hasta cuando fue enviado como anexo del Memorial de Demanda, motivo por el cual debe ser desestimado como Prueba de los resultados obtenidos en las Pruebas de Desempeño practicadas a la Central en julio de 2019[640].

776. Manifiesta que en el supuesto sin conceder, que la Demandante hubiera presentado el informe LAPEM No. K3323-95A-19 del 30 de octubre de 2019, antes de la emisión de la emisión del CAP (14 de agosto de 2019), CFE tendría el derecho contractualmente de verificar y en su caso realizar las

[637] Memorial de Contestación y Reconvención, No. 240.
[638] Memorial de Contestación y Reconvención, No. 242.
[639] Memorial de Contestación y Reconvención, No. 244.
[640] Memorial de Contestación y Reconvención, No. 246.

manifestaciones correspondientes, pero que en este caso dolosamente la contraparte lo presenta de manera extemporánea para los fines del Contrato[641].

777. Por lo anterior, reitera que son procedentes los descuentos aplicados al Pago del Precio del Contrato, notificados mediante el Oficio No. 7B/2019/RJMN-00370 del 23 de agosto de 2019, con base en el Informe LAPEM No. K3323-105-19, cuyo carácter es Definitivo (Final) una vez obtenidos los resultados de las muestras de gas por el laboratorio certificado y de las correcciones que resultaron aplicables conforme al Procedimiento EMP-UEDFYYY-01201[642].

778. Concluye que de toda la argumentación realizada por la Comisión no queda lugar a dudas sobre lo siguiente[643]:

i. Las afectaciones sufridas al Programa de Ejecución fueron reconocidas al Contratista, lo que dio origen a la formalización de los tres Convenios Modificatorios.

ii. Respecto al Tercer Convenio Modificatorio, los criterios de reconocimiento de dichas afectaciones al Programa de Ejecución, así como los términos y condiciones que compensarían al Contratista para cumplir con el objeto del Contrato, fueron pactados de común acuerdo entre las Partes, mediante la formalización del denominado *"Acuerdo entre las Partes sobre la aplicación de la Cláusula 25.5, para lograr la conclusión del objeto del Contrato*" de fecha 17 de septiembre de 2018 y la minuta del Comité consultivo del 13 de noviembre de 2018, sin que el instrumento Contractual antes señalado, previera la aplicación de curvas de degradación a las Pruebas de Desempeño, por motivos de los retrasos al Proyecto.

iii. El Tercer Convenio Modificatorio al Contrato, formalizado el 21 de octubre de 2019, reconoció una prórroga de 208 días que dejó satisfechos todos los derechos del Contratista respecto a la prórroga reconocida. Asimismo, la cláusula cuarta indicó que todas las estipulaciones y Cláusulas Contractuales quedan en pleno vigor, incluyendo sin limitación el Anexo 13 del Contrato, que descarta la aplicación de degradación en las turbinas de

[641] Memorial de Contestación y Reconvención, No. 247.
[642] Memorial de Contestación y Reconvención, No. 248.
[643] Memorial de Contestación y Reconvención, No. 276.

gas, y el clausulado contractual, particularmente referido a la definición de "*Condición Nueva y Limpia*", prevista en la Cláusula 1.1 del Contrato.

iv. Durante el Periodo de Afectación reconocido de 208 días en el Tercer Convenio Modificatorio, el Contratista fue responsable de la custodia, resguardo, operación y mantenimiento de la Central, por lo que los efectos de degradación tras la formalización de los acuerdos para compensar al Contratista y cumplir con el objeto del Contrato, deben ser asumidos por este último.

v. Del sustento contractual (legal) disponible, el Anexo 13 descarta el uso de Degradación durante las Pruebas de Desempeño y establece que el Contratista debe considerar la degradación de los equipos, desde el inicio de Pruebas hasta las Pruebas de Desempeño. Señala que lo anterior se robustece con la definición de "*Condición Nueva y Limpia*". Agrega que todo ello, permanece en pleno vigor y efecto tras formalización del Tercer Convenio Modificatorio.

vi. La conducta del Contratista al pretender que le sean considerados supuestos efectos de degradación a los resultados de las Pruebas de Desempeño, a la luz de su incumplimiento a los Valores Garantizados, habiéndose pactado y formalizado los respectivos acuerdos que lo compensarían por las afectaciones sufridas, debe entenderse como una conducta contraria y de mala fe.

vii. La degradación es un efecto inevitable; sin embargo, ésta debe ser asumida por el propio Contratista conforme a los términos del Contrato, así como a los instrumentos contractuales que permitieron la conclusión del Proyecto y evaluar el objeto del mismo.

viii. El procedimiento de Pruebas de Desempeño EMP-UEDF-YYY-01201 REV 1 emitido por el Contratista, establece la metodología aplicable del Procedimiento de Pruebas de Desempeño en su Sección 7, donde se definen los valores de corrección aplicables.

ix. El Contratista manipula el contenido y sentido de los términos del procedimiento de Pruebas de Desempeño EMP-UEDF-YYY-01201 REV 1, pretendiendo modificar la metodología de Pruebas de Desempeño incluida

en la Sección 7 del Procedimiento, donde se aclaran los únicos factores de corrección aplicables a las Pruebas. Para ello, pretende aplicar factores de corrección adicionales, basado en el contenido del Anexo VIII A de la Sección 9 "*Anexos*" del procedimiento, cuyo carácter se define en el mismo anexo con la "Nota 1", la cual indica es de "*Referencia*". Esta conducta debe entenderse como un acto más de mala fe del Contratista.

x. El accionar del Contratista es ventajoso toda vez que intenta trasladar a la Comisión una condición contractual que el fabricante Siemens acordó con DUNOR para el cumplimiento de las Garantías pactadas entre ellos, puesto que el Anexo VIIIA del Procedimiento de Pruebas de Desempeño, Revisión 1, es un documento interno de Siemens emitido para DUNOR, el cual hace mención en todo momento al Contrato que DUNOR mantiene por la orden de compra de las Turbinas SGT6-8000H (MB000064, MB000144) para el Proyecto Empalme II, indicadas en el Alcance (Scope) de la Especificación DP21T-00002937, por lo tanto, es un documento que sólo aplica entre Siemens y DUNOR y no guarda relación con el Contrato firmado entre la Comisión y DUNOR.

xi. El Informe LAPEM No. K3323-105-19 del 14 de agosto de 2019, emitido por LAPEM, es "*Definitivo*" y considera tanto las correcciones aplicables de acuerdo al procedimiento EMP-UEDF-YYY-01201 como los resultados del Poder Calorífico de las muestras de gas obtenidas durante las Pruebas. En este sentido, toda vez que sirvió como base para determinar los descuentos notificados al Contratista en el oficio No. 7B/2019/RJMN-00370 del 23 de agosto de 2019, estos deben considerarse completamente procedentes.

xii. El Contratista presenta el Informe LAPEM No. K3323-95A-19 del 30 de octubre de 2019, el cual denomina como "*Final*"; sin embargo, este último no fue presentado a la Comisión de forma oportuna, por lo que hubo incumplimiento de sus obligaciones contractuales con respecto a la entrega de la información al término de las Pruebas de Desempeño. Agrega que el Informe LAPEM No. K332395A-19 del 30 de octubre de 2019 fue emitido aproximadamente 4 meses después de la ejecución de las Pruebas de Desempeño, aproximadamente 3 meses después de la Aceptación Provisional y posteriormente al Pago del Precio del Contrato.

779. Destaca la Comisión que cuando el Contratista indica que el objetivo de las Pruebas de Desempeño es verificar el desempeño de la Central en condiciones normales de operación, omite señalar que estas "*condiciones normales de operación*" serán las condiciones operativas que prevalezcan durante la misma Prueba de Desempeño, es decir, que la prueba se realice con todos los equipos y sistemas operando en condiciones estables, confiables, seguras; y no al estado que guardan las instalaciones antes del inicio de la citada prueba como lo pretende hacer valer la Demandante[644].

780. También, señala la Comisión que la prórroga del Tercer Convenio Modificatorio reconoció una afectación total de 208 días al Programa de Pruebas por la imposibilidad de realizar Pruebas; esto implica, lógicamente, que el Contratista mantenía la total responsabilidad y decisión sobre la continuidad de la operación de la Central, tal como ha sido detallado en el párrafo 276 incisos III, IV y V del memorial de contestación de demanda de la Comisión[645].

781. La Comisión sostiene que los efectos de degradación fueron asumidos por el Contratista conforme a los términos contractuales que mantuvieron pleno efecto y vigor tras los actos jurídicos acontecidos previamente a la ejecución de las Pruebas de Desempeño[646]. Al respecto, sostiene que la no consideración de degradación a los resultados de las Pruebas de Desempeño obedece a: i) que no fue pactado en ningún instrumento contractual suscrito con anticipación a las Pruebas; ii) no se consideró en los instrumentos jurídicos suscritos de forma posterior a las Pruebas[647].

782. Adicionalmente, en relación con el argumento de que en la fecha de suscripción del Acuerdo, la Minuta de Reunión y el Convenio Modificatorio No. 2, DUNOR no pudo prever el alcance de las afectaciones por retrasos, la Comisión considera que es cierto que el Contratista no puede cuantificar el impacto de la degradación en los Valores Garantizados, debido a las restricciones impuestas por el CENACE desde septiembre del 2018, sin embargo, si tenía total conocimiento de que dichas restricciones implicaban un

[644] Dúplica y Réplica a la Reconvención, No. 263 (B).
[645] Dúplica y Réplica a la Reconvención, No. 263 (C).
[646] Dúplica y Réplica a la Reconvención, No. 267.
[647] Dúplica y Réplica a la Reconvención, No. 271.

mayor tiempo de operación y por lo tanto, un mayor degaste con un efecto inevitable en el desempeño previsto a la fecha en que se suscribieron los Convenios Modificatorio No. 2 y No. 3 (23 de noviembre de 2018 y 21 de octubre de 2019 respectivamente). Agrega que era del pleno conocimiento del Contratista las afectaciones sufridas al Proyecto debido a las restricciones impuestas por el CENACE, reconociendo en el Convenio 3 un total de 208 días de afectación[648].

783. Agrega la Comisión que la cláusula 8 “Comité Consultivo” del Contrato establece un mecanismo mediante el cual las Partes discuten y resuelven en buena fe contractual, todas las controversias técnicas, financieras o administrativas relacionadas con la ejecución del Proyecto. El Contratista no ejerció el derecho a acudir a este mecanismo con la diligencia requerida en la propia Cláusula 8, omisión que extraña a la Demandada, considerando que Contratista tiene el conocimiento y experiencia en este tipo de Proyectos.[649] A tal efecto la Comisión se pregunta: si la Demandante señala que la degradación es consecuencia de las restricciones del CENACE, ¿por qué el Contratista no indicó en el orden del día esta controversia de curvas de degradación, ya que uno de los temas indicado en el numeral 4 de la Minuta es el de las Afectaciones relacionadas por la Restricción de carga por CENACE? Manifiesta que la respuesta es clara la Demandante no tenía contemplado dicha degradación ya que fue hasta que no cumplió con los Valores Garantizados que hábilmente se escudó señalando que este fenómeno se encuentra contemplado en un anexo de referencia en el Procedimiento de Pruebas de Desempeño[650].

784. Agrega que, aún y cuando el Contratista no introdujo el tema de Curvas de Degradación en la Minuta señalada en el párrafo anterior, tenía el derecho de solicitar que el Comité se reuniera para discutir y resolver dicha afectación como establece la cláusula 8, hecho que jamás ocurrió. Ahora la Demandante en una mala fe contractual quiere trasladar su omisión en contemplar la degradación o en su caso haber manifestado a la Comisión que las Partes conviniera en

[648] Dúplica y Réplica a la Reconvención, No. 272 y 276.
[649] Dúplica y Réplica a la Reconvención, No. 283.
[650] Dúplica y Réplica a la Reconvención, No. 285.

cualquier instrumento jurídico determinar las afectaciones que se habían originado en la ejecución del Proyecto[651].

785. Señala también la Comisión que el Perito SGI realiza un planteamiento incompleto del investigador J. Zachary. A tal efecto destaca que el Perito Cámara observó que el estudio también indica que el uso de curvas de corrección debe acordarse claramente por adelantado como parte del contrato comercial entre el propietario, el proveedor y el contratista de EPC, hecho que no ocurrió en la ejecución del Contrato[652].

786. En relación con el argumento propuesto por DUNOR, el cual señala que sí incluyó el factor por degradación en el instrumento previsto para ello, esto es el Procedimiento de Pruebas de Desempeño, la Comisión señala que la manifestación de la Demandante carece de validez. Advierte que el Procedimiento EMP-UEDF-YYY-OP-01201 Rev. 1 únicamente contempla el desarrollo matemático conforme al inciso 7.8.1. "*Cálculo de los factores de corrección*" y la metodología indicada en los ejemplos de validación de las "*Curvas de Corrección Garantizadas y Aplicables a las Pruebas de Desempeño*" incluidos en el OT-2 de la Propuesta Técnica; siendo las únicas variables contempladas y proporcionadas desde la evaluación de la Propuesta Técnica por el Contratista[653].

787. También, la Comisión indica que el Contrato específica de manera cabal, integra e inequívoca el procedimiento matemático mediante el cual se determinaran los Valores Demostrados de Capacidad Neta Demostrada y Consumo Término Unitario Demostrado, los cuales deben compararse con los Valores Garantizados del Contrato. Así, señala que el Perito Lorenzo José Cámara Anzures indica acertadamente: "*DUNOR garantizó a la Comisión que la Central, una vez realizadas las Pruebas de Desempeño, cumpliría con los Valores Garantizados establecidos en el Anexo 13.1, conforme a los términos establecidos en la Proposición Técnica (OT4)*"[654].

[651] Dúplica y Réplica a la Reconvención, No. 286.
[652] Dúplica y Réplica a la Reconvención, No. 290.
[653] Dúplica y Réplica a la Reconvención, No. 293.
[654] Dúplica y Réplica a la Reconvención, No. 310.

788. Expresa la Comisión que el Contratista mal interpreta lo que indica la Guía M.E.J.26. Al respecto, la CFE hace las siguientes precisiones: Primero, la Sección 4 "*Requisitos Aplicables*" indica: "…*Las correcciones por condiciones diferentes a las garantizadas deben ser realizadas basadas en las curvas de corrección solicitadas en la Sección 3 de las Bases de Licitación y que se incluyen en el Anexo II de este Procedimiento y que forman parte del Contrato entre CFE y (nombre del Contratista)".*

789. En segundo lugar, indica que el anexo III de la Guía M.E.J.2.6 descarta cualquier factor por degradación, señalando que los cálculos deben realizarse conforme al Anexo 13 del Contrato y el inciso 8 de la misma Guía.[655]

790. Tercero, el inciso de la Guía M.E.J.2.6 vuelve a remitir al contenido del Anexo 13 y de la sección 7.3.1. tanto para el cálculo de CNG como de CTUND.[656]

791. Agrega que la Guía M.E.J.2.6 no contempla los anexos VII, VIIIA, VIIIB y IX. Asimismo el Procedimiento EMP-UEDF-YYY-01201 REV 1 realizado acorde con la misma Guía, reafirma que no contempla en su sección 7 (Metodología de Cálculo) y 8 (Desarrollo de Pruebas) la aplicación de dichos anexos, lo que hace evidente que el Resultado de las Pruebas y el Procedimiento no consideran los factores de degradación[657].

792. Adicionalmente, señala que la Sección 3.2.3 Curvas de Corrección Garantizadas establece claramente que "*Todas las curvas deben incluir una nota que indique: "CURVA GARANTIZADA Y APLICABLE EN LAS PRUEBAS DE DESEMPEÑO". Curvas típicas y/o con tolerancias, no serán aceptables.*", por lo que no resulta entendible el actuar de la Demandante que tiene la mala intención de aplicar las curvas señaladas por este en el Anexo VIIIA, aun y cuando se observa la Nota 1 "*referencia*" en la Rev. 1 del Procedimiento (Final), y esta acción no está descrita en la metodología de cálculo contenida en la Sección 7 del Procedimiento[658].

[655] Dúplica y Réplica a la Reconvención, No. 324.
[656] Dúplica y Réplica a la Reconvención, No. 325.
[657] Dúplica y Réplica a la Reconvención, No. 326.
[658] Dúplica y Réplica a la Reconvención, No. 327.

793. Ahora, en relación con el argumento de DUNOR de que el Anexo VIIIA no es un documento interno acordado entre Siemens y DUNOR, la Comisión mantiene que su contenido no tiene ninguna relación con los términos contractuales previstos en el Contrato[659].

794. Señala la Comisión que si el Anexo VIIIA que la Demandante intenta sostener es aplicable, este debía de haber sido incorporado desde la Convocatoria e incluir[660]:

i. Durante la etapa de elaboración de proposiciones de los Licitantes y de Preguntas y Respuestas a las mismas, en específico en la Sección 3 y en el OT-2, solicitándolo como una Curva de Corrección Garantizada y Aplicable a las Pruebas de Desempeño.

ii. En consecuencia, debió presentarse por el Contratista, junto con su propuesta técnica, para ser revisado y evaluado durante la etapa de Evaluación de Propuesta Técnicas del Proyecto, hecho que no tuvo lugar.

iii. Debió presentarse como parte del Libro de Anteproyecto durante la etapa de revisión de ingeniería.

iv. De igual forma tenía que entregarse en idioma español conforme a los términos del Anexo 5 del Contrato y la misma Cláusula 31.6 del mismo, para tan solo considerarlo como información para "*Revisión*".

v. Asimismo, la consideración de degradación habría sido claramente descrita en la sección 7 del mismo, donde se describe la metodología de cálculo, sin identificarlo con la Nota 1 "*Referencia*".

795. Agrega la CFE que para que el Anexo VIIIA pudiera haber sido aplicado:

i. La sección 3 del Contrato tendría que haber permitido su aplicación, identificándolo con la leyenda "*Curva Garantizada y Aplicable en las Pruebas de Desempeño*".

ii. Tendrían que haberse modificado al menos los términos contenidos en el Anexo 13 y clausula 1.1 "*Condición Nueva y Limpia*", que prohíben

[659] Dúplica y Réplica a la Reconvención, No. 330.
[660] Dúplica y Réplica a la Reconvención, No. 331.

expresamente su aplicación; sin embargo, todos estos términos contractuales fueron ratificados sin modificación alguna, manteniéndose en pleno efecto y vigor tras la formalización de los Convenios Modificatorios y diversos instrumentos jurídicos que se llevaron a cabo para discutir todos los aspectos técnicos y legales con motivo de afectaciones del Contratista.

iii. Para que dicho anexo fuera de aplicación, la definición de la "Condición Nueva y *Limpia*" indicada en el Procedimiento de Desempeño de Siemens (GT PERF TEST SPEC – EMPALME 2, DP21T-00002937), debería ser igual a la indicada en la definición de la Cláusula 1 del Contrato PIF-039/2015, situación que no es así. Agrega que conforme lo indicado en el propio Contrato, ante una discrepancia entre un Código, Norma, etc., respecto a lo indicado en el Contrato, prevalece lo indicado en el Contrato, por tal motivo, al no contener la misma definición y sobre todo el mismo alcance, no es procedente su aplicación, puesto que difiere de lo indicado en el Contrato.

iv. Y finalmente para que fuera de aplicación, la curvas de degradación deberían considerar en su punto de cero corrección, las horas de operación indicadas por DUNOR, es decir, a las 1.110'7 y 1.111'2 horas de operación y no a las 600 horas como inicia el ajuste, lo cual comprueba que las Curvas de Degradación indicadas en el Apéndice D del Procedimiento de Desempeño de Siemens, sólo son aplicables entre DUNOR y dicho fabricante de Turbinas de Gas para corregir las Garantías que pactaron entre sí, puesto que son Condiciones Contractuales entre éstos y no guardan relación con el Contrato.

796. Ahora bien, respecto de la posición de DUNOR la cual indica que el Anexo VIIIA no tiene el carácter de "*referencia*", la Comisión sostiene que el carácter de "*referencia*" no se debe únicamente a la nota incluida en el mismo anexo VIIIA, sino que también este carácter se desprende de realizar un análisis integral de la información y de los antecedentes que componen el procedimiento[661].

[661] Dúplica y Réplica a la Reconvención, No. 338.

797. Primeramente, reitera la Comisión que el carácter del Anexo VIIIA se confirma su naturaleza que es de "*Referencia*", toda vez que el mismo se encuentra desvinculado completamente de la metodología de cálculo incluida en la sección 7 del Procedimiento; es decir, dicha metodología no hace referencia a utilizar factores de degradación incluidos en la Sección 9, en particular a lo indicado en el Anexo VIIIA[662].

798. Segundo, reitera que se evidencia la no aplicabilidad del contenido de degradación para las Turbinas de Gas, de conformidad con los anexos aplicables Anexo IIA al Anexo VII[663].

799. Adicionalmente, la Comisión se refiere al Informe LAPEM No. K3323-95B-19 ,para indicar que en este informe se confirma que los valores de Capacidad Nominal corregidos a las condiciones de diseño para los Turbogeneradores de Gas (TG1 =258.68 MW, TG2=257.02 MW) son superiores a los valores indicados por la Demandante en su Balance Térmico a Condiciones Nueva Limpia – Condiciones de Diseño de Verano al 100% de Carga y para el trimestre 0 de la tabla de Capacidad Nominal Garantizada (255.663 MW), mientras que los valores de Capacidad Nominal obtenidos para la Turbina de Vapor son menores en 6.8 MW al valor indicado en el citado Balance Térmico[664].

800. Sostiene que lo anterior respalda totalmente la posición de la Comisión respecto a que fue el deficiente desempeño de la Turbina de Vapor la que provocó la deficiencia en la Capacidad Neta del Ciclo, tal como consta en los resultados del informe K332395B-19 emitido por LAPEM referente a las Pruebas de Comportamiento Térmico del Ciclo Combinado de Empalme II[665].

801. Concluye entonces que el incumplimiento de los Valores Garantizados durante la Prueba de Desempeño no se debió a la degradación de los Turbogeneradores de Gas (TGs) sino a un severo déficit de capacidad del Turbogenerador de Vapor (TV)[666].

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[662] Dúplica y Réplica a la Reconvención, No. 339.
[663] Dúplica y Réplica a la Reconvención, No. 340.
[664] Dúplica y Réplica a la Reconvención, No. 364.
[665] Dúplica y Réplica a la Reconvención, No. 366.
[666] Dúplica y Réplica a la Reconvención, No. 367.

802. A tal efecto, se refiere al Dictamen Complementario del Perito Cámara quien señala que: "*en el informe No. K3323-95B-19, se ha podido comprobar que el incumplimiento a los Valores Garantizados no se debió a degradación en las Turbinas de Gas, por lo que la intención del Contratista en su aplicación, simplemente resultaría en obtener una tolerancia adicional ante el incumplimiento de los Valores Garantizados*"[667].

803. También, en relación con el argumento de que las Penalidades impuestas por la Comisión fueron calculadas conforme al Primer Informe, la CFE aclara que la nota que identifica erróneamente en el encabezado con carácter de "*Preliminar*" es parte de un formato para el Acta de Aceptación Provisional, elaborado por un tercero, ajeno completamente a quien elaboró el Informe LAPEM No. K3323-101-19 del 14 de agosto de 2019. Lo anterior, hace evidente la increíble manipulación de la información realizada por el Contratista[668].

804. Señala que ni el Informe LAPEM No. K3323-101-19 del 14 de agosto de 2019, ni el Informe LAPEM No. K3323-105-19 del 14 de agosto de 2019, en su mismo contenido, refieren a los resultados obtenidos como "*Preliminares*". Muy por el contrario, el Informe LAPEM No. K3323-105-19 del 14 de agosto de 2019, en todo momento da un carácter de "*definitivo*" a los resultados, como puede constatarse en el numeral 7 Conclusiones del mismo Informe[669].

