INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/10/23 - Annulment Proceedings

TECO GUATEMALA HOLDINGS LLC

v.

REPUBLIC OF GUATEMALA

REPUBLIC OF GUATEMALA'S COUNTER-MEMORIAL ON TECO GUATEMALA HOLDINGS LLC'S APPLICATION FOR PARTIAL ANNULMENT OF THE AWARD

9 February 2015

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I. INTRODUCTION

1. The Republic of Guatemala (***Guatemala***) submits this Counter-Memorial in response to TECO Guatemala Holdings LLC's "Memorial on Partial Annulment of the Award," dated 17 October 2014 (***TGH's Memorial on Partial Annulment*** or ***TGH's Memorial***).[1]

2. TGH's annulment application is an attempt to reopen and reargue its case on damages. TGH was able to convince the Tribunal (the ***Tribunal***) in the original proceedings (the ***Arbitration***) with regard to certain aspects of its damages claim, but not others. It now seeks a second chance to prove its case where it failed the first time, as if this Annulment Committee (the ***Annulment Committee*** or the ***Committee***) were a court of appeal, which it obviously is not. The Tribunal dismissed part of TGH's damages claim in a reasoned decision and on the basis of the evidence on the record. That part of the Tribunal's decision raises no ground for annulment, and cannot be challenged just because TGH is dissatisfied with it.[2]

3. Likewise, TGH cannot seek to reargue the question of interest, which the Tribunal decided after having evaluated the evidence on the record and provided reasons.

4. **Section II** below summarises Guatemala's response to TGH's Memorial on Partial Annulment. **Section III** provides a short description of the dispute and the Award, correcting the many inaccuracies contained in TGH's own account. **Sections IV** and **V** then elaborate in more detail on the flawed nature of TGH's annulment application. **Section VI** contains Guatemala's request for relief.

II. SUMMARY OF GUATEMALA'S RESPONSE

5. As explained in Guatemala's Memorial on