805. Agrega que con respecto a los argumentos esgrimidos por la Demandante en el Memorial de Réplica, en los que alega que supuestamente no se consideraron ciertas normas que se encuentran contempladas en el Procedimiento de Pruebas No. EMP-UEDF-YYY-OP-01201, afirmando que no fueron aplicadas en el Informe LAPEM K3323-105-19 como se establece en la sección 4 del mismo Informe, advierte que la sección 4 del informe indica que el documento aplicable a las Pruebas de Desempeño en primera instancia es el procedimiento EMP-UEDF-YYY-OP01201, por lo que si este procedimiento

[667] Dúplica y Réplica a la Reconvención, No. 368.
[668] Dúplica y Réplica a la Reconvención, No. 380.
[669] Dúplica y Réplica a la Reconvención, No. 381.

contempla la aplicación de dicha normativa, por ende, los resultados del informe LAPEM K3323-105-19 contemplan de igual modo su aplicación[670].

806. Sostiene que es impensable que un Informe entregado casi dos años después pueda ser considerado como válido para aplicar los descuentos a los que el Contratista se ha hecho acreedor, máxime que de las aclaraciones realizadas por la Comisión, el Contratista carece de sustento técnico, fáctico y jurídico para sostener que el Informe LAPEM K3323-105-19 del 14 de agosto de 2019 no sea válido[671].

807. Por todo lo anterior, la Comisión concluye que[672]:

- Los Informes LAPEM K3323-101-19 y LAPEM K3323-105-19 del 14 de agosto de 2019 tienen carácter de definitivo (final).
- Los Informes LAPEM K3323101-19 y LAPEM K3323-105-19 contemplan toda la Normativa aplicable en el Procedimiento de Pruebas EMP-UEDF-YYY-OP-01201, toda vez que, tal como puede ser constatado en la sección 4 del Informe, al considerar como principal documento aplicable dicho Procedimiento y toda la normativa ahí contenida también resulta aplicable en los resultados de los Informes en cita.
- Teniendo en cuenta que LAPEM es un Laboratorio acreditado para realizar este tipo de Pruebas los resultados obtenidos en el Informe LAPEM K3323-105-19 del 14 de agosto de 2019 son completamente válidos técnicamente y legalmente.
- Por lo anterior, la Comisión y el Perito Lorenzo José Cámara Anzures demostraron fehacientemente que los descuentos aplicados con base en informes señalados supra deben considerarse correctos, resultando un descuento por incumplimiento a la Capacidad Neta Garantizada de US$ 370,048.43 (Trescientos setenta mil cuarenta y ocho dólares americanos 43/100 cy), US$ 3’623,871.88 (Tres millones seiscientos veintitrés mil ochocientos setenta y un dólares americanos 88/100 cy)

[670] Dúplica y Réplica a la Reconvención, No. 384.
[671] Dúplica y Réplica a la Reconvención, No.388.
[672] Dúplica y Réplica a la Reconvención, No. 389.

por incumplimiento al Consumo Térmico Unitario Neto Medio Pesado Garantizado del Proyecto y por Consumo Garantizado de Hidrógeno del Proyecto por la cantidad de US$ 2,009.79 (dos mil nueve dólares americanos 79/100 cy)**.**

#### 12.1.4.3 Consideraciones del Tribunal

808. En el presente caso la discusión entre las Partes versa sobre si son o no aplicables a las Pruebas de Desempeño las curvas de degradación, previstas por Siemens en el documento GT PERF TEST SPEC- EMPALME 2, que aparece como parte del Procedimiento de Pruebas de Desempeño, Anexo VIIIA. Dicho documento es aplicable entre el Fabricante (Siemens) y DUNOR, pero la pregunta es si el mismo debe aplicarse en la relación entre DUNOR y la CFE.

809. En primer lugar, el Tribunal debe analizar lo que dispone el Contrato, para posteriormente revisar si por la inclusión del Anexo VIII A en el Procedimiento de Pruebas de Desempeño, existió una modificación del Contrato; en caso contrario, cuál es el alcance del Procedimiento de Pruebas de Desempeño y la consecuencia de que se haya incluido el documento de Siemens a que se ha hecho referencia que incluye las curvas de degradación y, finalmente, si existen otras razones por las cuales se deben aplicar las curvas de degradación contenidas en dicho Anexo.

810. En cuanto al contenido del Contrato, se aprecia que el Anexo 13 del mismo, que regula las pruebas de desempeño, establece lo siguiente[673]:

> *"No se acepta aplicar curvas por envejecimiento y/o ensuciamiento, por lo cual los valores garantizados deben considerar la degradación de los equipos que pudiera existir por las etapas de Pruebas de Puesta en Servicio y las Pruebas de Operación previas a las Pruebas de Desempeño" (se subraya).*

Igualmente se dispuso en dicho Anexo que:

> *"Las correcciones al Consumo Térmico Unitario y a la Capacidad Neta que resulten de las Pruebas por condiciones diferentes a las de diseño o garantizadas*

[673] Doc. C-14.

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*deben ser realizadas con base únicamente en las curvas de corrección proporcionadas por el Contratista en su Proposición; debiendo el Contratista desarrollar y entregar para su aprobación en el Procedimiento de Pruebas de Desempeño las ecuaciones que describan a las curvas de corrección entregadas en la Proposición, considerando que de dichas ecuaciones se deben de obtener los valores exactos de las tabulaciones entregadas también en su Proposición (con los mismos decimales y aplicando redondeo). Los Valores Garantizados deben considerar las etapas de Pruebas y de operación previas a las Pruebas de Desempeño"* (se subraya).

811. Por otra parte, el Contrato en su cláusula primera define "*Condición Nueva Limpia*" y señala que "*significa la condición de la Central al inicio de las Pruebas de Desempeño y en la cual ya se incluye la posible degradación y ensuciamiento derivado desde el primer arranque de las Unidades, Pruebas de Puesta en Servicio y Pruebas de operación; lo que implica que no se aplicarán factores por degradación y ensuciamiento a los valores de capacidad neta y CTU neto que resulten de las Pruebas de Desempeño*" (se subraya).

812. De lo anterior se desprende entonces que de acuerdo con el texto del Contrato, no se aceptarían curvas por envejecimiento o ensuciamiento, por lo cual los valores garantizados deben considerar los valores de degradación de los equipos que pudieran existir por las etapas de Pruebas de Puesta en Servicio y Pruebas de Operación. Así mismo señaló el Contrato que las correcciones, por condiciones diferentes a las de diseño o garantizadas, deben ser realizadas únicamente con las curvas de corrección de la proposición del Contratista.

813. Ahora bien, la GUÍA PARA LA ELABORACIÓN DEL PROCEDIMIENTO DE PRUEBAS DE DESEMPEÑO PROYECTOS OPF M.E.J.2.6, dispone[674]:

*"EL PRESENTE PROCEDIMIENTO DE PRUEBAS DE DESEMPEÑO:*

*"• SE PRESENTA DE MANERA INDICATIVA MAS NO LIMITATIVA.*

*"…*

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[674] R-028.

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> *"SE PRESENTA DE MANERA GENERAL, Y DEBE SER MODIFICADO DE ACUERDO A LAS PARTICULARIDADES TECNICAS, OPERATIVAS Y CONTRACTUALES APLICABLES A CADA PROYECTO (SEGÚN LO INDICADO EN LAS SECCIONES 2, 3, Y EN EL ANEXO 13 DE LA SECCIÓN 6 DE LAS BASES DE LICITACIÓN, ASI COMO LO ESTIPULADO EN EL OT-2 VALORES GARANTIZADOS Y OT-4 BALANCES TERMICOS DE LA PROPUESTA TECNICA)"*

Así mismo se indica:

> *"Las correcciones por condiciones diferentes a las garantizadas deben ser realizadas basadas en las curvas de corrección solicitadas en la Sección 3 de las Bases de Licitación y que se incluyen en el Anexo II de este Procedimiento y que forman parte del Contrato entre CFE y (nombre del Contratista)"* (se subraya).

814. De esta manera la Guía, en concordancia con el texto del Contrato y su Anexo 13, estableció que las correcciones debían hacerse con las curvas de corrección solicitadas en la sección 3 de las Bases de Licitación.

815. No sobra señalar que el Anexo 13 del Contrato dispuso que si existían discrepancias entre los códigos que se citan en dicho anexo y el anexo o la guía "*prevalecerá lo establecido en este anexo y en la guía*". Es decir la voluntad de las Partes era que lo que se había previsto en el Anexo y la Guía prevaleciera.

816. De todo lo anterior se desprende que el Contrato excluyó la aplicación de curvas de degradación y solo autorizó la aplicación de las curvas de corrección indicadas por el Contratista en su proposición. Ahora bien, dado el texto del Contrato, cabe preguntarse la razón por la cual podrían aplicarse curvas de degradación para establecer el resultado de las Pruebas de Desempeño como lo sostiene la Demandante. Lo anterior se justificaría si existiera una modificación del Contrato, o si el propio Contrato hubiera autorizado establecer una regla distinta. Aunque, es claro que no existió una modificación expresa del Contrato, dado que podría discutirse si existió una modificación tácita, considera en todo caso pertinente el Tribunal precisar si la inclusión del Anexo VIIIA en el Procedimiento de Pruebas de Desempeño implicó un cambio del Contrato.

817. En este punto es pertinente señalar que la cláusula 31.5 del Contrato dispone *"31.5 Modificaciones V Renuncias. Cualquier modificación o aclaración al presente Contrato deberá efectuarse mediante previo acuerdo por escrito*

*debidamente suscrito por cada Parte en este Contrato, de conformidad con lo establecido en el artículo 59 de la LOPSRM y en el Titulo Tercero, Capitulo Tercero, sección 111 del RLOPSRM, en lo que resulte aplicable La renuncia de cualquier estipulación del Contrato por cualquier Parte deberá hacerse por escrito. debidamente suscrita por tal Parte. haciendo referencia expresa al derecho a que dicha Parte renuncia, así como a la Cláusula del presente Contrato en la cual se consigna dicho derecho"*.

818. Es pertinente advertir que de conformidad con la cláusula primera del Contrato, "*'Contrato' significa el presente Contrato de Obra Pública Financiada a Precio Alzado, incluyendo todos los Anexos que se adjuntan al mismo (que constituyen parte integrante del presente Contrato), así como todas las enmiendas que se hagan al mismo de conformidad con sus términos*".

819. De esta manera, de conformidad con las cláusulas 1ª y 31.5 del Contrato, cualquier modificación del Contrato debía hacerse mediante previo acuerdo por escrito suscrito por cada parte, lo cual incluye el Anexo 13, en la medida en que el mismo es parte del Contrato.

820. Desde esta perspectiva lo que debe determinarse es si la aprobación del Procedimiento de la Prueba de Desempeño por parte de la CFE, en cuanto contiene el Anexo VIII A que incluye curvas por degradación para la Prueba de Desempeño, podría llegarse a considerar una modificación del contrato, para lo cual se requeriría a la luz del propio contrato que existiera un acuerdo por escrito debidamente firmado.

821. A juicio del Tribunal una estipulación como la que se dispuso en la cláusula 31.5 busca evitar que el contrato sea modificado por quienes no tienen la competencia o facultad de celebrarlo y además asegurarse que exista claridad sobre las modificaciones del Contrato.

822. Desde esta perspectiva, se observa que no se ha acreditado una modificación formal al Contrato y no encuentra probado el Tribunal en el expediente que quien autorizó el procedimiento presentado por el contratista estaba facultado para celebrar contratos a nombre de la CFE. Lo anterior lleva al Tribunal a concluir que no existió una modificación al Contrato.

823. A lo anterior vale la pena agregar que las Partes suscribieron tres Convenios Modificatorios, que ha invocado la Demandada para oponerse a la aplicación de las curvas de degradación.

824. A tal efecto, el Tribunal considera pertinente examinar el Segundo y Tercer Convenio Modificatorios. Lo primero que debe observarse es que la CFE invoca la cláusula tercera de dichos convenios en la cual se incluye una renuncia por parte del contratista "*para obtener una nueva prórroga derivado de las mismas causas que dieron al presente Convenio*". Como se puede apreciar, dicha cláusula no tiene relevancia para la controversia sobre la aplicación de las curvas de degradación pues la renuncia que contiene se refiere a la posibilidad de solicitar una prórroga.

825. Por otra parte, es pertinente hacer referencia a la cláusula cuarta de dichos Convenios cuyo contenido es prácticamente idéntico. A tal efecto la cláusula cuarta del Segundo Convenio Modificatorio del 23 de noviembre de 2018[675] establece que "*Salvo lo expresamente modificado en el presente Convenio, las Partes reconocen que el Contrato mantienen todas y cada una de sus estipulaciones y Cláusulas en pleno vigor y efecto*" (el Tercer Convenio Modificatorio[676] agrega la siguiente expresión después de la palabra "Contrato": "*y los Convenios Modificatorios 1 y 2*"). De esta manera, de conformidad con dicha estipulación, el Contrato continua como con pleno vigor y efecto.

826. Por consiguiente, antes de que se realizaran las Pruebas de Desempeño, cuando se suscribió el Segundo Convenio Modificatorio, y después de ellas, cuando se firmó el Tercer Convenio Modificatorio, las Partes ratificaron la fuerza obligatoria del Contrato, lo que incluye el Anexo 13, y por consiguiente, la regla contenida en el mismo de que sólo serían aplicables las curvas incluidas en la proposición, y que no serían aplicables las curvas de degradación o ensuciamiento. De esta manera, las Partes reafirmaron que el Contrato no había sido modificado, salvo en lo previsto en los Convenios Modificatorios.

[675] Anexo Doc. C-004.

[676] Anexo Doc.-005.

827. Por otra parte, ha de examinarse el Procedimiento para la Prueba de Desempeño, pues la Demandante ha insistido que este era el mecanismo para regular las Pruebas de Desempeño y que ahí fue incluida la aplicación de las curvas por degradación.

828. En este punto debe observarse que el Procedimiento de las Pruebas de Desempeño fue aprobado por comunicación CSPPS/CCEII-0411/2019 de fecha 2 de julio del 2019. Dicho procedimiento incluyó un anexo titulado Procedimientos de Pruebas de Desempeño de Suministradores Principales, proveniente de Siemens. Ahora bien, a este respecto se observa que en este Anexo, que se numera VIIIA se hace referencia a las curvas de degradación. En todo caso debe destacarse que dentro del texto del procedimiento mismo no se incluye ninguna referencia a la aplicación de las curvas de degradación, ni tampoco referencia expresa a la aplicación del citado Anexo. En efecto, en el Procedimiento de Pruebas de Desempeño aprobado por la CFE se encuentra en el numeral 7.8.1 lo siguiente[677]:

> *"A fin de poder determinar que la Central cumple con los Valores Garantizados, es necesario aplicar las correcciones correspondientes a los valores obtenidos de la Prueba de Desempeño; es decir llevar estos valores obtenidos a las a Condiciones de Diseño de Verano y verificar que dichos valores son equivalentes o mejores a los garantizados.*
>
> *"Para poder verificar que la Central es capaz de cumplir los Valores Garantizados será necesario obtener los factores de corrección de las Curvas de Corrección Garantizadas, las cuales fueron entregadas en su Propuesta/Proposición Técnica y se incluyen en el Anexo II de este Procedimiento.*
>
> *"Para obtener los factores de corrección por cada variable que interviene en el desempeño de la Central (indicadas en las Curvas de Corrección) se aplicarán los procedimientos listados más adelante, mientras que para determinar el factor de corrección total se aplicará la metodología indicada en los ejemplos de validación incluidos en el OT-2 de la Proposición Técnica.*
>
> *Temperatura Ambiente/Temperatura de Bulbo Seco*

[677] Anexo C-144.

*b) Humedad relativa*

*c) Presión atmosférica/presión barométrica*

*d) Poder Calorífico/Relación C/H*

*e) Factor de Potencia*

*f) Temperatura de Agua de Mar*

*g) Toda corrección aplicable, según las Curvas de Corrección Garantizadas que se indican en este procedimiento"* (se subraya).

829. En el procedimiento igualmente se agrega lo siguiente:

*"ANEXO II: VALORES DE CORRECCIÓN, CURVAS GARANTIZADAS Y*

*EJEMPLOS DE FORMULAS DE CORRECCIÓN*

*IIA-Valores de corrección del Contrato Documento OT-2*

*IIB-Curvas Garantizadas de corrección del Contrato Documento OT-2*

*IIC-Ejemplos de Formulas de corrección del Contrato Documento OT-2".*

830. Destaca el Tribunal que en texto mismo del Procedimiento[678] expresamente se indicó que para verificar los Valores Garantizados se aplicarían los factores de corrección de las Curvas de Corrección Garantizadas, las cuales fueron entregadas en la Propuesta/Proposición Técnica y se incluyen en el Anexo II de este Procedimiento. A la luz de lo anterior, es lógico concluir que si la voluntad de quienes redactaron el procedimiento fuera que se aplicaran las curvas de degradación incluidas en el documento de Siemens, así lo hubieran indicado. A lo anterior se agrega que en la carátula del documento de Siemens se incluye lo siguiente: "*Nota 1: referencia*", lo cual genera la duda del alcance que se quiso dar a dicho documento, cuyo contenido es el procedimiento de pruebas de desempeño y no solo la aplicación de las curvas de degradación.

[678] Anexo C-144.

831. De este modo, si bien en el Procedimiento de Pruebas de Desempeño se agregó el Anexo VIII A, que contempla la aplicación de curvas de degradación, y dicho Procedimiento fue aprobado por la CFE, para el Tribunal ello no implicó una modificación de la regla contractual que impedía aplicar curvas de degradación por las siguientes razones: no existió modificación del Contrato como lo exigía la cláusula 31.5 del mismo; por el Segundo y Tercer Convenio Modificatorios las Partes mantuvieron las estipulaciones del Contrato tal como fue celebrado, y por consiguiente, el Anexo 13; dentro del texto mismo del Procedimiento de Pruebas no se hizo referencia a la aplicación de curvas por degradación, y el anexo fue identificado como de referencia.

832. Por otra parte, es pertinente advertir que en este punto las Partes han discutido cuál es el concepto de condición nueva y limpia que se debe tomar en cuenta para las pruebas de desempeño. A este respecto es pertinente señalar que en el Contrato las Partes definieron la "*Condición Nueva Limpia*" y al efecto señalaron "*significa la condición de la Central al inicio de las Pruebas de Desempeño y en la cual ya se incluye la posible degradación y ensuciamiento derivado desde el primer arranque de las Unidades, Pruebas de Puesta en Servicio y Pruebas de operación; lo que implica que no se aplicarán factores por degradación y ensuciamiento a los valores de capacidad neta y CTU neto que resulten de las Pruebas de Desempeño*." Ahora bien, en el Anexo VIIIA incorporado al Procedimiento de Pruebas de Desempeño se estableció en el numeral 4.1. que la Prueba de Desempeño debía realizarse lo más rápido posible después de la sincronización inicial, cuando la unidad esté en la Condición Nueva y Limpia. Dicho anexo define la Condición Nueva y Limpia precisando que es la que ha acumulado menos de 600 horas base equivalentes. La Demandante considera que es esta la definición que debe aplicarse.

833. A este respecto lo primero que debe destacarse es que al definir el Contrato la condición "*Nueva y Limpia*" se pactó expresamente que no se aplicarían curvas de degradación o ensuciamiento. Si de acuerdo con la definición del Anexo VIII la unidad en condición nueva y limpia es la que tiene menos de 600 horas de operación, y a ella no se le aplican las curvas por degradación, es claro que cuando las Partes estipularon expresamente que no se aplicarían factores por degradación o ensuciamiento, estaban considerando la posibilidad de que la

unidad tuviera más de 600 horas, pues de otra manera, no era necesario pactar expresamente que no se aplicarían factores de degradación o ensuciamiento, pues ello derivaba de la condición nueva y limpia en los términos del fabricante. Es decir la interpretación que asimila la condición nueva y limpia del contrato a la del fabricante conduce a privar de efectos una parte de la estipulación contractual, lo cual es contrario al criterio que señala el artículo 1853 del CCF, de conformidad con el cual *"(s)i alguna cláusula de los contratos admitiere diversos sentidos, deberá entenderse en el más adecuado para que produzca efecto*".

834. A lo anterior vale la pena agregar que según lo indica la Demandante, existió una gran diferencia entre las horas que las Partes habían previsto y las horas en que efectivamente las turbinas estuvieron en operación. En efecto, en su Demanda, la Demandante presenta el siguiente cuadro que "*acredita el número total de horas que permanecieron en funcionamiento las turbinas de gas*:

| *Turbinas de Gas (TG)* | *Previsión de EBH* | *EBH reales* |
|---|---|---|
| *TG21* | *1110'7 h* | *3690 h* |
| *TG22* | *1111'2 h* | *3470 h* |

*(*) EBH se refiere a "Equivalent Base Hours", esto es, las Horas de Fuego Equivalentes. Información extraída del DCS.339*
*(*) La Previsión de EBH se refiere a las horas estimadas en el Programa realizado por las Partes el 6 de septiembre de 2018"*[679].

835. Como se aprecia, las Partes habían previsto en el programa de 2018 que las turbinas tendrían 1110'7 y 1111'2 horas base equivalentes cuando se hiciera la prueba. En la fecha en que las Partes hicieron esa previsión no se había incorporado el Anexo VIIIA por lo que se aplicaba la definición del Contrato y el Contratista asumía el desgaste de las horas que se contabilizaran. Es decir, la previsión de las Partes en ese momento es que el Contratista asumiría el desgaste correspondiente a 1110'7 y 1111'2 horas base equivalentes. Lo anterior por cuanto en noviembre de 2018 se firmó el Segundo Convenio Modificatorio, en el cual se mantuvo la regla contractual. Ahora bien, si se aplica

[679] Demanda, párrafo 237.

la noción de nueva y limpia del Anexo VIIIA, se encuentra que a diferencia de lo que habían previsto las Partes en 2018, esto es que las turbinas tendrían más de 1110 horas de operación cuando se hicieran las Pruebas de Desempeño y las que debía asumir el Contratista según el Contrato, por la aplicación de la definición de nueva y limpia del Anexo VIIIA el Contratista no asumiría dichas horas, lo que no encuentra el Tribunal que se ajuste a lo que las Partes habían previsto.

836. Es pertinente señalar que la Demandante también ha invocado que la Guía para la elaboración del Procedimiento de Pruebas de Desempeño[680] señala que "*EL PRESENTE PROCEDIMIENTO DE PRUEBAS DE DESEMPEÑO: • SE PRESENTA DE MANERA INDICATIVA MAS NO LIMITATIVA…• SE PRESENTA DE MANERA GENERAL, Y DEBE SER MODIFICADO DE ACUERDO A LAS PARTICULARIDADES TECNICAS, OPERATIVAS Y CONTRACTUALES APLICABLES A CADA PROYECTO (SEGÚN LO INDICADO EN LAS SECCIONES 2, 3, Y EN EL ANEXO 13 DE LA SECCIÓN 6 DE LAS BASES DE LICITACIÓN, ASI COMO LO ESTIPULADO EN EL OT-2 VALORES GARANTIZADOS Y OT-4 BALANCES TERMICOS DE LA PROPUESTA TECNICA)*".

837. Al respecto se aprecia que, si bien procedimiento que se contiene en la Guía se presenta de manera indicativa y puede ser modificado de acuerdo con las particularidades de cada proyecto, en todo caso se hace referencia a que ello es "*SEGÚN LO INDICADO EN LAS SECCIONES 2, 3, Y EN EL ANEXO 13 DE LA SECCIÓN 6 DE LAS BASES DE LICITACIÓN*", es decir, que debe cumplirse el Anexo 13. Por consiguiente, no se puede afirmar que en el Procedimiento de Pruebas de Desempeño se puede modificar lo pactado por las Partes.

838. Por otro lado, se ha invocado que lo dispuesto en el Anexo VIIIA que se incorporó al procedimiento de pruebas de desempeño es un desarrollo de los códigos ASME a los que se refiere el Anexo 13.

839. A tal efecto se aprecia que el Anexo 13 señala lo siguiente:

[680] Anexo R-028.

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*"Las Pruebas de Desempeño deben ser efectuadas de acuerdo a la Guía M, E, J 2.6 y pudiendo tomar únicamente los códigos, más adelante listados, de acuerdo su última edición a la fecha de realización de la prueba, para lo cual el Contratista debe proporcionar para la aprobación de la Comisión 16 (dieciséis) Semanas antes del inicio de las Pruebas de Desempeño el Procedimiento de Pruebas, deberá de estar aprobado por la Comisión al menos 2 (dos) semanas antes del inicio de las Pruebas conforme al Programa presentado por el Contratista.*

| | |
|---|---|
| *ASME PTC 19.1* | *Cálculo de Incertidumbres* |
| *ASME PTC 19.2al 19.17* | *Incertidumbre de medición de Instrumentos y Aparatos.* |
| *Métodos 1 y 5 del EPA* | *U.S.A Environmental Protection Agency* |
| *Métodos 6, 7E, 8 y 26 de EPA* | *U.S.A Environmental Protection Agency* |
| *ASME PTC 46* | *Overall Plant Perfomance* |
| *Método 1 y 2 del EPA* | *Environmental Association"* |

840. Es de destacar que en el Anexo 13 también se dijo:

> *"En caso de discrepancia entre lo indicado en los códigos antes citados y lo establecido en este anexo 13.0 y/o la Guía M, E, J 2.6, prevalecerá lo establecido en este anexo y en la guía. Como se mencionó anteriormente 2(dos) semanas de anterioridad, se deberá entregar el Procedimiento definitivo, ya aprobado por la Comisión"* (se subraya).

841. Como se puede apreciar, el Procedimiento expresamente establece que si hay discrepancia entre los códigos y el Anexo 13 prevalecerá este último. Por consiguiente, si el Anexo 13 establece que no se aplicarán curvas de degradación o ensuciamiento, es claro que las mismas no se pueden aplicar so pretexto que ellas desarrollan un código ASME.

842. Por otra parte se ha invocado por DUNOR también la cláusula 17.4 que dispone que *"…El Contratista no será penalizado conforme al presente Contrato por el incumplimiento de las Fechas Críticas relacionadas con la sincronización de la Central en la medida en que dicho incumplimiento fuere el resultado de que*

*la Comisión no reciba la energía generada en las Pruebas, a menos que dicha no recepción fuera causada por el Contratista, y se entenderá que el Contratista ha cumplido con las Fechas Criticas para la sincronización de la Central*." Expresa entonces la Demandante que sería penalizar al contratista si no se aplican las curvas de degradación.

843. A este respecto debe observarse que, desde la perspectiva del Contrato, las penalizaciones contempladas en el mismo son las penas que prevé el propio Contrato. A tal efecto la cláusula 12.6 dispone

> *"2.6 Penas Convencionales por Atrasos. Si la Aceptación Provisional de la Central ocurre después de la Fecha Programada de Aceptación Provisional correspondiente, conforme al Programa de Ejecución pactado, por causas imputables al Contratista, donde el retraso no se deba a un acto u omisión de la Comisión, a un Evento de Incumplimiento de la Comisión o Caso Fortuito o de Fuerza Mayor, el Contratista deberá pagar a la Comisión, como pena convencional por el retraso, una cantidad calculada mediante la aplicación de los porcentajes para los periodos indicados a continuación, a la porción del Precio del Contrato atribuible a la Central retrasada, en la inteligencia de que la cantidad máxima agregada pagadera conforme a esta Cláusula 12.6 respecto al atraso en alcanzar la Aceptación Provisional no será mayor al monto de la Garantía de Cumplimiento, de conformidad con el Anexo 3, párrafo B;"* (se subraya).

844. Así entendido, una cosa es una penalización y otra la aplicación o no de una curva de degradación. La no aplicación de una curva de degradación no es una penalización sino un riesgo que asumió el contratista, por lo que el argumento indicado no puede prosperar.

845. Ahora cabe la pregunta de si en todo caso las curvas por degradación del Anexo VIIIA del Procedimiento de Pruebas de Desempeño deben aplicarse en virtud del principio que prohíbe volver contra los propios actos en detrimento de la buena fe. Es decir que por haberse aprobado el Procedimiento de Pruebas de Desempeño que incorporaba el Anexo VIIIA, no aplicar las curvas de degradación constituiría volver contra los propios actos de la CFE.

846. A este respecto es pertinente señalar que la prohibición de volver sobre los propios actos se funda en la buena fe, que como ha señala la jurisprudencia

mexicana[681] *"… como principio general de derecho, la buena fe es una regla de conducta que exige a las personas de derecho una lealtad y honestidad que excluya toda intención maliciosa. Implica un deber de actuar con coherencia y observar en el futuro la conducta que los actos propios hacían prever*". Así mismo ha dicho que el principio de la buena fe "*implica que las partes de una relación contractual deben comportarse en forma transparente y coherente de modo tal que, cuando una de ellas, con su proceder ha suscitado la confianza de la otra con relación a su actuación futura, no debe defraudar dicha confianza*".

847. Para que se aplique la prohibición de volver sobre los actos propios la jurisprudencia mexicana ha exigido los siguientes requisitos: a) Una conducta jurídicamente anterior, relevante y eficaz . . . que sea trascendental, relevante. . . . b) Un comportamiento posterior contradictorio que afecta las expectativas que surgen del anterior . . . esta conducta importa ejercer una pretensión que en otro contexto es lícita, pero resulta inadmisible por ser contradictoria con la primera. . . . c) La identidad del sujeto o centros de interés que se vinculan en ambas conductas[682]. Los Principios UNIDROIT sobre los Contratos Comerciales Internacionales también se refieren a este principio en el artículo 1.8 que señala "*Una parte no puede actuar en contradicción a un entendimiento que ella ha suscitado en su contraparte y conforme al cual esta última ha actuado razonablemente en consecuencia y en su desventaja*" (se subraya)[683]. De esta manera, lo que justifica la aplicación de esta doctrina es la traición a la buena fe, a la confianza que una persona ha depositado en el actuar de una parte, que después se contradice. La aplicación de esta doctrina entonces supone siempre que una conducta de una parte haya dado lugar a una confianza particular y normalmente a una actuación de la otra fundada en la conducta de la primera. Así ocurre, por ejemplo, cuando en la ejecución de un contrato el Contratista advierte que se ha desviado de las especificaciones y la otra parte le manifiesta

[681] Doc. C-143, Amparo Directo 614/2011 de 8 de diciembre de 2011, Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Citado en la Demanda, párrafo 268.

[682] Doc. C-143, Amparo Directo 614/2011 de 8 de diciembre de 2011, Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Citado en la Demanda, párrafo 268.

[683] Anexo C-141.

o le hace entender que ello no genera reparo, y posteriormente cuando termina la obra, le reclama la sanción por incumplimiento. En este caso la prohibición de volver contra los actos propios aplica, porque si el Contratante le hubiera indicado al Contratista que no aceptaba el incumplimiento, este habría tomado en cuenta dicha manifestación para adoptar las medidas apropiadas, como, por ejemplo, corregir el defecto en la construcción o buscar un acuerdo con el Contratante.

848. En el presente caso no encuentra el Tribunal que se presente esta situación, pues la aprobación del Procedimiento de Pruebas de Desempeño, con la inclusión del Anexo VIIIA no generó ninguna conducta del Contratista por razón de dicho Anexo. En efecto, si el Anexo no se hubiera incluido en todo caso se habría de realizar la Prueba de Desempeño en las condiciones en que se encontraban las turbinas, como finalmente se realizó.

849. Ahora bien, en la medida en que no son aplicables las curvas de degradación debe el Tribunal analizar el otro argumento de DUNOR, esto es, que la Comisión determinó el resultado de las pruebas de desempeño con un "*informe preliminar*", y que el informe que se ha presentado al inicio de este arbitraje por la Demandante es el que debe tomarse en cuenta para determinar los descuentos aplicables.

850. Al respecto, para claridad, es pertinente destacar que en su réplica DUNOR señala[684] que los descuentos que realizó la CFE se hicieron con base en el Informe LAPEM K3323-105-19. Advierte que la CFE indica que dichas penalizaciones fueron calculadas con base en el Informe LAPEM K3323-101-19, incluido en el Acta de Aceptación Provisional y no conforme al Informe LAPEM K3323-105-19[685]. A tal efecto señala la Demandante que el Informe LAPEM K3323-101-19 es un mero resumen del Informe LAPEM K3323-105-19.

851. Ahora bien, la Demandante ha sostenido que el Informe que tuvo en cuenta la CFE es de carácter preliminar, por lo que el resultado puede ser revisado, y en todo caso dicho informe no es correcto.

[684] Réplica, párrafo 355.

[685] Contestación de CFE, párrafo 237.

852. A este respecto debe observarse que el Perito Cámara al referirse al Informe tomado en cuenta por la CFE señala en su primer informe lo siguiente[686]: "*Sin embargo, es necesario mencionar que dicho informe fue solicitado directamente por la Comisión a LAPEM debido que el Contratista no presentó en ningún momento el Informe de Resultados de las Pruebas de Desempeño sin la aplicación de correcciones por las Curvas de Degradación*".

853. Observa el Tribunal que el documento que se incorpora en el Acta de Aceptación Provisional como resultado de las pruebas de desempeño es el oficio No K3323/101/19 en el cual se hace referencia al atestiguamiento de las pruebas de desempeño y a los resultados. En la parte superior de dicho documento se indica: "*Reporte de Prueba de desempeño (TG-1, TG-2 y TV) y garantías (preliminar)*". Al respecto señala la CFE que "*la nota que identifica erróneamente en el encabezado con carácter de 'Preliminar' es parte de un formato para el Acta de Aceptación Provisional, elaborado por un tercero, ajeno completamente a quien elaboró el Informe*"[687].

854. En relación con este punto encuentra el Tribunal al examinar el documento, que la calificación de "*preliminar*" que se le dio al Reporte de Prueba de Desempeño, no se le otorgó al Acta misma, pues ella es de la Aceptación Provisional, ni hasta donde el Tribunal aprecia a ningún otro documento incorporado a la citada Acta. Así mismo el Informe de LAPEM tampoco está calificado como "*Preliminar*". Lo anterior indica que la calificación se le otorgó al Informe por quien elaboró el Acta y en principio fue aceptada por la Comisión y por DUNOR, que la firmaron. Es pertinente agregar que el Perito Cámara expresa que "*en aquel momento el informe LAPEM No. K3323-101-19 del 14 de agosto de 2019 solicitado por la Comisión, tenía carácter de 'preliminar' ya que se encontraba a la espera del análisis del gas, que estaba siendo analizado*"[688]

[686] Primer Informe, párrafo 492.

[687] Dúplica y Réplica de la CFE, párrafo 380.

[688] Primer Informe, párrafo 500.

y fue cuando se contó con el análisis que LAPEM ratificó el resultado de las pruebas[689].

855. A lo anterior se agrega que en el Procedimiento de la Pruebas de Desempeño se había señalado[690] que *"(u)na vez terminadas la Prueba de Desempeño, DUNOR y conforme a lo acordado en la minuta de inicio de la Prueba de Desempeño DUNOR entregará un reporte preliminar de los resultados obtenidos de la Prueba de Desempeño*" (se subraya) y se agrega "*Una vez que se tenga el análisis de laboratorio del Combustible, estos datos se utilizarán para generar el Reporte final de la Prueba de Desempeño…*". De esta manera, el Procedimiento de la Prueba de Desempeño había previsto la existencia de un reporte preliminar.

856. Lo anterior indica que el Informe que se incorporó en el Acta de Aceptación Provisional realmente tenía carácter preliminar.

857. Ahora bien, teniendo en cuenta lo que indica el Perito Cámara posteriormente, cuando se contó con el análisis cromatográfico se expidió el Informe LAPEM K3323-105-19[691]. En el texto de este informe que obra en el expediente no se indica expresamente que el mismo es preliminar[692]. Tampoco se desprende de su redacción que sea preliminar, pues el informe concluye que la potencia es menor a la capacidad garantizada y el consumo término unitario es mayor al valor garantizado.

858. Ahora bien, con la Demanda el Demandante presentó el informe LAPEM K3323-95A 2019 emitido el 30 de octubre de 2019 sobre las Pruebas de Desempeño. La Demandada considera que este Informe no se puede tomar en cuenta porque ello implicaría "*solapar flagrantes incumplimientos contractuales, pues la CFE solicitó entregar en reiteradas ocasiones informes sin considerar degradación, lo que no fue atendido*"[693]. Agrega que es "*impensable que un*

[689] Primer Informe, párrafo 501.

[690] Doc-144, p. 25.

[691] Primer Informe, párrafo 501.

[692] Anexo R-129.

[693] Dúplica y Réplica de la CFE, párrafo 385.

*Informe entregado casi dos años después pueda ser considerado como válido para aplicar los descuentos a los que el Contratista se ha hecho acreedor, máxime que, de las aclaraciones realizadas por la Comisión, el Contratista carece de sustento técnico, fáctico y jurídico para sostener que el Informe LAPEM K3323-105-19 del 14 de agosto de 2019 no sea válido*".

859. De esta manera son dos las razones por las que la CFE considera que no se puede tomar en cuenta el informe de LAPEM K3323-95A 2019 emitido el 30 de octubre de 2019, de una parte, su carácter extemporáneo y de la otra, que no hay razón para sostener que el informe inicial no sea válido.

860. En cuanto a su carácter extemporáneo debe observarse que el Anexo 5[694] del Contrato, relativo a la Información Técnica Requerida después de la firma del Contrato, establece en su numeral 5.8 Manual de Pruebas y Puesta en servicio, que dicho Manual debe contener, entre otros documentos, los reportes de la Prueba de Desempeño que se deben entregarse a más tardar cuatro (4) semanas después de la fecha de la Aceptación Provisional de la Central, es decir, el 11 de septiembre de 2019 según indica el Perito Cámara[695]. Ahora bien, es claro que el informe que invoca DUNOR no se entregó dentro de dicho plazo, pues se acompañó a la Demanda; situación que, en principio, no podría alterar el descuento aplicado en tanto es un hecho realizado con base en el Informe K3323-101-19 según consta en la Comunicación 7B/2019/RJMN-00370 del 23 de agosto de 2019 de la CFE[696] pero que sí puede ofrecer datos importantes y objetivos respecto de las condiciones en las pruebas de desempeño de la central, que es lo que realmente interesa en relación con su operación.

861. Al respecto, considera el Tribunal que la falta de entrega oportuna del Informe hubiera podido tener un impacto en la Aceptación Provisional de la Central y en su obligación de pago, pero al ser un informe de carácter técnico y al tratarse de un documento oficial de la administración pública mexicana, calificable como "Documental Pública", que contiene un acto que se presume válido, el Tribunal

[694] Primer Informe del Perito Cámara. Anexo 92.

[695] Primero Informe del Perito Cámara, párrafo 507.

[696] Doc. C-012 7B-2019-RLMN-00370.

considera necesario ponderar el mismo, para concluir si las turbinas cumplían con las condiciones exigidas o no, cuando se hizo la prueba de desempeño.

862. Por tal motivo, resulta importante para el Tribunal examinar los Informes invocados por las Partes, respecto de los cuales no se ha predicado la invalidez de ninguno de ellos sino el carácter preliminar del primero y la extemporaneidad, pero con carácter final respecto del segundo.

863. En primer lugar, el Tribunal no pasa por alto que ambos informes se refieren a las Pruebas de Desempeño del Proyecto 333 (el Segundo Informe LAPEM simplemente habla de la Central de Ciclo Combinado) Empalme II, realizadas en julio de 2019. Y si bien el segundo informe se fecha en octubre de 2019 tuvo como información base la generada durante las pruebas desempeño.

864. Si se confronta el Informe LAPEM-K3323-105-19 del 14 de agosto de 2019[697] (en adelante el Primer Informe LAPEM), cuyas conclusiones coinciden con el K3323-101-19 que se incorporó al Acta de Aceptación Provisional[698], con el informe LAPEM-K3323-095A-19 del 30 de octubre de 2019[699] (el Segundo Informe LAPEM) se observa lo siguiente: el Primer Informe LAPEM tiene 27 hojas en el archivo .pdf en tanto que el segundo tiene 104 hojas en el archivo .pdf. Dicha diferencia corresponde a una mayor extensión en el análisis de gases, que en el Primer Informe LAPEM es de 18 páginas y en el segundo de 43 páginas. Igualmente al hecho de que en el Segundo Informe LAPEM se incluyen un acápite de curvas de corrección a diferentes niveles de carga (50%, 75% y 100%) en relación con los siguientes aspectos: capacidad neta vs presión atmosférica; consumo térmico unitario neto vs presión atmosférica; capacidad neta vs temperatura de bulbo; consumo término unitario neto vs temperatura del bulbo; capacidad neta vs humedad relativa; consumo térmico unitario neto vs humedad relativa; capacidad neta vs variación del poder calorífico inferior del combustible; consumo térmico unitario neto vs variación del poder calorífico inferior; capacidad neta vs factor de potencia; consumo térmico unitario neto vs

[697] SGI-2.

[698] Doc. C-053.

[699] SGI-4.

factor de potencia; capacidad neta vs temperatura del agua y consumo térmico unitario neto vs temperatura del agua de mar. En todos los casos se indica "*curva garantizada y aplicable en las pruebas de desempeño*". Estos análisis no se incluyeron expresamente en el Primer Informe LAPEM. No sobra señalar que en el Procedimiento de Prueba de Desempeño se dispuso "…*el Reporte final de la Prueba de Desempeño, al igual que el reporte preliminar este deberá de contar con todos los cálculos que efectúe y que den soporte al reporte presentado*"[700]. Por consiguiente, la voluntad de las Partes era que el Informe que sirviera de base contuviera todos los cálculos realizados, para verificar sus resultados.

865. El primer informe y el segundo son elaborados por técnicos distintos, sin embargo, cuentan con la aprobación del mismo Jefe de Oficina y el Visto Bueno (autorización en el caso del Segundo Informe LAPEM) del mismo Jefe de Departamento.

866. Por otra parte, hay diferencia en la referencia que se hace a documentos aplicables. En efecto, el Primer Informe LAPEM cita los siguientes:

> *"EMP-UEDF-YYY-OP-01201-0 Procedimiento Pruebas Desempeño de la central CC Empalme II*
>
> *EMP-UEDF-YYY-OP-01384 Procedimiento de prueba de consumo de agua desmineralizada CC Empalme II*
>
> *Normas*
>
> *ASME PTC 46*
>
> *AGA 3,5, Y 8*
>
> *Procedimiento de pruebas del LAPEM*
>
> *K3323201 Procedimiento para coordinar ensayos de equipos de unidades generadoras"*.

867. Por su parte el Segundo Informe LAPEM cita

[700] Anexo C-144, p. 25.

*"Normas:*

*• AGA Report No. 3 (2003) Orifice Metering of Natural Gas and Other Related Hydrocarbon Fluids.*

*• AGA Report No. 5 (2009) Natural Gas Energy Measurement.*

*• AGA Report No. 8 (2003) Compressibility Factor of Natural Gas and Other Related Hydrocarbon Gases.*

*• ASME MFC-3M-R1995 Measurement of Fluid Flow in Pipes Using Orifice, Nozzle and Venturi.*

*• ASME PTC 4.4-2008 Gas Turbine Heat Recovery Steam Generators.*

*• ASME PTC 6.2-2004 Steam Turbines in Combined Cycles.*

*• ASME PTC 19.5-2004 Flow Measurement.*

*• ASME PTC 22-2014 Gas Turbines.*

*• ASME PTC 46-1996 Overall Plant Performance.*

*Procedimientos de pruebas del LAPEM:*

*• K3323201 Para coordinar ensayos de equipos y sistemas de unidades generadoras.*

*• K3323213 Verificaciones para determinar el régimen térmico corregido y la potencia corregida en unidades de ciclo combinado o en unidades turbogas.*

*Otros documentos:*

*• EMP-UEDF-YYY-OP-01201-01_01 Procedimiento Pruebas Desempeño*

*• Datos de diseño del ciclo combinado"*.

868. Ahora bien, en las conclusiones en cuanto a los resultados en el Primer Informe LAPEM se señala:

| | Garantía kW | Prueba corregida kW | Diferencia KW |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Capacidad Neta | 761 167.00 | 790 513.83 | -653.17 |
| | Garantía kJ/kWh | Prueba corregido | Diferencia |
| CTUNMP | 6 146,60 | 6 153,97 | 7.37 |

869. En el Segundo Informe LAPEM se indica lo siguiente:

| **Descripción** | **Unidades** | **Garantía** | **Corregido** | **Diferencia** |
|---|---|---|---|---|
| **Capacidad Neta** | [MW] | 791.167 | 790.397 | -0.770 |
| **Consumo Térmico Unitario Medio Pesado** | [kJ/kWh] | 6 146.59 | 6 147.30 | 0.71 |
| | | | | |

870. En el Segundo Informe LAPEM se concluye que "*La Capacidad Neta Corregida se encuentra -0.770 MW por debajo de la garantizada, y el Consumo Térmico Unitario Neto Medio Pesado Corregido se encuentra +0.71 kJ/kWh por encima del garantizado*". Si se mira con atención, la diferencia mayor entre un informe y otro es la capacidad neta antes de la corrección, lo que resulta en una diferencia menor en el Segundo Informe LAPEM. Mientras que en el consumo Térmico Unitario es la corrección la que permite disminuir la diferencia.

871. Encuentra el Tribunal en relación con las normas que se citan en los dos informes, que el Segundo Informe LAPEM invoca más normas que el primero y que el Primer Informe LAPEM no cita todas las normas indicadas en el Procedimiento de Pruebas de Desempeño, como si lo hace el Segundo Informe

LAPEM. Ahora bien, la CFE sostiene que al referirse el Informe al Procedimiento de las Pruebas de Desempeño ha de entenderse que el Primer Informe LAPEM aplicó todas las normas contenidas en el mismo. Sobre el particular advierte el Tribunal que en todo caso el Primer Informe LAPEM cita unas normas y no hace referencia a las demás indicadas en el Procedimiento de las Pruebas de Desempeño, por lo que, si no las cita, no es posible concluir que las demás normas fueron tenidas en cuenta. Por el contrario, el Segundo Informe LAPEM cita otras, incluyendo todas las que eran aplicables de conformidad con el Procedimiento de Pruebas de Desempeño.

872. Finalmente, no sobra señalar que, si bien el Perito Cámara en la audiencia señaló que se habían verificado los cálculos del Primer Informe LAPEM, al ser preguntado "*Sí, si usted tiene dos informes técnicos en un primer informe tiene unos resultados con una normatividad de solos dos normas y, después tiene un segundo informe emitido tiempo después, pero en el que se contempla la aplicación de 12 normas. Desde el punto de vista técnico, ¿usted a cuál de los dos informes le pedirían?*" indicó que tendría que verificar el cumplimiento de los requerimientos normativos y que no descartaría el informe que no indica literalmente las normas adicionales. Al ser preguntado "*O sea, ¿no le haría caso entonces a ninguno de los dos?, ¿cuál aplicaría usted desde el punto de vista técnico?*", contestó: "*Desde el punto de vista técnico, sí, probablemente, si solamente me preguntan cuál tiene mayores condiciones en su estructura para tomarse en cuenta, el que indique las normas, correcto*"[701].

873. Por otra parte, es pertinente destacar que el perito de la CFE no cuestiona las conclusiones del Segundo Informe LAPEM, sino su extemporaneidad.

874. A este respecto en el primer informe pericial de SGI se expresa que "*si el Tribunal Arbitral declarase que no es procedente aplicar curvas de degradación, de cualquier forma se tendría que concluir que la Comisión realizó descuentos en exceso al Contratista*"[702]. Después de hacer los cálculos señala el perito:

[701] Transcripción del tercer día de audiencia 3283 a 3300.

[702] Primer Informe de SGI, página 24.

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*"Estos cálculos demuestran que los valores manifestados en el Oficio No. 7B/2019/RJMN-00370, de 23 de agosto del 2019, son incorrectos aun si no resultasen aplicables las curvas de degradación, porque:*

*"i. La penalización derivada de que la Capacidad Neta Demostrada fuese inferior a la Capacidad Neta Garantizada debería haber sido de USD $ 386,376.61 y no de USD $370,048.43, por lo que hay una diferencia de USD $ 16.318,18 a favor de la Comisión.*

*"ii. La penalización derivada de que el Consumo Térmico Unitario Neto Medio Pesado Demostrado resultase mayor al Consumo Térmico Unitario Neto Medio Pesado Garantizado debería haber sido de USD$ 348.586,92 y no de USD $ 3'623.871,88, por lo que hay una diferencia de USD $ 3'275.284,96 en perjuicio de DUNOR".*

875. El Tribunal considera pertinente el razonamiento del Perito SGI y agrega, además, que el Segundo Informe LAPEM representa con mayor detalle técnico la situación en que se encontraba la central, con independencia de la extemporaneidad del mismo. Las Partes acordaron la posibilidad de la aplicación de descuentos en el pago según la diferencia arrojada por los informes tanto en la Capacidad Neta Demostrada como en el Consumo Térmico Unitario Neto Medio Pesado Demostrado y las cantidades garantizadas. Al ser una cuestión técnica, este Tribunal utilizará el Segundo Informe LAPEM por ofrecer mayor información respecto de las normas usadas y acordadas por las Partes para el cálculo de la capacidad y consumo garantizados de la central y porque refleja con mayor precisión las condiciones reales y objetivas de la central al momento de la realización de las pruebas de desempeño.

876. Por lo anterior, considera el Tribunal que la Planta no cumplió con las cantidades garantizadas en los puntos señalados por el Informe LAPEM-K3323-095A-19 del 30 de octubre de 2019. Por tanto, el descuento derivado de los resultados de las pruebas de desempeño debe ser de US$ 348,586.92 (Trescientos cuarenta y ocho mil quinientos ochenta y seis dólares americanos 92/100 cy); por lo que la CFE realizó descuentos superiores a los que correspondían. El valor de los descuentos realizados en exceso es de US$ 3'258,966.78 (Tres millones doscientos cincuenta y ocho mil novecientos sesenta y seis dólares americanos 78/100 cy) que la CFE debe pagarle a DUNOR.

877. Es pertinente precisar que, en el presente caso, al momento de pagar el precio y aplicar el descuento, la CFE procedió con base en el informe que había obtenido, pues el que le había presentado DUNOR aplicaba las curvas de degradación, que como ya se ha señalado, no eran aplicables de conformidad con lo estipulado en el Contrato. En esta medida si bien de acuerdo con lo que se ha expuesto la CFE hizo un descuento mayor del que correspondía, su conducta con la información que en ese momento tenía no constituía un incumplimiento. Por lo anterior, no existiendo en ese momento una conducta reprochable, no procede imponerle la obligación de asumir los gastos financieros que corresponderían por un pago tardío.

### 12.1.5 Gastos Financieros Asociados a los Indebidos Descuentos Aplicados por la Comisión, al Retardo en el Pago del Precio del Contrato

#### 12.1.5.1 Posición de la Demandante

878. La Demandante señala que la cláusula 9.2 del Contrato establece los plazos en los que CFE debe pagar a DUNOR dicho Precio. Agrega que en el Contrato se establece expresamente la obligación de la Comisión de pagar los gastos financieros que se le ocasionen al Contratista si la Comisión se demora en realizar cualquier pago al que esté obligada, de conformidad con la cláusula 10.2 del Contrato[703].

879. Señala también que el Contrato establece una tasa específica – Tasa de Gastos Financieros – con la que las Partes deben indemnizarse mutuamente *"[e]n caso de que cualquier parte del Precio del Contrato, cualquier Valor de Terminación o cualquier otra cantidad pagadera de conformidad con el presente Contrato, no sea pagada una vez vencida*". Destaca entonces DUNOR que estos gastos se generan hasta la fecha de pago[704].

[703] Memorial de Demanda, No. 357-359.
[704] Memorial de Demanda, No. 360.

880. Expresa la Demandante que la Comisión ha descontado indebidamente un total de US$ 7’054,808.49 (Siete millones cincuenta y cuatro mil ochocientos ocho dólares americanos 49/100 cy) al Precio del Contrato, aplicando de manera unilateral los siguientes descuentos: i) US$ 3’060,888.18 (Tres millones sesenta mil ochocientos ochenta y ocho dólares americanos 18/100 cy) por la supuesta falta de entrega de las Partes de Repuesto, Herramientas y Equipos Especiales de los turbogeneradores de gas, y ii) US$ 3’993,920.31 (Tres millones novecientos noventa y tres mil novecientos veinte dólares americanos 31/100 cy) por la discrepancia entre los resultados obtenidos en las Pruebas de Desempeño y los Valores Garantizados en el Anexo 13 del Contrato[705].

881. Agrega que dado que la cláusula 10.2 del Contrato prevé que en caso de que cualquier cantidad pagadera, no sea pagada una vez vencida, la Parte obligada al pago deberá cubrir los gastos financieros que le haya ocasionado a la otra Parte[706].

882. Por lo anterior, afirma que la Comisión debe indemnizar a DUNOR por los daños financieros que le han ocasionado los indebidos descuentos aplicados por CFE, desde la fecha de vencimiento del Precio del Contrato (cláusula 9.2 del Contrato) hasta la fecha en que se realice el reembolso de los descuentos (cláusula 10.2 del Contrato)[707].

883. Por lo anterior, afirma que la Comisión debe indemnizar a Dunor por los daños financieros que le han ocasionado los indebidos descuentos aplicados por CFE, desde la fecha de vencimiento del Precio del Contrato (cláusula 9.2 del Contrato) hasta la fecha en que se realice el reembolso de los descuentos (cláusula 10.2 del Contrato)[708].

884. Menciona que, de manera provisional a fecha de la presentación de la Demanda, la cantidad erogada aplicando la Tasa de Gastos Financieros a las partidas de esta sección, es decir US$ 7’054,808.49 (Siete millones cincuenta y cuatro mil ochocientos ocho dólares americanos 49/100 cy) resulta en US$

[705] Memorial de Demanda, No. 363.
[706] Memorial de Demanda, No. 365.
[707] Memorial de Demanda, No. 366.
[708] Memorial de Demanda, No. 366.

197,178.06 (Ciento noventa y siete mil ciento setenta y ocho dólares americanos 06/100 cy)[709].

885. En cuanto a los Gastos Financieros Asociados al Retraso en el Pago del Precio del Contrato señala que la Demandante ha incumplido con su obligación de pagar el Precio del Contrato en el momento de la Aceptación Provisional de la Central, de conformidad con la cláusula 6.6 del Contrato[710].

886. Señala que el Precio del Contrato debe ser pagado dentro de los 20 días siguientes a la fecha posterior entre: (i) la Fecha de Aceptación Provisional o (ii) la Fecha Programada de Aceptación Provisional. Asimismo, si cualquier parte del Precio no es pagada una vez vencida, la Parte que haya incumplido con su obligación deberá pagar los gastos financieros que le haya generado a la otra Parte.

887. Expresa que, dado que la Aceptación Provisional ocurrió el 14 de agosto de 2019, esto es, después de la Fecha Programada de Aceptación Provisional (prevista para el 14 de marzo de 2019), el plazo de 20 días para pagar el Precio del Contrato venció el 3 de septiembre de 2019. Sin embargo, la Comisión no pagó el Precio del Contrato hasta el 11 de septiembre de 2019, incumpliendo en consecuencia las cláusulas 9.2 y 10.2 del Contrato[711].

888. Sostiene que, en la Respuesta a la Solicitud de Arbitraje, CFE excusa su incumplimiento en (i) la falta de entrega del Informe Final de Pruebas de Desempeño por parte del Contratista y (ii) en que las facturas emitidas por Dunor presentaban inconsistencias administrativas y fiscales. A este respecto expresa la Demandante lo siguiente[712]:

889. **Primero.** En lo que se refiere a la supuesta falta de entrega del Informe Final de Pruebas de Desempeño. Si bien la cláusula 18.5 del Contrato dispone que, "*en el caso de que las Pruebas de Desempeño demuestren incumplimiento de la CNG o del CTUNG, la Comisión tendrá el derecho de realizar los descuentos que correspondan… conforme al Anexo 13*", la Demandada fue la responsable

[709] Memorial de Demanda, No. 367.
[710] Memorial de Demanda, No. 368-369.
[711] Memorial de Demanda, No. 371.
[712] Memorial de Demanda, No. 372.

de que la ejecución de las Pruebas a la Central no se desarrollara conforme al Programa de Pruebas inicialmente previsto, por lo que la invocación de dicha cláusula no ampara en absoluto la indebida aplicación de descuentos al Precio del Contrato[713]. Igualmente, expresa que el Procedimiento de Pruebas de Desempeño entregado por Dunor y aprobado por CFE, prevé expresamente el factor de corrección por degradación en su Anexo VIIIA, Apéndice D[714].

890. **Segundo**. En lo referente a la excusa de CFE de que, al momento de presentar el comprobante fiscal para efectuar el pago del Precio se encontraron datos erróneos del receptor, destaca que las cláusulas 9.2 y 10.2 del Contrato no contemplan la modificación de los datos fiscales de la factura como causa que permita retrasar el pago del Precio del Contrato. Por ende, la Comisión no puede ampararse en ello para mantener su postura. Agrega que, en este sentido, la Comisión se basa en el artículo 128 del RLOPSRM, que dispone que "*el contratista será el único responsable de que las facturas que se presenten para su pago cumplan con los requisitos administrativos y fiscales*". Sin embargo, también dispone el citado artículo que, *"en caso de que las facturas entregadas por el contratista presenten errores o deficiencias, la entidad, dentro de los tres días hábiles siguientes al de su recepción, indicará por escrito al contratista las deficiencias que deberá corregir"*[715].

891. Agrega que el 1 de julio de 2019, Dunor entregó a CFE el primer borrador de factura del Precio del Contrato. Posteriormente, mediante varias comunicaciones escritas, Dunor volvió a hacer entrega de diversas facturas correspondientes al monto del Precio del Contrato. El receptor de todas estas facturas era CFE Generación II EPS/ CGI160330KL4. El 26 de agosto de 2019, esto es, casi un mes más tarde, DUNOR volvió a remitir diversas facturas siendo el receptor de las mismas CFE Generación II EPS[716].

892. Sostiene DUNOR que, pese a que la Comisión tuvo tiempo de sobra para revisar las facturas, 2 días antes de que venciese el plazo para pagar el Precio del Contrato, CFE solicitó a DUNOR que cambiase los datos fiscales del receptor

[713] Memorial de Demanda, No. 372 y 374.
[714] Memorial de Demanda, No. 375.
[715] Memorial de Demanda, No. 378.
[716] Memorial de Demanda, No. 379.

del comprobante fiscal. Este comportamiento supone un incumplimiento del artículo 128 del RLOPSRM antes citado, pues CFE no indicó en plazo y por escrito a DUNOR que sus facturas presentaban errores. No obstante, y como muestra de su buena fe contractual, el 2 de septiembre de 2019, DUNOR procedió a cancelar las facturas emitidas y envió las nuevas facturas actualizando los datos del receptor (CFE Generación IV E.P.S./CGI160330R94). Finalmente, CFE pagó el importe parcial de la factura el 11 de septiembre de 2019, habiendo vencido el plazo contractualmente previsto[717].

893. De esta manera, DUNOR ha soportado una serie de gastos financieros provocados por el retraso en el pago del Precio del Contrato que ascienden a US$ 368,810.25 (Trescientos sesenta y ocho mil ochocientos diez dólares americanos 25/100 cy). En vista de lo cual, de conformidad con la cláusula 10.2 del Contrato OPF, DUNOR reclama a la Demandada el pago de dichos gastos financieros[718].

894. En lo relacionado con los Gastos Financieros Asociados al Acuerdo, DUNOR sostiene que el 17 de febrero de 2020 aportó la factura asociada a la Minuta, señalando que la Comisión disponía de un plazo de 20 días para pagar a DUNOR de conformidad con la cláusula 6.1 del Acuerdo. Dicho plazo finalizó el 9 de marzo de 2020, no siendo satisfecha la factura hasta el 23 de marzo 2020. Es decir, la Comisión pagó la factura correspondiente con 14 días de retraso, incumpliendo con ello el apartado 6.1 del Acuerdo. Como consecuencia de este retraso en el pago, DUNOR ha soportado unos gastos financieros que ascienden a US$ 12,833.31 (Doce mil ochocientos treinta y tres dólares americanos 31/100 cy) y que deben ser abonados por la Comisión de conformidad con la cláusula 10.2 del Contrato[719].

895. En este punto debe señalarse que la Demandante reclama los Perjuicios Derivados del Mantenimiento de la Garantía de Cumplimiento. Sin embargo, en razón del acuerdo de las Partes de conformidad con lo manifestado por DUNOR

[717] Memorial de Demanda, No. 380.
[718] Memorial de Demanda, No. 381.
[719] Memorial de Demanda, No. 382.

el 13 de mayo de 2022 y confirmado por la CFE, dicho reclamo no está comprendido en la litis.

896. A manera de conclusión, DUNOR manifiesta que la Tasa de Gastos Financieros deberá aplicarse a los siguientes conceptos en los siguientes periodos, según expresa en su Memorial de Conclusiones[720]:

| Concepto | Fecha Inicio (diez a quo) Cómputo | Fecha ad quem provisional | Cuantificación Provisional a |
|---|---|---|---|
| Entrega de las Partes de Repuesto<br>Penalidades por las pruebas de Desempeño | 3 de septiembre 2019 | 25 de marzo de 2022 | US$ 304,090[721] |
| Retraso en el pago del Precio del Contrato | 3 de septiembre de 2019 | 11 de septiembre de 2019 | US$227,760[722] |
| Impago de la Comisión de Agencia | 8 de marzo de 2020 | 25 de marzo de 2020 | US$861.51 |

897. Adicionalmente, DUNOR, en su Memorial de Réplica, señala que CFE no niega la procedencia de pago de los Gastos Financieros, que ascienden a un total de US$ 746,976.15 (Setecientos cuarenta y seis mil novecientos setenta y seis dólares americanos 15/100 cy)[723]. Igualmente señala que la Comisión no realiza defensa alguna, ni de fondo ni de forma, sobre la procedencia del reclamo

[720] Memorial de Conclusiones de Dunor, No. 179.

[721] Doc. C-265.

[722] Doc. C-266.

[723] Réplica y Contestación Reconvención, No. 445.

de la Demandante. La única manifestación realizada es que DUNOR "*abandonó las mesas de negociación en su perjuicio y no se concluyó con la conciliación de los montos*". Al respecto, señala DUNOR que han quedado acreditadas las circunstancias que dieron lugar a que el proceso de revisión y aprobación de los costos generados por la aplicación de la cláusula 25.5 del Contrato fueran interrumpidos, las que no son imputables a DUNOR[724].

898. Agrega que DUNOR ha realizado sus mejores esfuerzos para tratar de resolver sus controversias con CFE negociándolas, pero una y otra vez los esfuerzos de DUNOR chocaban con las tácticas dilatorias de la Comisión que ha utilizado y utiliza cualquier excusa a su alcance para postergar *sine die* el pago de montos a los que está obligada.[725]

899. Expresa que tampoco queda clara la relación que existe entre el alegado abandono de las mesas de negociación y la inaplicabilidad de los Gastos Financieros. Pareciera que CFE, sin decirlo, pretende aludir a que los montos pagaderos no serían exigibles debido a este supuesto "*abandono*" de las negociaciones. Este argumento carece de lógica por cuanto supondría que solo procedería el pago de Gastos Financieros cuando la Comisión diera su beneplácito a los montos en disputa. CFE es perfecta conocedora de que adeuda cantidades a DUNOR y el hecho de que exista disputa sobre el quantum no enerva la obligación de CFE de pagar los Gastos Financieros que precisamente genera su conducta renuente en el pago. Lo anterior, alentaría conductas como la de CFE, quien, en vez de negociar de buena fe, ha intentado en todo momento eludir el cumplimiento de sus obligaciones alargando hasta lo indecible el procedimiento de negociación, esperando ahora, además, que esta conducta no venga acompañada por una condena a reembolsar a DUNOR por los Gastos Financieros previstos contractualmente[726].

900. Por último, indica que igual o más clara resulta la posición de la Comisión respecto de los Gastos Financieros asociados a: (i) los indebidos descuentos aplicados al Precio del Contrato (por la supuesta falta de entrega de las Partes de Repuesto y la no aplicación de curvas de degradación), y (ii) el retraso en el

[724] Réplica y Contestación Reconvención, No. 446.
[725] Réplica y Contestación Reconvención, No. 447.
[726] Réplica y Contestación Reconvención, No. 448.

pago del Precio del Contrato. En estas prestaciones sólo se niega la procedencia, señalando que es una pretensión accesoria de la principal, con lo que admite que dichas pretensiones serán procedentes en caso de que las principales así resulten, ya que no presenta prueba ni argumento alguno en contra de lo sostenido por la Demandante en su Memorial de Demanda[727].

#### 12.1.5.2 Posición de la Demandada

901. Por su parte, la Comisión señala que, en el Proceso para realizar el pago del Precio del Contrato, surgieron diferentes sucesos imputables al Contratista que generaron el retraso de Pago[728].

902. La Comisión precisa los diferentes comunicados que se dieron entre las Partes, en donde DUNOR principalmente solicita la emisión del CAP por considerar que ha cumplido con los requisitos de la cláusula 18.1 del Contrato[729].

903. Adicionalmente, la CFE expresa que el incumplimiento del Contratista en los Valores Garantizados, derivó a que la Comisión les manifestara su rechazo a los resultados del Informe Preliminar entregado, ya que el Procedimiento de Prueba de Desempeño aprobado por las Partes no contempla la aplicación de corrección por degradación en las Turbinas de Gas[730].

904. En cuanto al pago del Precio del Contrato, la Comisión hace referencia a la correspondencia de las Partes y señala que, tras la revisión del área de finanzas de la CFE mediante correo electrónico de 16 de agosto de 2019, emitió comentarios a las notas de crédito[731].

905. Posteriormente, el 19 de agosto de 2019, mediante escrito No. Ref. DUNOR-CFE-666, el Contratista canceló las 2 Notas de Crédito que incluían el IVA y las sustituyó por otras en las que se corrige dicha observación[732].

[727] Réplica y Contestación Reconvención, No. 449.
[728] Memorial de Contestación y Reconvención, No. 471.
[729] Memorial de Contestación y Reconvención, No. 472-476.
[730] Memorial de Contestación y Reconvención, No. 476.
[731] Memorial de Contestación y Reconvención, No. 488.
[732] Memorial de Contestación y Reconvención, No. 489.

906. Por los argumentos antes esgrimidos, la Comisión señala que, una vez que la Demandante entregó la facturas sin ningún error, CFE tuvo a bien realizar el pago del Precio del Contrato[733].

907. Ahora, en cuanto a los Gastos Financieros Asociados al Acuerdo, la Comisión indica que este rubro solo podrá correr cuando sea declarado procedente por el Tribunal. Esto, en tanto la Comisión considera que DUNOR abandonó las mesas de negociación en su perjuicio y no concluyó con la conciliación de los montos[734].

908. En relación con los Gastos Financieros Asociados a supuestos: i) retrasos del pago Precio del Contrato, y ii) los supuestos descuentos por la falta de entrega de la parte de repuesto de la Turbina, la Comisión sostiene que al declararse improcedente la pretensión principal, esta que es accesoria correría la misma suerte[735].

909. Adicionalmente, la Comisión, en su Dúplica, reitera que la Demandante no ha cumplido con la obligación de entregar a CFE los documentos necesarios que acrediten y soporten los gastos que fueron devengados. Señala que DUNOR pretende hacer creer que ha cumplido con la entrega de la información desde la presentación de su solicitud de 25 de junio de 2019[736].

910. Señala también respecto de los Gastos Financieros asociados a los supuestos indebidos descuentos aplicados por la Demandada, que, al declararse la pretensión principal, ésta, al ser accesoria, corre la misma suerte[737]. Aclara que, la Comisión no pretende aplicar descuentos, sino compensar a DUNOR los gastos razonables en los que se vio afectado, por lo que la Demandante no tiene derecho a reclamar los gastos directos e indirectos en la ejecución de obras en atraso por causas imputables a él mismo[738].

[733] Memorial de Contestación y Reconvención, No. 490.
[734] Memorial de Contestación y Reconvención, No.492.
[735] Memorial de Contestación y Reconvención, No. 493.
[736] Memorial de Contestación y Reconvención, No. 465.
[737] Memorial de Contestación y Reconvención, No. 468.
[738] Memorial de Contestación y Reconvención, No. 469.

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### 12.1.5.3 Consideraciones del Tribunal

911. Para decidir las pretensiones formuladas por la Demandante en materia de gastos financieros, considera pertinente el Tribunal, en primer lugar, determinar si existió un pago tardío del precio del Contrato y cuáles son sus consecuencias; en segundo lugar, si en razón de los descuentos realizados al precio por la Demandada, que el Tribunal ha considerado que no eran procedentes, deben reconocerse sumas adicionales por gastos financieros; en tercer lugar, si existió un pago tardío de las sumas acordadas por las Partes en virtud del Acuerdo y si deben reconocerse gastos financieros por las sumas que el Tribunal ha concluido que deben ser pagadas por la Demandada por virtud del Acuerdo, y finalmente, si procede un reconocimiento de sumas adicionales a título de indemnización y perjuicios.

#### 12.1.5.3.1 El pago tardío del precio.

912. En primer lugar, en lo que se refiere al pago tardío del precio del Contrato, encuentra el Tribunal que la cláusula 9.2 del mismo dispone lo siguiente:

> *"9.2 Pago del Precio del Contrato. El Catálogo de Valores detalla la distribución del Precio del Contrato que corresponde a la Central. Sin perjuicio de lo establecido en la LOPSRM, el Precio del Contrato será pagado de la forma especificada en la Cláusula 10, dentro de los 20 (veinte) Días siguientes a la fecha posterior de entre (i) la Fecha de Aceptación Provisional de la Central, o (ii) la Fecha Programada de Aceptación Provisional de la Central, en caso de que la Aceptación Provisional de la Central hubiera ocurrido antes de la Fecha Programada de Aceptación Provisional de la Central.*
>
> *"La Comisión pagará el Precio del Contrato que corresponda una vez que haya recibido a su satisfacción las Obras y Materiales del Contrato de la Central y éstos se encuentren en condiciones de generar los ingresos que permitan cumplir a la Comisión las obligaciones asumidas. Se entenderá que se ha cumplido este supuesto una vez que se haya llevado a cabo la Aceptación Provisional de la Central"* (se subraya).

913. De esta manera, de conformidad con la cláusula 9.2 del Contrato, el precio debe pagarse dentro de los 20 días siguientes a la fecha que sea posterior, entre la fecha de Aceptación Provisional o la Fecha Programada de Aceptación Provisional. En este punto es pertinente señalar que al definir la palabra "día", sin calificación, el Contrato señala qué es 1(un) día natural o calendario. Por consiguiente, si la Aceptación Provisional ocurrió el 14 de agosto de 2019, el pago del precio debía hacerse el 3 de septiembre de 2019.

914. Ahora bien, el pago del precio se verificó el 11 de septiembre de 2019, según expresa DUNOR en la comunicación Dunor-CFE-770 de 15 de octubre de 2019[739]. Este hecho no es controvertido por la Demandada, la que señala que el pago se retrasó por hechos imputables al Contratista[740].

915. A tal efecto, en su respuesta a la solicitud de arbitraje, la Comisión señaló que el retraso en el pago se produjo, por una parte, por el incumplimiento del Contratista en la obligación de entrega del Informe Final de Pruebas de Desempeño que permitiera determinar el monto del descuento y penas convencionales aplicables al Precio del Contrato, y por otra parte, por las inconsistencias presentadas en la factura[741].

916. Por otra parte, en su Contestación[742], la Comisión explicó que inicialmente se negó a expedir el Certificado de Aceptación Provisional porque había pendientes críticos. Así mismo, por la improcedencia de considerar curvas de degradación en el Informe preliminar de la Prueba de Desempeño. Finalmente, la CFE emitió el Certificado de Aceptación Provisional y el Contratista entregó tres notas de crédito por descuentos que debían aplicarse al pago del precio, dos de las cuales presentaban inconsistencias, por lo que una vez corregidas se procedió al pago[743].

917. Procede entonces el Tribunal a examinar los distintos argumentos expuestos por la CFE para justificar el pago tardío, teniendo en consideración que el plazo

[739] Doc C-18.
[740] Memorial de Contestación y Reconvención, No. 471.
[741] Respuesta a la Solicitud de Arbitraje, No. 31.
[742] Memorial de Contestación y Reconvención, párrafos 471 y siguientes.
[743] Memorial de Contestación y Reconvención, párrafos 486 a 490.

para el pago del precio comenzó a correr en la Fecha de Aceptación Provisional de la Central, esto es el 14 de agosto de 2019.

918. Por una parte, el Anexo 5 del Contrato relativo a la Información Técnica Requerida después de la firma del Contrato, establece en su numeral 5.8 Manual de Pruebas y Puesta en servicio que dicho Manual debe contener entre otros documentos los reportes de la Prueba de Desempeño y que dicho Manual debe entregarse a más tardar cuatro (4) semanas después de la fecha de la Aceptación Provisional de la Central, lo que corresponde al 11 de septiembre. Ahora bien, consta en el expediente que la CFE por oficio No. 742.161/JALV-080/1962 del 18 de julio de 2019[744] rechazó los resultados del Informe Preliminar enviado por DUNOR, porque el Procedimiento de Pruebas de Desempeño no contempla correcciones por curvas de degradación. En dicha comunicación la CFE solicitó enviar el Informe en apego a lo establecido en el Contrato. Finalmente, la Comisión tuvo en cuenta el oficio LAPEM No. K3323-101-19 del 14 de agosto de 2019 solicitado por la Comisión[745].

919. Teniendo en cuenta lo anterior, lo primero que advierte el Tribunal es que la discusión acerca del Informe de la Prueba de Desempeño de la Central y el rechazo del entregado por el Contratista no tuvo transcendencia desde el punto de vista del plazo para pagar el precio, en virtud de que, aunque la CFE rechazó el Informe presentado por DUNOR, finalmente emitió el Certificado de Aceptación Provisional, lo cual dio lugar a que se comenzara a contar el plazo para el pago del precio.

920. Por otra parte, en cuanto al retraso en el pago del precio por razón de la inconsistencia o el error en las notas de crédito, porque las mismas no podían incluir el IVA, se encuentra los siguiente: el 13 de agosto de 2019, mediante Oficio No. 742.161/JALV-097/19173, la CFE le informó a DUNOR el monto de los "*Descuentos por Atrasos en la Entrega de Información Técnica*", y le indicó que con la finalidad de continuar con los trámites correspondientes al pago del Precio del Contrato, el Contratista debía presentar la respectiva nota de

[744] Anexo R- 034.
[745] Contestación de la Demanda, párrafo 239.

crédito[746]. Asimismo le informó el 20 de agosto de 2019, mediante oficio No. 7B/2019/RJMN-00364174, que ante la negativa del Contratista de entregar las Partes de Repuesto Solicitadas para las Turbinas de Gas se hizo acreedor a un descuento por el retraso en la entrega y a un descuento por la no entrega de las Partes de Repuesto.

921. Ahora bien, por comunicación del 16 de agosto de 2019 la Comisión se refirió a las notas de crédito enviadas por el Contratista y le indicó que los descuentos de penas convencionales no debían incorporar el IVA[747]. El Contratista corrigió las notas de crédito el 19 de agosto teniendo en cuenta las observaciones de la Comisión[748].

922. Como se puede apreciar, entre la fecha en que se entregaron las notas de crédito corregidas, 19 de agosto de 2019, y la fecha en que debía hacerse el pago (3 de septiembre de 2019) existió un lapso suficiente para hacer el pago, por lo que la corrección de las notas de crédito no justifica el retraso en el pago.

923. Por otro lado, como se indicó, al contestar la solicitud de arbitraje la Demandada fundó el retraso en el pago de las facturas en el hecho de que DUNOR debió corregir las facturas a solicitud de la CFE.

924. Ahora bien, al confrontar las dos facturas que aporta la Demandada[749], que corresponden a la inicialmente enviada por DUNOR a la CFE y la que posteriormente se remitió para atender las observaciones de la CFE, se encuentra que la diferencia radica en que la primera factura del 26 de agosto de 2019 está dirigida a la CFE GENERACION II EPS, en tanto que la segunda factura, que es del 2 de septiembre de 2019, está dirigida a CFE GENERACION IV EPS. En el oficio correspondiente se indica que esta última factura se remite de acuerdo con lo solicitado y se expresa que se procedía a cancelar la factura original.

[746] Anexo R- 099.
[747] Anexo R-101.
[748] Anexo R-102.
[749] Anexo 008 y Anexo 009.

925. Por otra parte, la Demandante señala que previamente había enviado varias facturas anexas a las comunicaciones del 6 de julio, 9 de julio, 15 de julio y 29 de julio de 2019, todas dirigidas a CFE GENERACION II EPS sin que la CFE formulara observación al respecto[750].

926. Al respecto la Comisión señala que la Demandante pretende hacer pasar que dio cumplimiento a su obligación de remisión de las facturas desde el 1 de julio de 2019 y que CFE demoró injustificadamente en la formulación de comentarios y correcciones cuando, en realidad, aún estaban pendientes de solución múltiples cuestiones previas a la determinación del pago del precio del Contrato y los descuentos correspondientes.

927. En relación con este tema debe recordarse que el artículo 128 del RLOPSRM, dispone que "*el contratista será el único responsable de que las facturas que se presenten para su pago cumplan con los requisitos administrativos y fiscales*". Sin embargo, también dispone *que "en caso de que las facturas entregadas por el contratista presenten errores o deficiencias, la entidad, dentro de los tres días hábiles siguientes al de su recepción, indicará por escrito al contratista las deficiencias que deberá corregir".*

928. Ahora bien, para aplicar esta disposición debe tenerse en cuenta que las comunicaciones del 6, 9, 15 y 30 de julio de 2019, en las cuales el Contratista solicitó la emisión del Certificado de Aceptación Preliminar y adicionalmente remitió la respectiva factura, son anteriores a la Aceptación Provisional del 14 de agosto de 2019[751]. Como quiera que el plazo para pagar el precio en el presente caso comenzó a correr con la Aceptación Provisional, es claro para el Tribunal que con anterioridad al 14 de agosto de 2019 no había lugar a que la CFE se pronunciara sobre las facturas remitidas. Por consiguiente, lo que debe tomarse en cuenta son las facturas emitidas con posterioridad al 14 de agosto de 2019.

[750] **Doc. C-162**, Comunicado Dunor-CFE-580, de 6 de julio de 2019; **Doc. C-163**, Comunicado Dunor-CFE-587, de 9 de julio de 2019; **Doc. C-164**, Comunicado Dunor-CFE-592, de 15 de julio de 2019; **Doc. C-165**, Comunicado Dunor-CFE-640, de 29 de julio de 2019.
[751] Doc. C-53.

929. En esta medida, si la primera factura posterior a la Aceptación Provisional fue del 26 de agosto de 2019[752], el plazo para solicitar la corrección era de 3 días hábiles, es decir hasta el 29 de agosto de 2019, que era jueves. No está claramente acreditado en el expediente la fecha en que se solicitó la corrección. En todo caso la nueva factura se presentó el 2 de septiembre, por lo que era posible su pago el 3 de septiembre, en la medida en que la Comisión ya conocía el valor y la única corrección era el receptor de la factura. Sin embargo la CFE realizó el pago hasta el 11 de septiembre de 2019, según indica el Contratista en comunicación del 15 de octubre de 2019, lo cual no ha sido negado por la CFE[753].

930. En esta medida el Tribunal considera que se deben reconocer los gastos financieros por el retraso en el pago del precio que ascienden a US$ 227,760.00 (Doscientos veintisiete mil setecientos sesenta dólares americanos 00/100 cy), que es la cifra que DUNOR indica en su Memorial de Conclusiones[754], a la que acompaña el cálculo correspondiente[755], y que es inferior a la indicada previamente en su escrito de Demanda.

**12.1.5.3.2 Los gastos financieros y los descuentos aplicados al precio**

931. Por lo que se refiere a los gastos financieros por la indebida aplicación de descuentos al precio considera el Tribunal lo siguiente:

932. Como ya se indicó, la cláusula 9.2 del Contrato establece un plazo para el pago del precio del Contrato, y prevé en la cláusula 10.2 el pago de gastos financieros en caso de que cualquier cantidad pagadera de conformidad con el Contrato no sea pagada una vez vencida.

933. Así las cosas, si la Comisión realiza descuentos al precio que no corresponden a lo previsto en el Contrato, el pago realizado es incompleto, y por

[752] Anexo 006-CFE.
[753] Doc. C-18.
[754] Memorial de Conclusiones, No, 179.
[755] Doc. C-266,

ello debe pagar sobre el monto descontado indebidamente los gastos financieros consagrados en el contrato. En el presente caso el Tribunal ha encontrado que la Comisión tenía razón al exigir la entrega de los Partes de Repuestos Herramientas y Equipos Especiales Solicitados. Sin embargo, el Tribunal ha concluido que el descuento aplicable en este caso solo podría ser el previsto en el inciso D del Anexo 3 del Contrato y que de conformidad con lo acordado por las Partes no era pertinente el descuento del precio del contrato por obra no ejecutada a que se refiere el artículo 231 del RLOPSRM.

934. Por consiguiente, el descuento por obra no ejecutada constituye una parte del precio no pagado que debe ser reembolsado por la CFE. No obstante, este Tribunal considera que debe aplicarse la cláusula 10.2 del Contrato, la cual dispone que *"En caso de que cualquier parte del Precio del Contrato… o cualquiera otra cantidad pagadera de conformidad con el presente Contrato, no sea pagada una vez vencida, a solicitud del Contratista o de la Comisión, según sea el caso, la Comisión o el Contratista según corresponda, deberá pagar gastos financieros a la Tasa de Gastos Financieros, dichos gastos empezarán a generarse cuando las Partes tengan definido el importe a pagar…".* Por consiguiente, de conformidad con esta estipulación en caso de que no esté definida la suma debida, los gastos financieros corren a partir de que hay acuerdo entre las Partes o, en su defecto, cuando el Tribunal lo determina. De esta manera, la cantidad que el Tribunal ha determinado que no procedía deberá pagarse dentro de los treinta días siguientes a la notificación de este laudo, y se generarán Gastos Financieros a partir del vencimiento de dicho plazo.

935. Por otra parte, en relación con las sumas descontadas en exceso por razón de los resultados de las pruebas de desempeño, el Tribunal ha concluido que no procede el pago de gastos financieros sobre ellas a partir de la fecha en que debió pagarse el precio, pues la CFE procedió con base en la información que tenía. Como quiera que por virtud del presente laudo se establece el monto que se debe pagar, debe aplicarse la Cláusula 10.2 del Contrato a la cual ya se hizo referencia. Así las cosas las sumas correspondientes a los descuentos del precio que el Tribunal ha concluido que no procedían deben pagarse dentro de los

treinta días siguientes a la notificación de este laudo, y se generarán Gastos Financieros a partir del vencimiento de dicho plazo.

#### 12.1.5.3.3 Los gastos financieros y las sumas debidas por la aplicación de la cláusula 25.5

936. Procede el Tribunal a pronunciarse sobre los Gastos Financieros vinculados al Acuerdo, para lo cual considera el Tribunal pertinente distinguir entre los casos en los cuales existió un acuerdo entre las Partes sobre el monto debido, y aquellos en que no se llegó a un acuerdo.

937. A este respecto lo primero que debe observarse es que la cláusula 6.1 del Acuerdo dispone:

> *"6.1PLAZO PARA EL PAGO.*
>
> *Todas aquellas minutas formalizadas hasta la Fecha de la Aceptación Provisional de la Central serán pagadas por la Comisión dentro de los cuarenta y cinco (45) días posteriores a la emisión del Certificado de Aceptación Provisional.*
>
> *"En el caso de los importes pendientes por conciliar o acordar por las Partes posteriormente a la Aceptación Provisional de la Central, LA COMISIÓN pagará a EL CONTRATISTA los importes efectivamente reconocidos y formalizados mediante minuta concerniente a los veinte (20) Días siguientes a la presentación de la factura correspondiente".*

938. Desde esta perspectiva encuentra el Tribunal que conforme al Acuerdo las minutas formalizadas antes de la fecha de la aceptación provisional, debían ser pagadas dentro de los cuarenta y cinco días siguientes a la emisión del certificado de aceptación provisional y las que se formalizaran con posterioridad, dentro de los 20 días siguientes a la presentación de la factura correspondiente.

939. A este respecto encuentra el Tribunal que obra en el proceso la Minuta de Reconocimiento de Reembolso por Concepto del Apartado 3.1 Financieros, Seguros y Garantías del Proyecto Empalme II, de Conformidad con la cláusula

25.5 del Contrato[756] en la cual en el acápite de acuerdos se determina un monto de MXN$ 9'662,588.15 (Nueve millones seiscientos sesenta y dos mil quinientos ochenta y ocho pesos mexicanos 15/100 M.N.). Existe, por consiguiente, un acuerdo entre las Partes sobre el monto debido, posterior a la Aceptación Provisional de la Central, por lo que el mismo debía pagarse dentro de los 20 días a la presentación de la factura correspondiente.

940. Ahora bien, por comunicación del 17 de febrero de 2020 DUNOR hizo entrega de la factura correspondiente a esta minuta[757]. De esta manera el plazo para pagarla vencía el 9 de marzo de 2020. Sin embargo, dicha factura fue pagada el 23 de marzo de 2020, según indica la Demandante, sin que la Demandada haya controvertido lo anterior. Por consiguiente, la factura se pagó con 14 días de retraso.

941. Como quiera que en el Acuerdo las Partes no estipularon reglas en materia de intereses, debe aplicarse la cláusula 10.2 del Contrato la cual dispone*: "En caso de que… cualquiera otra cantidad pagadera de conformidad con el presente Contrato, no sea pagada una vez vencida, a solicitud del Contratista o de la Comisión, según sea el caso, la Comisión o el Contratista según corresponda, deberá pagar gastos financieros a la Tasa de Gastos Financieros, dichos gastos empezarán a generarse cuando las Partes tengan definido el importe a pagar…".* Por consiguiente, sobre las sumas no pagadas en el plazo establecido en el Acuerdo deben pagarse gastos financieros.

942. De acuerdo con los cálculos realizados por el Demandante, sin que la Demandada haya formulado reparos, la suma debida es de US$ 12,833.31 (Doce mil ochocientos treinta y tres dólares americanos 31/100 cy)[758].

943. Por otra parte, queda pendiente por definir por el Tribunal los gastos financieros que deben reconocerse cuando las partidas no fueron objeto de acuerdo entre las Partes.

[756] Doc. C-31.
[757] Doc. C- 32.
[758] Demanda, párrafo 382.

944. En este punto observa el Tribunal que la Cláusula 6.1 del Acuerdo establece un plazo para pagar las "*minutas formalizadas hasta la Fecha de la Aceptación Provisional*", y otro para *"los importes pendientes por conciliar o acordar por las Partes posteriormente a la Aceptación Provisional de la Central" caso en el cual se pagan "los importes efectivamente reconocidos y formalizados mediante minuta concerniente a los veinte (20) Días siguientes a la presentación de la factura correspondiente".*

945. De esta manera, las Partes solo regularon el caso en el cual el valor a pagar resulta del acuerdo de las Partes, reflejado en una minuta. Debe entonces el Tribunal precisar la regla aplicable en aquellos eventos en que no existió acuerdo de las Partes, y por ello es el Tribunal el que determina los montos que deben pagarse.

946. Lo primero que advierte el Tribunal es que las reglas acordadas por las Partes determinan un tratamiento particular para el pago de las sumas que sean acordadas por las Partes en desarrollo de lo previsto en el Acuerdo.

947. Al examinar las reglas particulares del Acuerdo se aprecia que el plazo de pago no corre mientras se desarrollara la negociación de las Partes. En efecto, el plazo para el pago siempre corre desde que hay acuerdo de las Partes. Lo que implica que no se causan gastos financieros hasta que no se determinen las sumas debidas.

948. Desde otra perspectiva aprecia el Tribunal que cuando no existe acuerdo de las Partes, debe ser el Tribunal quien determine los montos debidos. Si se aplica en lo pertinente la regla prevista en la cláusula 6.1 del Acuerdo, se encuentra que no deben aplicarse gastos financieros antes de la fecha en que las sumas son determinadas, en este caso por el Tribunal.

949. A lo anterior se agrega que la cláusula 10.2 del Acuerdo dispone que "*En caso de que … cualquiera otra cantidad pagadera de conformidad con el presente Contrato, no sea pagada una vez vencida,… la Comisión o el Contratista según corresponda, deberá pagar gastos financieros a la Tasa de Gastos Financieros, dichos gastos empezarán a generarse cuando las Partes tengan definido el importe a pagar*" (se subraya). Por consiguiente, es a partir de

la fecha del laudo que debe contarse el plazo para realizar el pago de las sumas debidas en desarrollo del Acuerdo que determine el Tribunal y es a partir del vencimiento del mismo que se causarán gastos financieros a la tasa definida en el Contrato.

### 12.1.6 Otros Daños y Perjuicios.

#### 12.1.6.1 Posición de la Demandante.

950. En relación con otros daños y perjuicios DUNOR señala que la CFE era consciente de que, debido a la complejidad y monto del Contrato, el Contratista tendría que recurrir necesariamente a financiación para la ejecución del proyecto, de conformidad con la cláusula 4.6 del Contrato[759].

951. Agrega que en términos de la cláusula 4.6 del Contrato, el Contratista estaba obligado a obtener financiamiento para la ejecución de las obras y culminación del Proyecto. Señala que, la Comisión era perfectamente conocedora de que cualquier impago o descuento del Precio del Contrato generaría un perjuicio financiero a DUNOR, como el pago de comisiones o intereses de mora[760].

952. A tales efectos, DUNOR hace referencia al CCF el cual dispone que: *"[e]l que estuviere obligado a prestar un hecho y dejare de prestarlo o no lo prestare conforme a lo convenido, será responsable de los daños y perjuicios…"*. Por lo anterior sostiene DUNOR que CFE realizó descuentos improcedentes al Precio Contractual y por tanto, debe indemnizar a DUNOR por los daños y perjuicios ocasionados. Añade que la conducta es dolosa. Enfatiza en que DUNOR tiene que renovar los créditos con los Acreedores del Proyecto, por lo que, se extiende la vigencia de los mismos por las cantidades impagadas del Precio Contractual[761].

953. Advierte DUNOR que el daño sufrido es consecuencia inmediata y directa de la falta de cumplimiento de la obligación de pago por parte de CFE, pues a partir

[759] Memoria de Demanda, No. 391.
[760] Memoria de Demanda, No. 392.
[761] Memoria de Demanda, No. 396.

de este incumplimiento, DUNOR ha tenido que satisfacer con su patrimonio las diversas comisiones e intereses que tal incumplimiento generó. Agrega que, una vez establecido el nexo causal entre el incumplimiento y el pago, DUNOR acredita que el monto de la indemnización al que tiene derecho es el siguiente: i) Comisiones de novación y estructuración del Contrato de Cesión de Derechos por valor de US$ 343,920.80 (Trescientos cuarenta y tres mil novecientos veinte dólares americanos 80/100 cy); ii) Comisión de Agencia por valor de US$ 45,000.00 (Cuarenta y cinco mil dólares americanos 00/100 cy); iii) Comisiones de Crédito por valor de US$ 7,750.00 (Siete mil setecientos cincuenta dólares americanos 00/100 cy); e, iv) Intereses adicionales por valor de US$ 69,344.04 (Sesenta y nueve mil trescientos cuarenta y cuatro dólares americanos 04/100 cy)[762].

954. Señala que, todo lo anterior asciende al valor de US$ 466,014.84 (Cuatrocientos sesenta y seis mil catorce dólares americanos 84/100 cy).

955. En su Memorial de Réplica, DUNOR manifiesta sobre este reclamo que la legislación en materia de Obras Públicas no limita la posibilidad de que CFE sea condenada a pagar daños y perjuicios.

956. Así las cosas, sostiene que la Demandada afirma de manera equivocada que, al estar en presencia de un "*contrato administrativo*" y de naturaleza regulada, no se puede validar una interpretación "*a contrario sensu*" para incorporar términos y condiciones que las Partes no incluyeron en el mismo y, que ello sería contrario a la "*Ley de Orden Público*" que rige el Contrato OPF y que asumimos se refiere a la LOPSRM[763].

957. Agrega que CFE pretende robustecer su postura indicando que el Código Civil Federal, en su artículo 1840 señala que la estipulación de la pena excluye la posibilidad de reclamar daños y perjuicios y, que en el caso del Contrato, se establecieron prestaciones específicas para distintos incumplimientos (tales como el pago de gastos no recuperables, el pago de gastos financieros y

[762] Memoria de Demanda, No. 397 y 398.
[763] Réplica y Contestación Reconvención, No. 450.

distintos incumplimientos); y que, por ello, se contemplan las prestaciones que las Partes se deberían (como acreedoras) por virtud de esos incumplimientos[764].

958. Señala que, si bien es cierto que el artículo 1 de la LOPSRM indica que la misma es de orden público, ello no implica que su contenido deba aplicarse por encima de otras disposiciones legales del mismo nivel jerárquico[765].

959. Aclara que lo anterior, se desprende claramente del contenido del artículo 13 de la LOPSRM que contempla la aplicación supletoria de las disposiciones de derecho común, a saber, el Código Civil Federal y el Código Federal de Procedimientos Civiles. Dicho cuerpo normativo reconoce que, a pesar de regular la contratación de obras pública, la misma no es completa ni total, y por tanto, es válido acudir a otros cuerpos normativos[766].

960. Adicionalmente, DUNOR sostiene que los argumentos de CFE le dan la razón a la Demandante. Al respecto, indica que, para intentar sostener su postura, la Demandada cita una serie de disposiciones de la LOPSRM que regulan los daños y perjuicios y concluye que, al no contemplarse en sus artículos el pago de perjuicios a cargo de las dependencias y entidades, quedaría demostrado que los particulares que contraten con el Estado no tienen derecho a reclamarlos[767].

961. Afirma que este argumento resulta equivocado, precisamente porque la redacción de la LOPSRM no considera lo ocurrido en el caso que nos ocupa, esto es, que los representantes de la entidad contratante (CFE) incumplieron intencionalmente el contenido del Contrato y esto precisamente es la base del presente reclamo: la indemnización por un acto violatorio del contrato que perjudica el patrimonio de DUNOR[768].

962. Por último, DUNOR expresa que el hecho de que la LOPSRM no contemple responsabilidad por daños y perjuicios a cargo de las entidades contratantes cuando incumplen los acuerdos contractuales que les vinculan, no impide en

[764] Réplica y Contestación Reconvención, No. 451.
[765] Réplica y Contestación Reconvención, No. 453.
[766] Réplica y Contestación Reconvención, No. 454.
[767] Réplica y Contestación Reconvención, No. 457.
[768] Réplica y Contestación Reconvención, No. 458.

absoluto la aplicación supletoria de la responsabilidad que sí contempla el CCF. Además, los requisitos mencionados en el Memorial de Contestación (que derivan de la Contradicción de Tesis que fue resuelta en la jurisprudencia 34/2013 de la Segunda Sala de la Suprema Corte de Justicia de la Nación) se cumplen a cabalidad en el caso que nos ocupa, porque la cuestión a suplir - obligación de CFE de indemnizar daños y perjuicios por incumplimiento del Contrato - no está regulada y, al hacerlo, no se contraría de forma alguna el contenido de la LOPSRM, todo lo contrario, se colma el vacío legal dejado por el legislador, quien no previó un actuar como el desplegado por CFE en el caso que nos ocupa. Por tanto, concluye que se debe condenar a la Demanda a pagar la indemnización por un valor total de US$ 159,151.91 (Ciento cincuenta y nueve mil ciento cincuenta y un dólares americanos 91/100 cy)[769].

#### 12.1.6.2 Posición de la Demandada

963. Por su parte, la Demandada sostiene que las Partes no pactaron en el Contrato el pago de perjuicios, y no sería válido incorporarlos al mismo, ya que sería contrario a la cláusula sobre "Totalidad del Contrato", la cual establece que: *"El presente Contrato es la compilación completa y exclusiva de todos los términos y condiciones que rigen el acuerdo de las Partes en relación con el objeto del mismo*", por lo que validar una interpretación de un Contrato Administrativo "*a contrario sensu*" de manera tal que se incorporaran términos y condiciones que las Partes no incluyeron en el mismo, violaría el Contrato y sería contrario a su naturaleza regulada, pues en todo caso si fuese válido realizar tal incorporación por vía de interpretación a "*contrario sensu*", tal adición sería contraria a la ley de orden público que rige al Contrato (irrenunciable) y conforme a la cual se debe regir e interpretar el mismo[770].

964. Agrega que el mismo CCFseñala que "*pueden los contratantes estipular cierta prestación como pena para el caso de que la obligación no se cumpla o no se cumpla de la manera convenida. Si tal estipulación se hace, no podrán reclamarse, además, daños y perjuicios*". En el caso del Contrato de Obra

[769] Réplica y Contestación Reconvención, No. 462 y 463.
[770] Memorial de Contestación y Reconvención, No. 494.

Pública celebrado entre las Partes, se establecieron "*prestaciones*" específicas para distintos incumplimientos, tales como: el pago de gastos no recuperables y el pago de gastos financieros; se contemplan además expresamente distintos supuestos por incumplimiento en las obligaciones a su cargo, ya sea retenciones económicas o para imponerle penas convencionales[771].

965. Precisa la Comisión que, tomando en consideración que el Contrato no puede ir en contra de lo establecido en la ley de orden público que lo rige, ya que de lo contario sería nula toda disposición que así lo hiciere, tampoco debería ir más allá de lo pactado entre las mismas en el propio Contrato[772].

966. Asimismo, sostiene que el Contrato excluye la aplicación de daños y perjuicios tal como están definidos en el CCF. Esto es coherente con la naturaleza misma del Contrato de Obra Pública Financiada y conforme a la LOPSRM, en los cuales quedará ilustrada la existencia de un sistema de compensación económica autosuficiente y autónomo del CCF.

967. Menciona que después de realizar una revisión exhaustiva del concepto perjuicios, resulta evidente que todas las menciones que la LOPSRM y su Reglamento hacen del concepto perjuicios se hacen para casos muy específicos y con respecto a los particulares que son quienes deben cubrirlos, pero nunca con respecto a la Administración Pública[773].

968. Señala también que, tomando en cuenta que los actos de la Administración Pública se presumen de buena fe, el no referirse al pago de perjuicios por parte de las dependencias y entidades que licitan y contratan, es congruente con esta presunción, y es por ello que la ley (y el Contrato) prevén mecanismos expresos de compensación para que los Contratistas (y licitantes) recuperen lo invertido[774].

969. La Comisión precisa, que la aplicación supletoria del CCF señalada en la LOPSRM y su Reglamento no es absoluta y debe darse dentro de ciertos límites, sin llegar al extremo de implementar derechos o instituciones no regulados en la

[771] Memorial de Contestación y Reconvención, No. 496.
[772] Memorial de Contestación y Reconvención, No. 497.
[773] Memorial de Contestación y Reconvención, No. 499.
[774] Memorial de Contestación y Reconvención, No. 501.

ley que ha de suplirse, pues lo cierto es que como se expuso, el Contrato, la LOPSRM y su Reglamento contemplan diversas consecuencias para el resarcimiento de las contratistas según la naturaleza de los hechos de que se trate, pero no en la forma en que las Demandantes desearían[775].

970. La Demandada recuerda que el CCF, a diferencia de la LOPSRM, no es una ley de orden público, y que el mismo Código señala que *"[e]l fin o motivo determinante de la voluntad de los que contratan, tampoco debe ser contrario a las leyes de orden público ni a las buenas costumbres",* y por tanto su cumplimiento no está por encima de la voluntad de las Partes (excepto cuando el mismo Código señale otra cosa)[776].

971. Agrega que los requisitos por tanto para que pueda aplicarse la supletoriedad según la tesis jurisprudencial, son los siguientes[777]:

a) Que el ordenamiento legal a suplir establezca expresamente esa posibilidad, indicando la ley o normas que pueden aplicarse supletoriamente, o que un ordenamiento establezca que aplica, total o parcialmente, de manera supletoria a otros ordenamientos;

b) Que la ley a suplir no contemple la institución o las cuestiones jurídicas que pretenden aplicarse supletoriamente o, aun estableciéndolas, no las desarrolle o las regule deficientemente;

c) Que esa omisión o vacío legislativo haga necesaria la aplicación supletoria de normas para solucionar la controversia o el problema jurídico planteado, sin que sea válido atender a cuestiones jurídicas que el legislador no tuvo intención de establecer en la ley a suplir; y,

d) Que las normas aplicables supletoriamente no contraríen el ordenamiento legal a suplir, sino que sean congruentes con sus principios y con las bases que rigen específicamente la institución de que se trate.

972. Señala que el artículo 13 de la LOPSRM menciona que*: "[s]erán supletorias de esta Ley y de las demás disposiciones que de ella se deriven, en lo que*

[775] Memorial de Contestación y Reconvención, No. 503.
[776] Memorial de Contestación y Reconvención, No. 504.
[777] Memorial de Contestación y Reconvención, No. 505.

*corresponda, el Código Civil Federal, la Ley Federal de Procedimiento Administrativo y el Código Federal de Procedimientos Civiles"*[778]. Sin embargo, dicha supletoriedad, como se mencionó anteriormente, no aplica más que en determinados supuestos, y dado que en el caso que nos ocupa: (i) la LOPSRM sí contempla las cuestiones jurídicas que pretenden aplicarse supletoriamente, de manera especializada y desarrollada; (ii) no sería válido atender a cuestiones jurídicas que el legislador no tuvo intención de establecer en la ley a suplir; y (iii) las normas a aplicar supletoriamente contrarían a la LOPSRM, al no ser congruente con sus principios y las bases que rigen los conceptos de compensación previstos en la LOPSRM y su Reglamento. Por todo lo anterior no sería válida la aplicación supletoria que invocan las Demandantes para la figura de perjuicios.

973. Adicionalmente, la Comisión cita una tesis jurisprudencial en materia mercantil y señala que la LOPSRM regula los principios de compensación para el Contratista de manera autónoma y autosuficiente, lo que justifica que no sea necesario acudir a la aplicación supletoria del CFF[779].

974. Agrega que la LOPSRM establece un mecanismo para el Contratista, a quien facilita la prueba de los daños y perjuicios bajo los conceptos de gastos financiero. Advierte que si alguien quisiera reclamar daños y perjuicios contra la Comisión, tiene que demostrar una conducta ilícita por parte de la Administración Pública y considera que el Tribunal no tiene jurisdicción sobre la Comisión para determinar si actuó de manera ilícita[780].

975. Señala que la demostración de los perjuicios supone acreditar que la obtención de la ganancia no se funda sobre una simple posibilidad o una exigua probabilidad, sino – *a contrario sensu* – sobre una probabilidad fuerte o alta[781].

976. Sostiene que el Contratista no demuestra haber cumplido con sus obligaciones en términos del Contrato. Añade que todos y cada uno de los incumplimientos en que incurrió motivan que adolezca de una falta de

[778] Memorial de Contestación y Reconvención, No. 506 y 507.
[779] Memorial de Contestación y Reconvención, No. 509.
[780] Memorial de Contestación y Reconvención, No. 510 y 513.
[781] Memorial de Contestación y Reconvención, No. 516.

legitimación activa que le impide situarse en el supuesto normativo para hacer los reclamos que indican, situación que desde luego se solicita sea considerada por este H. Tribunal Arbitral para desestimar el reclamo[782].

977. Adicionalmente, señala que los daños y perjuicios para ser reclamados deben de señalarse y precisarse. Las Demandantes no precisan en qué consistieron, ni tampoco exhiben documentación alguna que los acrediten, lo cual puede dejar en estado de indefensión a la Comisión[783].

978. Asimismo, se refiere al artículo 2110 del CCF que establece lo siguiente: *"Los daños y perjuicios deben ser consecuencia inmediata y directa de la falta de cumplimiento de la obligación, ya sea que se hayan causado o que necesariamente deban causarse*"[784].

979. Señala que, por otra parte, la cláusula 27 del Contrato expresa en sus propios términos el mismo concepto: *"No obstante cualquier disposición en contrario contenida en el presente Contrato, ninguna de las Partes será responsable por pérdidas o daños o perjuicios indirectos o consecuenciales de cualquier tipo que se deriven o que de alguna manera se relacionen con el cumplimiento o incumplimiento de las obligaciones del presente Contrato"*[785].

980. Precisa que hay que determinar qué se entiende por la expresión "*consecuencia inmediata y directa*". Señala que la doctrina y la jurisprudencia se revelan particularmente valiosas para llevar a cabo dicho ejercicio. Al respecto, señala que la doctrina estima que el CCF se basa sobre la teoría de la causa próxima, por lo que, sólo es causa aquello que inmediatamente en el tiempo da lugar a un resultado mientras que los eventos que de manera más lejana contribuyen al desenlace no son causas sino condiciones[786].

981. También indica la CFE que le corresponde a las Demandantes la carga de la prueba, en este caso la demostración del nexo causal y que, a falta de dicha

[782] Memorial de Contestación y Reconvención, No. 519.
[783] Memorial de Contestación y Reconvención, No. 520.
[784] Memorial de Contestación y Reconvención, No. 525.
[785] Memorial de Contestación y Reconvención, No. 526.
[786] Memorial de Contestación y Reconvención, No. 527 y 528.

demostración, el Tribunal Arbitral no tendrá otra opción distinta a desestimar su argumentación por falta de fundamentos[787].

982. Adicionalmente, la Comisión en su Dúplica señala que la LOPSRM sí limita la extensión de la condena. Al respecto, se refiere al artículo 60 de la LOPSRM relativo a la terminación anticipada de los contratos, el cual establece que serán reembolsados al contratista "*aquellos gastos no recuperables en que haya incurrido, siempre que éstos sean razonables*". Por otro lado, el artículo 61 del mismo ordenamiento, correspondiente a la rescisión del contrato señala que, en dicho supuesto se *"pagará los trabajos ejecutados, así como los gastos no recuperables, siempre que estos sean razonables"*[788].

983. Por tanto, la Comisión advierte que la argumentación presentada por la Demandante en el Memorial de Réplica conduce a una interpretación sesgada de la normativa aplicable al Contrato, en primer término; porque la legislación que rige a la relación contractual sí prevé y limita las consecuencias jurídicas de la rescisión y terminación anticipada del Contrato. En segundo lugar, sostiene que la interpretación realizada por la Demandante frente al artículo 1840 del mismo Código resulta completamente contradictoria[789].

984. Precisa que dicha contradicción deriva de que, la pretensión reclamada por DUNOR se encuentra fundada en el artículo 2104 del CCF, que resulta incompatible con el artículo 1840 del mismo Código pues, a sabiendas que ante la procedencia de una terminación anticipada o la rescisión del Contrato, el Contratista únicamente tendría derecho a la recepción de las prestaciones indicadas en la LOPSRM. Destaca que la Demandante insiste en reclamar prestaciones no comprendidas en los términos contractuales ni legales aplicables al Contrato con el objeto de obtener prestaciones indebidas a manera de una doble reparación[790].

985. Adicionalmente, expresa que no debe escapar a la vista del Tribunal Arbitral que la supletoriedad es una figura jurídica que indica la remisión a un

[787] Memorial de Contestación y Reconvención, No. 532.
[788] Dúplica y Réplica a la Reconvención, No. 477.
[789] Dúplica y Réplica a la Reconvención, No. 478 y 479.
[790] Dúplica y Réplica a la Reconvención, No. 480.

ordenamiento secundario únicamente cuando la norma principal es omisa en detallar las particularidades de una determinada cuestión. En ningún caso debe utilizarse a la supletoriedad para intentar llevar a cabo la aplicación de un elemento sustancial que fue excluido por el legislador en la redacción de una norma[791].

986. De lo anterior, concluye la Comisión que las reclamaciones presentadas por DUNOR, correspondiente al pago de daños y perjuicios, implican una doble indemnización y además, se sustentan en consideraciones e interpretaciones contrarias a lo establecido por los ordenamientos normativos aplicables al Contrato[792].

987. Por último señala que el hecho de que hayan sido utilizadas disposiciones del CCF para dar respuesta a las reclamaciones de la Demandante no supone reconocimiento alguno respecto de la procedencia de daños y perjuicios en los contratos administrativos regulados por la LOPSRM. Por lo tanto, manifiesta que el hecho de que la Demandada haya recurrido a estos preceptos, debe entenderse como un ejercicio que se circunscribe al derecho de contradicción de la Parte.[793]

#### 12.1.6.3 Consideraciones del Tribunal

988. Señala DUNOR[794] que de conformidad con la cláusula 4.6 del Contrato, el Contratista estaba obligado a obtener el financiamiento para la ejecución de las obras y culminación del Proyecto, por lo que la Comisión conocía de la obtención de tales financiamientos, tanto por el hecho de que se le notificó la cesión de los derechos de cobro del Precio del Contrato, como porque reconoció las diversas comisiones por extensión de los créditos bajo el Acuerdo (relativo a la cláusula 25.5 del Contrato). Agrega que la Comisión era perfectamente conocedora de que cualquier impago o descuento del Precio del Contrato generaría un perjuicio

[791] Dúplica y Réplica a la Reconvención, No. 481.
[792] Dúplica y Réplica a la Reconvención, No. 483.
[793] Dúplica y Réplica a la Reconvención, No. 485 y 486.
[794] Demanda, No. 392.

financiero a DUNOR, tales como el pago de diversas comisiones (previstas específicamente en la cláusula 4.6) o intereses de demora.

989. Señala[795] que bien es cierto que la cláusula 10.2 del Contrato establece que el retraso en el pago del Precio del Contrato o de "*cualquiera otra cantidad pagadera de conformidad con el presente Contrato*" genera la obligación de CFE de abonar a DUNOR la Tasa de Gastos Financieros, "*los daños que ha sufrido DUNOR no quedan excluidos explícita o implícitamente, pues no hay una pena convencional pactada para el incumplimiento en cuestión*". Agrega[796] que el artículo 2104 del CCF dispone que "*[e]l que estuviere obligado a prestar un hecho y dejare de prestarlo o no lo prestare conforme a lo convenido, será responsable de los daños y perjuicios. . .*".

990. Señala adicionalmente[797] que la CFE realizó descuentos improcedentes al Precio Contractual, y agrega que el comportamiento de la CFE merece el calificativo de doloso. Señala que el artículo 2106 del Código Civil Federal establece que "*[l]a responsabilidad procedente de dolo es exigible en todas las obligaciones. La renuncia de hacerla efectiva es nula.*"

991. Como consecuencia de lo anterior reclama: (i) Comisiones de novación y estructuración del Contrato de Cesión de Derechos por valor de US$ 343,920.80 (Trescientos cuarenta y tres mil novecientos veinte dólares americanos 80/100 cy); (ii) Comisión de Agencia por valor de US$ 45,000 (Cuarenta y cinco mil dólares americanos 00/100 cy); (iii) Comisiones de Crédito por valor de US$ 7'750 (Siete mil setecientos cincuenta dólares americanos 00/100 cy), y (iv) Intereses adicionales por valor de US$ 69,344.04 (Sesenta y nueve mil trescientos cuarenta y cuatro dólares americanos 04/100 cy).

992. Por su parte, la Demandada señala que la Partes no pactaron en el Contrato el pago de perjuicios, y no sería válido incorporarlos al Contrato, ya que sería contrario a la Cláusula sobre "Totalidad del Contrato". Igualmente se refiere al

[795] Demanda, No. 393.
[796] Demanda, No. 395.
[797] Demanda, No. 396.

régimen del contrato y al carácter supletorio en esta materia del Código Civil y los criterios para aplicarlo.

993. En relación con lo anterior considera el Tribunal lo siguiente:

994. Las Partes estipularon el reconocimiento de gastos financieros tanto por el no pago del precio del Contrato, como por el no pago de cualquier otra suma debida, lo que incluye las sumas derivadas de la aplicación de la cláusula 25.5 del Contrato.

995. Es claro que el acuerdo de las Partes en el sentido de que la CFE debe pagar un gasto financiero en caso no de pago, parte de la base que el no pago oportuno de dichas cifras perjudica al acreedor, pero en lugar de aplicar las reglas propias de la responsabilidad, las Partes pactaron el valor que habría de pagarse. Desde esta perspectiva el acuerdo de reconocer un gasto financiero por el no pago equivale a haber estipulado una pena por el no pago.

996. En este contexto, habiendo pactado las Partes la consecuencia del no pago de parte del precio o del no pago de las sumas que se debieran en razón la cláusula 25.5 del Contrato, es claro que debe aplicarse la voluntad de las Partes. A este respecto debe recordase que el artículo 1840 del Código Civil Federal dispone:

> *"Artículo 1840.- Pueden los contratantes estipular cierta prestación como pena para el caso de que la obligación no se cumpla o no se cumpla de la manera convenida. Si tal estipulación se hace, no podrán reclamarse, además, daños y perjuicios".*

997. Teniendo en cuenta lo anterior, considera el Tribunal que en principio no es pertinente reconocer sumas adicionales a título de daño a la Demandante, cuando en el Contrato se estipuló la pena que habría de pagarse en caso de que no pagara el precio o las sumas a cargo del contratista.

998. Ahora bien, es pertinente señalar que la Demandante invoca el artículo 2106 del Código Civil Federal que establece:

> *"Artículo 2106.- La responsabilidad procedente de dolo es exigible en todas las obligaciones. La renuncia de hacerla efectiva es nula".*

999. De conformidad con esta norma no puede el deudor limitar o excluir su responsabilidad si actuó a sabiendas de que su conducta era contraria al ordenamiento. Por consiguiente, un pacto que de alguna manera excluya o limite su responsabilidad en este caso no puede producir efectos.

1000. Expuesto todo lo anterior, en el presente caso el Tribunal no considera que de los hechos que aparecen probados en el proceso se pueda concluir que la CFE actuó a sabiendas de que su conducta era contraria al ordenamiento y el dolo no puede presumirse. Por esta razón concluye que no procede el reconocimiento de una indemnización adicional por los conceptos reclamados.

### 12.2 Pretensiones de la Demanda Reconvencional.

1001. En su Memorial de Reconvención, la Comisión solicita lo siguiente:

a) Que el Tribunal Arbitral condene a DUNOR al pago a favor de CFE de la cantidad de MXN$ 9’113,673.45 (Nueve millones ciento trece mil seiscientos setenta y tres pesos mexicanos 45/100 M.N), por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, correspondiente al año 2019.

b) Que el Tribunal Arbitral condene a DUNOR al pago a favor de CFE de los gastos financieros generados con motivo de la falta de pago de la cantidad antes indicada, por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, correspondiente al año 2019.

#### 12.2.1 Posición de la CFE

1002. La CFE señala que en la Sección 7.2.14.11 de la Convocatoria, se estableció que el Contratista tendría a su cargo, entre otras obligaciones, la responsabilidad de suministrar energía eléctrica para construcción, Pruebas y Puesta en Servicio[798].

[798] Memorial de Contestación y Reconvención, No. 535.

1003. La Comisión específica que en la cláusula 6.8 sobre Suministro de Electricidad, del Contrato, las Partes estipularon que, si el Contratista así lo decidiera, podría celebrar contrato con la Comisión para suministro de energía eléctrica en las etapas de construcción y Pruebas, en los términos establecidos en las leyes, reglamentos, manuales y disposiciones legales vigentes aplicables[799].

1004. Precisa también que cuando se materializó la obligación del Contratista de suministrar energía eléctrica para las etapas de construcción y pruebas del Proyecto, ya estaba en vigor la "*Reforma Energética*", la cual trajo como consecuencia la entrada en vigor de la Ley de la Comisión Federal de Electricidad y la Ley de la Industria Eléctrica[800]. Indica que de acuerdo con la regulación, únicamente se tienen 2 escenarios posibles para disponer de la energía eléctrica en alta tensión necesaria para las Pruebas, que son: i) Registrar la Central Eléctrica, para que el propietario de la misma (CFE Generación IV) adquiriera la figura de "*Generador*", contando con facultades para comprar y vender energía en el MEM, o ii) Registro de Centro de Carga, figura que se encuentra dirigida a altos consumidores (Industriales) que comprarán energía eléctrica en el MEM a largo plazo, lo cual implica el cumplimiento de estudios y requisitos no previstos en el Contrato. Señala la Comisión que no existió otra mejor posibilidad que el propietario de la Central, que en ese momento era la Empresa Productiva Subsidiaria de la Comisión Federal de Electricidad denominada CFE Generación IV (en adelante la EPS IV), registrara la Central, para que esta última, en su condición de "*Generador*", adquiriera estas facultades de compra y venta de Energía Eléctrica en el MEM; consecuentemente, una vez adquirido el carácter de "*Generador*", la EPS IV estuvo en posibilidad de celebrar contratos de compraventa de energía eléctrica[801].

1005. Frente a lo anterior, señala que, para cumplir con su obligación, el Contratista optó por adquirir energía a través de la Comisión, por lo que se celebró el Contrato de Compraventa de Energía Eléctrica (en adelante el "Contrato de

[799] Memorial de Contestación y Reconvención, No. 536.
[800] Memorial de Contestación y Reconvención, No. 537.
[801] Memorial de Contestación y Reconvención, No. 539 y 540.

Energía") con el propietario de la Central (EPS IV), suscrito el 20 de marzo de 2018[802].

1006. Manifiesta la Comisión que, mediante oficio No. CFE GEN IV-OGE-196/2019, la EPS IV realizó un requerimiento de pago referente a diversas facturas que corresponden al año 2019, por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, las cuales Dunor Energía S.A.P.I. de C.V., no ha pagado, razón por la cual se generaron y se siguen generando los correspondientes gastos financieros[803].

1007. Respecto de lo anterior, sostiene que DUNOR manifestó la existencia de ciertas interrupciones del servicio, por lo que solicitó el informe de fallas correspondiente y, en su caso, el monto de la indemnización aplicable, para estar en posibilidad de compensar los adeudos que tiene DUNOR por la compraventa de energía eléctrica bajo el Contrato de Energía[804].

1008. Posteriormente, mediante oficio No. CFE GEN IV-OGE-216/2019192, la EPS IV rechazó la supuesta indemnización por las interrupciones referidas por DUNOR en su carta No. DUNOR-CFE-718, exigiendo nuevamente el pago por las facturas vencidas del año 2019. Adicionalmente, a través del oficio No. CFE GEN IV- OGE-138/2020193, la EPS IV envió a Dunor Energía S.A.P.I. de C.V., los montos de los adeudos actualizados por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, los cuales consideran los gastos financieros generados hasta la fecha de emisión del oficio en comento, por el impago de las facturas de suministro de energía eléctrica del año 2019[805].

1009. Posteriormente, señala que al mes de julio de 2020, los adeudos totales a cargo de Dunor Energía S.A.P.I de C.V., por concepto de la compraventa de energía eléctrica al amparo del Contrato de Energía, ascienden a un total de $ 9'113,673.45 (Nueve millones ciento trece mil seiscientos setenta y tres pesos

[802] Memorial de Contestación y Reconvención, No. 541.
[803] Memorial de Contestación y Reconvención, No. 549.
[804] Memorial de Contestación y Reconvención, No. 551.
[805] Memorial de Contestación y Reconvención, No. 552 - 553.

mexicanos 45/100 M.N.), cantidad que deberá ser actualizada con los gastos financieros generados a la fecha real de pago[806].

1010. Señala que pese a los requerimientos de pago que se han realizado a DUNOR, éste ha hecho caso omiso en pagar las cantidades que adeuda por concepto de compraventa de energía eléctrica al amparo del Contrato de Energía, así como los gastos financieros generados[807].

1011. A su vez, afirma la Comisión que se encuentra legitimada para realizar el reclamo. Al respecto precisa que el hecho de que el Contrato de Energía se haya celebrado con la EPS IV no es óbice para que CFE realice el presente reclamo, ya que de conformidad con el artículo 6 de la Ley de la Comisión Federal de Electricidad, CFE puede realizar sus actividades, operaciones o servicios con apoyo de sus empresas productivas subsidiarias, tal y como ocurrió en el presente caso[808].

1012. Bajo esta línea, expresa que CFE dentro de su objeto puede llevar a cabo la actividad de la generación, de acuerdo con la Ley de la Industria Eléctrica, tal y como lo establece el artículo 5 de la Ley de la Comisión Federal de Electricidad y, en apego al numeral 6 de la misma ley, dicha actividad puede realizarla con apoyo de sus empresas productivas subsidiarias, como lo es el caso de CFE Generación IV[809].

1013. Por lo anterior, considera que en términos del artículo 60 de la propia Ley de la Comisión Federal de Electricidad y del Acuerdo de creación de la empresa productiva subsidiaria de la Comisión Federal de Electricidad, denominada CFE Generación IV, publicado en el Diario Oficial de la Federación el 29 de marzo de 2016, CFE encomendó el suministro de energía eléctrica a la EPS IV, para que, en términos del artículo 6 y 57 de la Ley de la Comisión Federal de Electricidad realizara las actividades de generación de energía eléctrica que CFE tiene encomendadas para el cumplimiento de su objeto[810].

[806] Memorial de Contestación y Reconvención, No. 554.
[807] Memorial de Contestación y Reconvención, No. 555.
[808] Memorial de Contestación y Reconvención, No. 562.
[809] Memorial de Contestación y Reconvención, No. 564.
[810] Memorial de Contestación y Reconvención, No. 565.

1014. La Comisión precisa que el Contrato de Energía tiene su origen en una obligación contractual de DUNOR, derivada del Contrato, además de que, con apoyo en las disposiciones legales vigentes, la Demandante no habría podido cumplir con dicha obligación si no es mediante la celebración del Contrato de Energía con la EPS IV, ya que de lo contrario, DUNOR habría tenido que obtener ante el MEM su Registro de Centro de Carga, figura que, como ya se ha mencionado, se encuentra dirigida a altos consumidores (Industriales) que se dedican a comprar energía eléctrica a largo plazo, lo cual le hubiera representado la realización de diversos estudios y el cumplimiento de requisitos no previstos en el Contrato[811].

1015. Por último, concluye la Comisión que la Demandada reconoce que existe una vinculación entre las obligaciones derivadas del Contrato y las obligaciones emanadas del Contrato de Energía y que, en un momento dado, las prestaciones derivadas de ambos instrumentos jurídicos pudieran compensarse. Advierte que tal manifestación robustece el hecho de que CFE está legitimada para plantear la presente reconvención ante la falta de pago de DUNOR[812].

1016. En su Memorial de Réplica, la Comisión reitera que el Tribunal tiene Jurisdicción respecto a la Demanda de Reconvención. Señala que, de un adecuado análisis del Contrato de Energía, se puede apreciar que, en términos de su Cláusula 1.2 “Fin del Contrato”, las Partes estipularon que el Contrato de Energía tiene por objeto satisfacer la energía eléctrica para la realización de las pruebas y mantenimiento del Proyecto Central Eléctrica 313 Empalme II, que es obligación del Comprador en su carácter de Contratista[813].

1017. Advierte además que la Demandante reconoció los adeudos materia del reclamo realizado por la Comisión, tal y como se desprende del comunicado No. DUNOR-CFE-718314, en el cual la Demandante manifestó tener problemas de liquidez, bajo el argumento de que las pruebas de puesta en servicio de la Central Empalme se alargaron por causas no imputables al Contratista y que CFE no había reconocido ni liquidado los periodos de extensión, entre cuyos conceptos se encuentra la energía eléctrica destinada a las pruebas del proyecto

[811] Memorial de Contestación y Reconvención, No. 566.
[812] Memorial de Contestación y Reconvención, No. 568.
[813] Dúplica y Réplica a la Reconvención, No. 501.

CC Empalme II. Considera la Comisión que, con dicho comunicado Dunor reconoce la vinculación existente entre las obligaciones derivadas del Contrato PIF-039/205 y las obligaciones emanadas del Contrato de Energía[814].

### 12.2.2 Posición de DUNOR

1018. DUNOR sostiene que el Tribunal Arbitral carece de jurisdicción respecto de esta reclamación. A tal efecto señala que este reclamo no tiene asidero en las obligaciones contractuales asumidas por las Partes en el Contrato[815].

1019. Al respecto, señala que la Jurisdicción del Tribunal se basa en el Contrato. Para este efecto hace un recuento de su Solicitud de Arbitraje ante la Corte Internacional de Arbitraje de Londres contra la Comisión al amparo de la cláusula 30.3 del Contrato[816] y de la Respuesta a la Solicitud de Arbitraje, en la que se señala el alcance del presente arbitraje acotándolo a "*toda controversia que se suscite en relación con el Contrato*"[817].

1020. Adicionalmente, DUNOR señala frente a la argumentación de la Comisión que el Contrato y el Contrato de Energía son independientes, siendo sus partes, objeto y causas diferentes[818].

1021. DUNOR objeta la Jurisdicción del Tribunal Arbitral por no existir identidad de Partes. Al respecto, señala que, si bien DUNOR es parte tanto del Contrato de Energía como del Contrato, no es así en el caso de la Demandada, quien no es parte del Contrato de Energía (base de su reclamación de cantidad). A este respecto destaca que la Comisión y CFE Generación IV son empresas independientes, con personalidad jurídica propia[819].

1022. Expresa que el estatuto orgánico de la Comisión establece que *"la Comisión Federal de Electricidad es una empresa productiva del Estado de propiedad exclusiva del Gobierno Federal, con personalidad jurídica y patrimonio propios y*

[814] Dúplica y Réplica a la Reconvención, No. 517.
[815] Réplica y Contestación Reconvención, No. 465.
[816] Réplica y Contestación Reconvención, No. 466.
[817] Réplica y Contestación Reconvención, No. 467.
[818] Réplica y Contestación Reconvención, No. 470.
[819] Réplica y Contestación Reconvención, No. 474.

*gozará de autonomía técnica, operativa y de gestión*". Agrega que la Comisión tiene por objeto prestar el servicio público de transmisión y distribución de energía eléctrica y, para ello, *"podrá realizar las actividades, operaciones o servicios necesarios por sí misma; con apoyo de sus empresas productivas subsidiarias y empresas filiales o mediante la celebración de contratos . . . con personas físicas o morales de los sectores público, privado o social, nacional o internacional*"[820].

1023. Así mismo señala que el título sexto del estatuto de la Comisión regula la relación entre ésta y sus Empresas Productivas Subsidiarias ("EPS") y Empresas Filiales ("EF"), y establece que "*deberá conducirse en estricto apego a la Ley, a su Reglamento y a los Términos para la estricta separación legal de la Comisión*". Señala también que el estatuto orgánico de CFE Generación IV dispone que "*[ésta] es una Empresa Productiva Subsidiaria de la Comisión, la cual cuenta con personalidad jurídica y patrimonio propio, que tiene por objeto generar energía eléctrica, así como realizar las actividades de comercialización, excepto la prestación del Suministro Eléctrico*"[821].

1024. También, indica que CFE Generación IV cuenta con sus propios órganos superiores y de gobierno, y con su propio Departamento Jurídico al que le corresponde "*representar legalmente a CFE Generación IV . . . ante las instancias arbitrales . . . Defender los intereses jurídicos de CFE Generación IV y representarle en los juicios, procedimientos y recursos administrativos, judiciales o arbitrales en que sea parte o tenga interés jurídico*"[822].

1025. Por lo anterior, DUNOR concluye que la Demandada y CFE Generación IV son empresas independientes con personalidad jurídica y patrimonio propios, regidas cada una por su propio estatuto orgánico. En ningún caso puede entenderse que se trate de la misma persona jurídica, por cuanto su objeto, órganos de dirección y control y representación legal son completamente diferentes[823].

[820] Réplica y Contestación Reconvención, No. 475.
[821] Réplica y Contestación Reconvención, No. 476.
[822] Réplica y Contestación Reconvención, No. 478.
[823] Réplica y Contestación Reconvención, No. 479.

1026. Sostiene que si bien la Comisión argumenta que el reclamo podría presentarse en el presente arbitraje debido a que el artículo 6 de la LCFE estipula que CFE puede realizar sus actividades a través de sus empresas productivas subsidiarias, la Comisión olvida que una cosa es "*realizar actividades*" a través de empresas subsidiarias y otra muy diferente es que el consentimiento al arbitraje prestado por DUNOR se extienda a terceras personas[824].

1027. Señala DUNOR que nunca ha asumido ninguna obligación frente a la Comisión bajo el Contrato de Energía, y por tanto, no se le puede exigir ningún pago. La Demandada carece de legitimación por activa para reclamar a DUNOR en el presente arbitraje bajo un contrato del que no es parte como si se tratase de una misma persona jurídica[825].

1028. Explica DUNOR que las EPS y EF operan conforme a los dispuesto en la Ley de Industria Eléctrica (LIE), en términos de estricta separación legal. En ese sentido, DUNOR menciona que el Transitorio Cuarto de la LIE ordena a CFE llevar a cabo *"la separación contable, operativa, funcional y legal que corresponda a cada una de las actividades de generación, transmisión, distribución y comercialización [de energía*]" y prevé que la Secretaría de Energía y la Comisión Reguladora de Energía establezcan los términos bajo los cuales CFE llevará a cabo dicha separación. La separación legal deberá ser vertical entre las distintas líneas de negocio y horizontal entre una misma línea de negocio[826].

1029. Después de indicar que CFE y sus EPS se rigen en términos de estricta separación legal y que actúan con total independencia, DUNOR sostiene que la Demandada y CFE Generación IV no pueden, ni deben, considerarse la misma persona jurídica. Agrega que CFE Generación IV fue creada mediante el *"Acuerdo de creación de la empresa productiva subsidiaria de la Comisión Federal de Electricidad*", de 29 de marzo de 2016 (en adelante, el "Acuerdo de

[824] Réplica y Contestación Reconvención, No. 480.
[825] Réplica y Contestación Reconvención, No. 482.
[826] Réplica y Contestación Reconvención, No. 484 y 485.

Creación"), como una empresa con personalidad jurídica y patrimonio propios[827] .

1030. Destaca además DUNOR que, el Contrato de Energía constituye una obligación válida y vinculante exclusivamente para las Partes que lo suscriben, esto es, DUNOR y CFE Generación IV.610 En este sentido, la cláusula 5 del Contrato de Energía establece que "*la relación entre las Partes deriva y consiste únicamente de los derechos y obligaciones establecidos en el presente Contrato*".[828]

1031. Hace referencia al principio *pacta sunt servanda* recogido en el CCF para señalar que los contratos obligan solamente a sus partes. Manifiesta que, por mucho que la Demandada realice actividades a través de sus EPS, la Comisión y CFE Generación IV son personas jurídicas independientes. El Contrato de Energía únicamente confiere derechos y obligaciones a CFE Generación IV. La Demandada está intentando ejercitar derechos en este arbitraje en base a un contrato del que ni tan siquiera es parte. Por lo tanto, concluye que la Comisión no tiene legitimación por activa para reclamar el pago de MXN$ 9'282,113.54 (Nueve millones doscientos ochenta y dos mil ciento trece pesos mexicanos 54/100 M.N.)[829].

1032. Además de lo anterior, señala que, aun considerando que la Comisión y CFE Generación IV fuesen la misma persona jurídica (*quod non),* el Tribunal Arbitral carece de jurisdicción en relación con la presente reclamación. Al respecto, expresa que el Contrato OPF no extiende su cláusula arbitral a otros contratos[830].

1033. Señala que el convenio arbitral constituye la piedra angular del procedimiento arbitral. Es además el fundamento primario de la potestad de decisión o competencia de cualquier tribunal arbitral. Expresa que dicho convenio viene a ser un acto jurídico constitutivo toda vez que genera obligaciones para las Partes

[827] Réplica y Contestación Reconvención, No. 489 y 491.
[828] Réplica y Contestación Reconvención, No. 493.
[829] Réplica y Contestación Reconvención, No. 494 y 497.
[830] Réplica y Contestación Reconvención, No. 498.

y las vincula a su finalidad específica, que es la de someter a arbitraje la solución de las controversias a las que el convenio arbitral extiende sus efectos[831].

1034. Agrega que, en lo referente al objeto del presente arbitraje, la cláusula arbitral del Contrato se refiere únicamente a las controversias surgidas en relación con dicho Contrato, y no extiende su aplicación a otros contratos distintos[832].

1035. Expresa DUNOR que la intención y voluntad de las Partes es clara en cuanto al alcance del convenio arbitral, no pudiendo la Demandada extender unilateralmente su alcance a controversias surgidas de un contrato distinto. Es más, derivado del carácter consensual del arbitraje, la única forma de subvertir esta situación sería mediante pacto expreso de las Partes[833].

1036. También, DUNOR sostiene que el Contrato de Energía no tiene cláusula arbitral. Por lo que, son los tribunales mexicanos los competentes para dirimir cualquier controversia que de él se deriven. Señala que la cláusula 16 del Contrato de Energía dispone que, *"para todos los asuntos relacionados con la interpretación y cumplimiento del presente Contrato, la legislación aplicable serán las leyes federales de México*"[834]."

1037. DUNOR recuerda que es un principio fundamental del arbitraje que sólo las partes de un acuerdo de arbitraje pueden verse vinculadas por él. El principio de autonomía de la voluntad de las partes constituye el sustrato mismo del arbitraje. Este es el punto de partida que debe presidir el análisis de la jurisdicción del Tribunal Arbitral.[835]

1038. Por lo anterior, considera que, a efectos de identificar las partes de un acuerdo arbitral, el factor determinante es el consentimiento inequívoco de someterse a arbitraje. El consentimiento se manifiesta por el concurso de la oferta y de la aceptación sobre la cosa y la causa que ha de constituir el contrato de arbitraje. En general, el consentimiento puede ser expreso o tácito. **No así en arbitraje,** donde el acuerdo arbitral debe "*constar por escrito, y consignarse en*

[831] Réplica y Contestación Reconvención, No. 500-501.
[832] Réplica y Contestación Reconvención, No. 502.
[833] Réplica y Contestación Reconvención, No. 505.
[834] Réplica y Contestación Reconvención, No. 510.
[835] Réplica y Contestación Reconvención, No. 512.

*documento firmado por las partes"*, de conformidad con el artículo 1423 del Código de Comercio[836].

1039. En conclusión, DUNOR manifiesta que resulta claro y manifiesto que la reclamación que pretende la Comisión en base al Contrato de Energía queda fuera de la jurisdicción del Tribunal Arbitral por cuanto (i) de conformidad con la legislación aplicable, es necesario que el acuerdo de arbitraje conste por escrito y firmado por las partes que lo suscriben, y (ii) el Contrato de Energía no contiene cláusula arbitral.[837]

1040. Adicionalmente agrega que no existe acuerdo entre las Partes que permita la tramitación conjunta de reclamaciones bajo distintos contratos.[838].

1041. Añade que, incluso si la Demandada intentara elaborar una teoría sobre el Contrato y el Contrato de Energía son parte de una misma transacción, DUNOR expone que: i) El Contrato estipula que "*el presente Contrato es la compilación completa y exclusiva de todos los términos y condiciones que rigen el acuerdo de las Partes en relación con el objeto del mismo*". Por su parte, el Contrato de Energía dispone que "*este Contrato constituye la totalidad del acuerdo establecido entre las Partes*"; ii) el Contrato de Energía no es complementario del Contrato y, iii) el Contrato y el Contrato de Energía son completamente independientes. El primero podría existir en ausencia del segundo y viceversa[839].

1042. Por último, señala DUNOR que el Contrato de Energía prohíbe expresamente la cesión de derechos. A tal efecto, se refiere a la cláusula 6 del Contrato de Energía, la cual establece que ninguna de las Partes podrá ceder, enajenar, gravar o transmitir, ya sea total o parcialmente, los derechos y obligaciones derivados de este Contrato, salvo con el consentimiento por escrito de la otra Parte[840].

1043. En ese orden de ideas, DUNOR se refiere al artículo 2030 del CCF que establece en su párrafo 1º que *"[e]l acreedor puede ceder su derecho a un*

[836] Réplica y Contestación Reconvención, No. 513.
[837] Réplica y Contestación Reconvención, No. 519.
[838] Réplica y Contestación Reconvención, No. 520.
[839] Réplica y Contestación Reconvención, No. 529.
[840] Réplica y Contestación Reconvención, No. 533.

*tercero sin el consentimiento del deudor, a menos que la cesión esté prohibida por la ley, se haya convenido no hacerla o no le permita la naturaleza del derecho."* Y añade en su párrafo 2º que *"[e]l deudor no puede alegar contra el tercero que el derecho no podía cederse porque así se había convenido, cuando ese convenio se conste en el título constitutivo del derecho"*[841].

1044. Concluye entonces que, DUNOR nunca ha prestado (ni prestará) su consentimiento escrito autorizando que se ceda o transmita a la Comisión el eventual derecho de CFE Generación IV a cobrar las cantidades que aquí se reclaman bajo el Contrato de Energía[842].

1045. Por lo anterior concluye DUNOR[843]:

- El presente procedimiento arbitral se basa exclusivamente en el Contrato, y no en el Contrato de Energía.
- El Contrato y el Contrato de Energía lo suscriben partes diferentes. En este sentido, mientras las partes del Contrato son DUNOR y la Comisión, las partes del Contrato de Energía son DUNOR y la empresa CFE Generación IV; esta última es una empresa independiente con personalidad jurídica y patrimonio propios.
- Aun considerando que CFE Generación IV y la Comisión fuesen la misma persona jurídica (*quad non*), el Contrato no permite extender su cláusula de arbitraje a otros contratos.
- El Contrato de Energía no contiene una cláusula de arbitraje. No habiendo DUNOR y CFE Generación IV consentido someter las diferencias derivadas de ese contrato a arbitraje, serán exclusivamente competentes los juzgados y tribunales mexicanos.
- No existe acuerdo entre las Partes, ni clausula contractual que permita la tramitación conjunta de reclamaciones basadas en contratos diferentes. En todo caso, la Reconvención no puede basarse en un contrato que no esté cubierto por el acuerdo arbitral.

[841] Réplica y Contestación Reconvención, No. 534.
[842] Réplica y Contestación Reconvención, No. 536.
[843] Réplica y Contestación Reconvención, No. 545.

- El Contrato de Energía prohíbe en su cláusula 6 ceder o transmitir los derechos y obligaciones derivados de dicho contrato, salvo con el consentimiento por escrito de la otra parte. DUNOR no ha prestado su consentimiento y anticipa que no lo prestará.

1046. Por otra parte, DUNOR hace referencia a la fecha en que se expidieron las normas que rigen el sector eléctrico a las que alude la Comisión y afirma que cuando en octubre de 2015 las Partes firmaron el Contrato, la Comisión era perfecta conocedora de que, llegado el momento, no podría ser la propia CFE quien realizase las actividades de compraventa de energía eléctrica, sino que sería necesariamente una EPS quien tendría las facultades de compraventa de energía. Lo cual se materializó el 29 de marzo de 2016, a través del "*Acuerdo de creación de la empresa productiva subsidiaria de la Comisión Federal de Electricidad*"[844].

1047. Pese esta situación, DUNOR destaca que la Comisión jamás introdujo ningún cambio en la redacción de la cláusula 6.8 del Contrato ni antes ni después de la firma del mismo[845].

1048. Adicionalmente, señala DUNOR que la actualización de la Cláusula 6.8 del Contrato es contractualmente imposible e ilegal. Al respecto, manifiesta que la Cláusula 31.5 del Contrato dispone: *"Cualquier modificación o aclaración al presente Contrato deberá efectuarse mediante previo acuerdo por escrito debidamente suscrito por cada Parte en este Contrato, de conformidad con lo establecido en el artículo 59 de la LOPSRM y en el Título Tercero, Capítulo Tercero, sección III del RLOPSRM, en lo que resulte aplicable. La renuncia de cualquier estipulación del Contrato por cualquier Parte deberá hacerse por escrito, debidamente suscrita por tal Parte, haciendo referencia expresa al derecho a que dicha Parte renuncia, así como a la Cláusula del presente Contrato con la cual se consigna dicho derecho"*[846].

1049. DUNOR aclara que, de conformidad con dicha cláusula, la Demandada pudo haber hecho las modificaciones y aclaraciones

[844] Dúplica a la Demandada de Reconvención, No. 20.
[845] Dúplica a la Demandada de Reconvención, No. 22.
[846] Dúplica a la Demandada de Reconvención, No. 24.

pertinentes al Contrato con anterioridad a su firma, ya que fue ella quien diseñó dicho Contrato en fase de Licitación – o incluso con posterioridad, tras la creación de CFE Generación IV, en marzo de 2016 y durante la firma del Contrato de Energía. Sin embargo, nada de esto hizo. Del tenor literal de la cláusula transcrita se desprende, utilizando las palabras de CFE, que la actualización en especie de la cláusula 6.8 (esto es, que la obligación de pago a CFE Generación IV se *entienda* hecha a CFE y pase a convertirse en una obligación bajo el Contrato exigía que las Partes lo hubiesen acordado expresamente en alguno de los contratos)[847].

1050. Agrega, además, que no solo no se ha modificado o aclarado el Contrato (por escrito y con el consentimiento previo de DUNOR) sino que (i) cuando CFE Generación IV manifiesta que: "*El Contrato [de Energía] constituye una obligación válida y vinculante para el Vendedor[CFE Generación IV], exigible conforme a sus términos*"; y (ii) firma el Contrato de Energía en su propio nombre y derecho, no hace referencia alguna a que DUNOR deba entender que, en realidad, se está actualizando en especie el Contrato y está contratando con la Comisión; o que las cantidades que deba pagar DUNOR por la compra de energía en realidad son de la Comisión y forman parte de las obligaciones contractuales que DUNOR asume bajo el Contrato"[848].

### 12.2.3 Consideraciones del Tribunal

1051. La jurisdicción del Tribunal en el presente caso deriva de un pacto arbitral el cual está contenido en la cláusula 30.3 del Contrato que dispone:

> *"30.3 Arbitraje. Todas las desavenencias que surjan en relación con el presente Contrato, distintas a las controversias que de conformidad con la Cláusula 30.2, deban ser resueltas, serán decididas exclusivamente y definitivamente de conformidad con el Reglamento de Arbitraje de la Corte Internacional de Arbitraje de Londres (London Court of International Arbitration), por 3 (tres) árbitros; uno elegido por cada una de las Partes; el tercer árbitro será nombrado por las Partes o por los árbitros ya nombrados y a falta de acuerdo por la Corte Internacional de Arbitraje de Londres (London Court of International Arbitration, en adelante*

[847] Dúplica a la Demandada de Reconvención, No. 25.
[848] Dúplica a la Reconvención, No. 26.

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*LCIA). Los árbitros preferentemente conocerán derecho mexicano. La sede del arbitraje será la ciudad de México, Distrito Federal, y se conducirá en idioma español. La Ley Aplicable al fondo del arbitraje y por supletoriedad al procedimiento en lo que fuere omiso el Reglamento de Arbitraje de la LCIA será la estipulada en la Cláusula 30.1. En cuanto al procedimiento, si el Reglamento de la Corte de Arbitraje Internacional de Londres es omiso, se aplicará las Normas que las Partes o, en su defecto, el Tribunal Arbitral, determinen. El proceso arbitral será confidencial y cualquier Persona que participe en el mismo deberá guardar reserva. La confidencialidad anterior deberá mantenerse siempre y cuando una autoridad competente no exija la publicidad conforme a la Ley Aplicable. Se entiende que el Tribunal Arbitral deberá aceptar como obligatorias las determinaciones -si las hubiere- del Experto respecto de aspectos técnicos o administrativos dentro de los límites del mandato de dicho Experto."* (se subraya)

1052. Para determinar el alcance de la jurisdicción del Tribunal en relación con la Demanda de Reconvención debe tenerse en cuenta tanto el contenido del pacto, como las partes que lo han suscrito. En efecto, el contenido del pacto determina las controversias que se someterán a arbitraje, pero adicionalmente, el pacto sólo obliga a quienes son partes en él, por lo que sólo pueden someterse a arbitraje controversias entre las personas que lo han celebrado.

1053. A este respecto se aprecia que conforme al texto del pacto pueden ser sometidas a arbitraje las desavenencias "*que surjan en relación con el presente contrato*". La expresión "*en relación con*" que utiliza la cláusula puede tener un sentido amplio, pues de acuerdo con el Diccionario de la RAE la expresión relación significa "*Conexión, correspondencia de algo con otra cosa",* por lo que el pacto arbitral podría llegar a aplicarse a las controversias de las partes, que aunque no se deriven de obligaciones estipuladas en el Contrato, guarden relación con el mismo.

1054. Sin embargo, ello por sí solo no es suficiente para concluir que la controversia planteada en la Demanda de Reconvención está cobijada por el pacto, pues adicionalmente debe determinarse a quiénes vincula el pacto arbitral, pues sólo aquellos que son partes quedan obligados a someter la respectiva controversia a arbitraje.

1055. En este punto se debe recordar que el pacto arbitral es un contrato por lo cual se sujeta a las reglas de los mismos, y en particular al principio del efecto relativo. Los contratos siendo producto de la voluntad de los contratantes en principio sólo a ellos los obligan. En tal sentido el artículo 1796 del CCF dispone que *"Los contratos se perfeccionan por el mero consentimiento, excepto aquellos que deben revestir una forma establecida por la ley. Desde que se perfeccionan obligan a los contratantes, no sólo al cumplimiento de lo expresamente pactado, sino también a las consecuencias que, según su naturaleza, son conforme a la buena fe, al uso o a la ley" (*se subraya). Por consiguiente, de acuerdo con el CCF el pacto arbitral sólo obliga a quienes son parte en el mismo y no a terceros.

1056. En este mismo sentido el artículo 1416 del Código de Comercio de México expresamente establece que el acuerdo de arbitraje es "*el acuerdo por el que las partes deciden someter a arbitraje todas o ciertas controversias que hayan surgido o puedan surgir entre ellas respecto de una determinada relación jurídica, contractual o no contractual*" (se subraya).

1057. Por consiguiente de conformidad con la ley mexicana, el pacto arbitral sólo puede referirse a las controversias que surjan entre las partes del pacto, pues son ellas las que se han obligado por el mismo. Así lo han entendido autoridades judiciales mexicanas, como se desprende de la siguiente referencia:

> *"Instancia: Tribunales Colegiados de Circuito Décima Época*
>
> *Materia(s): Civil Tesis: I.3o.C.401 C (10a.)*
>
> *Fuente: Gaceta del Semanario Judicial de la Federación. Libro 73, Diciembre de 2019, Tomo II, página 1030*
>
> *Tipo: Aislada*
>
> *COMPROMISO ARBITRAL. INVOLUCRA SÓLO A LAS PARTES QUE LO PACTARON.*
>
> *El consentimiento de las partes opera en el momento de iniciar el arbitraje, ya que se basa en el principio de libertad y disposición de las partes para elegir la*

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*vía para resolver sus conflictos. Por tanto, las partes que no están involucradas en el compromiso arbitral no podrán participar en él. En ese sentido, cuando existen contratos en los que las partes pactaron cláusula arbitral no puede existir una interrelación con otros en donde no se hizo ese compromiso arbitral, porque no puede someterse al arbitraje a quien no lo decidió. Sin embargo, el laudo arbitral es válido, aun cuando existan terceros que contrataron con cada una de las partes que decidieron someterse al arbitraje. Las diferencias entre éstos y alguno de los arbitrajes, se resolverán en la jurisdicción formal y materialmente jurisdiccional.*

*TERCER TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO.*

*Amparo directo 8/2019. M+W High Tech Projects México, S. de R.L. de C.V. 10 de abril de 2019. Unanimidad de votos. Ponente: Paula María García Villegas Sánchez Cordero. Secretaria: Montserrat Cesarina Camberos Funes"* (se subraya).

1058. De esta manera, no puede entenderse sometida a arbitraje una controversia entre personas que no son todos ellas partes del pacto arbitral que se invoca.

1059. A todo lo anterior vale la pena agregar que de conformidad con el artículo 1423 del Código de Comercio de México *el "acuerdo de arbitraje deberá constar por escrito, y consignarse en documento firmado por las partes o en un intercambio de cartas, télex, telegramas, facsímil u otros medios de telecomunicación que dejen constancia del acuerdo, o en un intercambio de escritos de demanda y contestación en los que la existencia de un acuerdo sea afirmada por una parte sin ser negada por la otra"* (se subraya).

1060. Por consiguiente, el consentimiento de las partes en el acuerdo de arbitraje, a la luz de la legislación mexicana, debe estar revestido de la formalidad del escrito.

1061. Bajo esta perspectiva se aprecia entonces que el pacto arbitral en que se funda la jurisdicción de este Tribunal está incluido en el Contrato celebrado entre CFE y DUNOR, y por ello sólo se entiende referido a las controversias entre esas dos partes.

1062. Ahora bien, la controversia a la que se refiere la Demanda de Reconvención se refiere al pago del precio debido en desarrollo del Contrato de Compraventa de Energía que se celebró, según se indica en su texto, entre Dunor Energía S.A.P.I DE C.V. y la Empresa Productiva Subsidiaria de la Comisión Federal de Electricidad, denominada CFE Generación IV., quien se identifica como el Vendedor.

1063. Es pertinente señalar que en las declaraciones que se hacen en la primera parte del Contrato de Compraventa de Energía se expresa que el Vendedor es una "*Empresa Productiva Subsidiaria de la Comisión Federal de Electricidad, con personalidad jurídica y patrimonio propios*". Destaca el Tribunal que la personalidad jurídica de CFE Generación IV implica que esta última es el sujeto de los derechos y obligaciones derivados del contrato correspondiente, a menos que hubiere contratado como representante de otra persona, lo que no ocurre en este caso.

1064. En efecto, debe destacarse que, en el Contrato de Venta de Energía, CFE Generación IV no manifiesta actuar a nombre de la Comisión Federal de Electricidad. Por el contrario, en la declaración II.e) el Vendedor (que según el encabezamiento del Contrato de Venta de Energía es CFE Generación IV) identifica la persona natural que suscribe el Contrato y se dice que lo hace "*en su calidad de Representante Legal*" y que "*cuenta con las facultades necesarias y suficientes para celebrar el presente Contrato y obligarla en los términos del mismo*" Lo que indica que el obligado es CFE Generación IV y no otra persona. Así mismo en la declaración j. se indica que "*El Contrato constituye una obligación válida y vinculante para el Vendedor (es decir CFE Generación IV) exigible conforme a sus términos*" (la frase entre paréntesis no es del texto original).

1065. Adicional y específicamente en relación con el precio y la forma de pago, que es a lo que se refiere la Demanda de Reconvención, se dispone en la cláusula 3.1 del Contrato de Compraventa de Energía "*El precio que el Comprador se obliga a pagar al Vendedor en los términos de este Contrato*". Es decir que quien tiene derecho al pago es el Vendedor, es decir CFE Generación IV.

1066. Por consiguiente, en la medida en que en el Contrato de Compraventa de Energía no participó como parte la CFE, y, por tanto, no es titular de derechos y obligaciones por tal contrato, es claro que la controversia que surge de del Contrato de Compraventa de Energía no está incluida en el pacto arbitral del Contrato.

1067. Ahora bien, la CFE ha invocado la cláusula 6.8 del Contrato y los cambios en la ley eléctrica que dieron lugar a la celebración del Contrato de Compraventa de Energía para justificar su legitimación para presentar la Demanda de Reconvención e invocar el pacto arbitral.

1068. A este respecto se encuentra que la cláusula 6.8 del Contrato dispone lo siguiente:

> *"6.8 Suministro de Electricidad. Si así lo decidiera, el Contratista podrá celebrar Contrato con la Comisión, para suministro de energía eléctrica en las etapas de construcción y Pruebas en los términos establecidos en las Leyes, Reglamentos, manuales y disposiciones legales vigentes aplicables;*
>
> *Las solicitudes del Contratista a la Comisión para celebrar los contratos deberán presentarse por separado, a los 30 (treinta) Días para construcción, y a los 60 (sesenta) Días para Pruebas, contados a partir de la firma del Contrato.*
>
> *De acuerdo a la cláusula cuarta del Manual de Servicios al Público en materia de energía eléctrica, referente a la tramitación de las solicitudes y la celebración de los contratos para el suministro de energía eléctrica, se deben de efectuar en las oficinas o en los módulos administrativos del suministrador correspondiente al domicilio en que se requiera el suministro.*
>
> *Si el Contratista no realiza con la Comisión la contratación del suministro de energía eléctrica para la construcción y Pruebas debe por sus propios medios proporcionar la energía eléctrica que requiera"* (se subraya).

1069. Como se puede apreciar, la cláusula contractual prevé una facultad para el Contratista de celebrar un contrato con la Comisión para el suministro de energía eléctrica, pero al propio tiempo dispone que, si no se celebra con la Comisión, el contratista debe por sus propios medios proporcionar la energía eléctrica que requiera, lo que obviamente debe hacer de conformidad con el marco legal de la energía eléctrica en México. Es decir, del texto

contractual no se deduce una obligación para el Contratista de celebrar un contrato de compraventa de energía con CFE.

1070. Ahora bien, en el Contrato de Compraventa de Energía se indica en el numeral IV del acápite antecedentes lo siguiente:

> *"IV. En la cláusula 6.8. Suministro de Electricidad, del Contrato de Obra Pública Financiada a Precio Alzado, mencionado en el numeral I de los presentes antecedentes, se estableció la obligación del contratista de realizar los contratos para el suministro de energía eléctrica para las etapas de construcción y Pruebas en los términos establecidos en las Leyes, Reglamentos, manuales y disposiciones legales vigentes aplicables; en este caso la normatividad aplicable son los Criterios mediante los que se establecen las características específicas de la infraestructura requerida para la Interconexión de Centrales Eléctricas y Conexión de Centros de Carga, por lo que para la compra de energía, CFE Generación IV es el único facultado para hacer la compra en el Mercado Eléctrico Mayorista, pero subsiste la responsabilidad del Contratista del pago de la energía eléctrica que consuma durante la realización de las pruebas de la nueva Central Eléctrica"* (se subraya).

1071. Como se puede apreciar, lo que dispone esta cláusula es que el Contratista estaba obligado a celebrar los contratos para el suministro de energía eléctrica para las etapas de construcción y pruebas, pero al propio tiempo que CFE Generación IV es el único facultado para hacer la compra en el Mercado Eléctrico Mayorista.

1072. El Contrato de Compraventa de Energía no indica que CFE Generación IV hubiere actuado a nombre de la Comisión Federal de Electricidad. Por el contrario, de su texto se desprende que el Contrato de Compraventa de Energía vincula a CFE Generación IV y DUNOR, y que DUNOR está obligado a pagar el precio a CFE Generación IV.

1073. De otra parte, como fundamento de su posición la CFE invoca el artículo 6 de la Ley de la Comisión Federal de Electricidad el cual dispone:

> *"Artículo 6. La Comisión Federal de Electricidad podrá realizar las actividades, operaciones o servicios necesarios para el cumplimiento de su objeto por sí misma; con apoyo de sus empresas productivas subsidiarias y empresas filiales, o mediante la celebración de contratos, convenios, alianzas o asociaciones o cualquier acto jurídico, con personas físicas o morales de los sectores público,*

*privado o social, nacional o internacional, todo ello en términos de lo señalado en esta Ley y las demás disposiciones jurídicas aplicables"* (se subraya).

1074. Es claro de acuerdo con esta disposición legal que la CFE puede realizar sus actividades directamente o lo puede hacer con apoyo de sus empresas productivas. Sin embargo, ello en manera alguna significa que en estos casos la CFE se convierta en parte en los contratos que se celebran por las empresas productivas subsidiarias, por cuanto en la medida en que tales empresas tienen personalidad jurídica y celebran contratos, deben aplicarse las reglas generales del derecho de las obligaciones y contratos, por lo que las obligaciones que surjan de los contratos que celebren dichas empresas en su propio nombre generarán derechos y obligaciones para aquellas que han expresado su voluntad de contratar.

1075. En este punto debe destacarse que de conformidad con el Acuerdo de Creación de la empresa productiva subsidiaria CFE Generación IV[849] dicha empresa tiene personalidad jurídica y patrimonio propios (artículo 1º) y es representada por el Director General (artículo 17).

1076. Por consiguiente, si bien la ley de la CFE dispone que la Comisión puede contar con el apoyo de las empresas productivas subsidiarias, ello no permite desconocer que en el presente caso CFE Generación IV tiene el carácter de persona jurídica distinta a la Comisión con su propio representante, que es el Director General, y que por ello es titular de los derechos y obligaciones que surgen a favor del vendedor en el Contrato de Compraventa de Energía.

1077. No sobra además señalar que el artículo 64 del Estatuto Orgánico de la Comisión establece que la *"La relación entre la Comisión, sus empresas productivas subsidiarias y empresas filiales deberá conducirse en estricto apego a la Ley, a su Reglamento y a los Términos para la estricta separación legal de la Comisión Federal de Electricidad…".* Es decir que las disposiciones que rigen la Comisión imponen la separación entre los actos de las empresas

[849] Doc C-210.

productivas y la CFE, por lo que no se puede considerar que esta es parte en los contratos celebrados por aquellas en su propio nombre.

1078. Por lo demás, el hecho de que la celebración del Contrato de Compraventa de Energía se haga en cumplimento de las obligaciones derivadas del Contrato celebrado entre la CFE y DUNOR, no altera la conclusión, pues una cosa es la razón por la que se celebra un contrato, y otra quienes son parte en el mismo y acreedores o deudores de las obligaciones que de él derivan.

1079. Por consiguiente, ha de concluirse que la CFE no es parte en el Contrato de Compraventa de Energía, sino que sólo tienen ese carácter CFE Generación IV y DUNOR.

1080. Por tal razón, no se puede afirmar que exista un conflicto entre las Partes en el pacto arbitral contenido en el Contrato, cuando la controversia a la que se alude es el pago del precio derivado del Contrato de Compraventa de Energía celebrado entre CFE Generación IV y DUNOR en el que no es parte CFE.

1081. Vale la pena señalar que la Comisión ha invocado que por el hecho del no pago del precio del Contrato de Compraventa de Energía por parte de DUNOR, habría un incumplimiento del Contrato celebrado entre CFE y DUNOR. El Tribunal no comparte esta conclusión, pues del Contrato entre CFE y DUNOR surge la obligación de proveer la energía en la etapa de construcción y pruebas, que es distinta a la de pagar el precio a quien le provee la energía. De hecho DUNOR cumplió su obligación con la CFE pues se dispuso de la energía en la etapa de construcción y pruebas. Otra cosa es que DUNOR le deba el precio correspondiente a CFE Generación IV.

1082. Finalmente, debe señalarse que en la Dúplica y Réplica a la Reconvención la Demandada invoca una comunicación No. DUNOR-CFE-718 del 12 de septiembre de 2019, la cual sin embargo no obra en el expediente, por lo cual el Tribunal no puede referirse a ella.

1083. Por todo lo anterior, el Tribunal concluye que carece de jurisdicción para pronunciarse sobre la Demanda de Reconvención, en la medida en que

la controversia relativa al pago del precio por el Contrato de Compraventa de Energía no surge entre las Partes en el pacto arbitral en que se funda este proceso.

### 12.3 Conclusión

1084. De todo lo expuesto el Tribunal concluye que debe hacer las siguientes declaraciones en relación con las pretensiones formuladas por DUNOR en su Demanda:

1. Declarar que tiene jurisdicción frente a la Demandada en relación con las pretensiones formuladas en este proceso;
2. Declarar que la Demandada ha incumplido el Contrato por no pagar la totalidad de las sumas debidas a la Demandante;
3. Ordenar a la Demandada a pagar a DUNOR la suma que resulta de los siguientes conceptos:

| | |
|---|---|
| Gastos Financieros, Seguros y Garantías un monto total de | US$ 487,992.32 |
| Gastos de Gestión de Personal y Administración de Campo de | US$ 7’739,641.51 |
| Gastos de Administración y Estructura de las Oficinas | US$ 2’975,708 |
| Reclamaciones de terceros | US$ 4’681,181.31 |
| Descuento indebido por incumplimiento en entrega de partes de repuestos solicitados | US$ 1’393,106.70 |

| | |
|---|---|
| Descuento excesivo por curvas de degradación | US$ 3’258,966.78 |
| Gastos financieros pagos tardíos | US$ 227,760 |
| | US$ 20’764,356.62 |

4. Todas las cantidades que deba pagar la Demandada a DUNOR a que se refiere el numeral 3 anterior devengarán intereses post-laudo conforme a la Tasa de Gastos Financieros, a partir del vencimiento del término de veinte días para el pago de las sumas debidas, contados a partir de la notificación del presente Laudo.
5. Declarar que el Tribunal no tiene jurisdicción sobre la Demanda de Reconvención.

1085. Finalmente debe observarse que la Demandante solicita que al ordenar el pago de la suma que solicita, se adicione los impuestos que sean de aplicación[850]. Entiende el Tribunal que dicha petición se refiere a aquellas sumas que la ley mexicana prevé que deben pagarse adicionalmente (por ejemplo el IVA), por lo que en este contexto considera procedente la solicitud.

## 13 COSTAS

### 13.1 Consideraciones del Tribunal Arbitral

1086. De conformidad con el Artículo 28.2 del Reglamento de Arbitraje, el Tribunal Arbitral deberá decidir la proporción en la que las Partes deberán soportar los Costos del Arbitraje, mismos que son determinados por la LCIA en términos del Artículo 28.1 del Reglamento de Arbitraje (los “Costos del Arbitraje”). Asimismo, el Tribunal Arbitral tiene el poder de decidir en el presente Laudo si la totalidad o una proporción de los gastos legales o de cualquier tipo incurridos por una parte (los “Costos Legales”) en relación con el presente Arbitraje deben ser

[850] Memorial de Conclusiones de Dunor, párrafo 196.

pagados por la otra parte en términos del Artículo 28.3 del Reglamento de Arbitraje.

### 13.1.1 Costos Legales

1087. El artículo 1455 del Código de Comercio de México dispone:

> *"Artículo 1455.- Salvo lo dispuesto en el párrafo siguiente, las costas del arbitraje serán a cargo de la parte vencida. Sin embargo, el tribunal arbitral podrá prorratear los elementos de estas costas entre las partes si decide que el prorrateo es razonable, teniendo en cuenta las circunstancias del caso.*
>
> *"Respecto del costo de representación y de asistencia legal, el tribunal arbitral decidirá, teniendo en cuenta las circunstancias del caso, qué parte deberá pagar dicho costo o podrá prorratearlo entre las partes si decide que es lo razonable.*
>
> *"Cuando el tribunal arbitral dicte una orden de conclusión del procedimiento arbitral o un laudo en los términos convenidos por las partes, fijará las costas del arbitraje en el texto de esa orden o laudo.*
>
> *"El tribunal arbitral no podrá cobrar honorarios adicionales por la interpretación, rectificación o por completar su laudo".*

1088. De esta manera, la ley mexicana establece como punto de partida en materia de costas que las mismas son a cargo de la parte vencida, pero le permite al Tribunal prorratear dichas costas si ello es razonable.

1089. Por lo cual teniendo en consideración, tanto el resultado del proceso, como la conducta que han observado las Partes en el desarrollo del mismo, el Tribunal concluye que cada parte debe asumir sus costos.

### 13.1.2 Costos del Arbitraje

1090. Los Costos del Arbitraje netos (diferentes a los Costos Legales u otros costes incurridos por las Partes por cuenta propia) han sido determinados por la Corte de la LCIA, de conformidad con el Artículo 28.1 del Reglamento de Arbitraje, de la siguiente manera:

| | |
|---|---|
| Cuota de Registro: | GBP 1,750.00 |
| Costes Administrativos de la LCIA: | GBP 28,477.19 |
| Honorarios y gastos del Tribunal: | GBP 244,725.00 |
| Costes totales del arbitraje: | GBP 274,952.19 |

Estos honorarios y gastos están sujetos a IVA.

1091. De estos costes, la Demandante ha pagado GBP 161,759.92, lo que incluye la Cuota de Registro, los depósitos transferidos, y los intereses devengados y la Demandada ha pagado GBP 160,009.92, lo que incluye los depósitos transferidos, y los intereses devengados. El monto restante de los fondos será devuelto por la LCIA a las Partes en las proporciones que fueron pagados, de conformidad con el Artículo 28.7 del Reglamento de Arbitraje.

1092. De conformidad con el Artículo 28.2 del Reglamento de Arbitraje, el Tribunal Arbitral declara que cada Parte soportará un 50% de los Costos del Arbitraje netos.

## DECISIÓN DEL TRIBUNAL ARBITRAL

1093. En función de lo expuesto, el Tribunal Arbitral adopta las siguientes determinaciones:

**1:** Declarar que tiene jurisdicción frente a la Demandada en relación con las pretensiones formuladas en este proceso.

**2:** Declarar que la Demandada ha incumplido el Contrato por no pagar la totalidad de las sumas debidas a la Demandante.

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**3:** Ordenar a la Demandada a pagar a DUNOR la suma de US$ 20’764,356.62 (Veinte millones setecientos sesenta y cuatro mil trescientos cincuenta y seis dólares americanos 62/100 cy), por los conceptos indicados en la parte motiva de este Laudo, más los impuestos adicionales que sean aplicables.

**4:** Condenar a la Demandada a pagar a la Demandante intereses post-laudo conforme a la Tasa de Gastos Financieros determinada en el Contrato, esto es LIBOR a 6 (seis) meses, de acuerdo con la cotización de Reuters Services mas 1% (un punto porcentual) sobre la suma descontada por obra no ejecutada, a partir del vencimiento del término de veinte días para el pago de las sumas debidas a que se refiere el numeral 3 anterior, contados a partir de la notificación del presente Laudo.

**5:** Declarar que el Tribunal no tiene jurisdicción sobre la Demanda de Reconvención.

**6:** Declarar en materia de Costos Legales del proceso que cada Parte asume los propios.

**7:** Declarar en materia de Costos del Arbitraje que cada Parte soportará un 50% de los Costos del Arbitraje netos.

**8:** Negar las demás pretensiones formuladas.

Sede del Tribunal: Ciudad de México (México)
Dado a los días 26 días del mes de septiembre de 2022.

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ROBERTO HERNANDEZ GARCIA
Coárbitro

GUILLERMO ESTRADA ADAN
Coárbitro

JUAN PABLO CÁRDENAS MEJÍA
Presidente del Tribunal Arbitral

Arbitraje LCIA CASO N. 204865

entre

DUNOR ENERGÍA, S.A.P.I. DE C.V.

(DEMANDANTE) (México)

v.

COMISIÓN FEDERAL DE ELECTRICIDAD

(DEMANDADA) (México)

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# INDICE

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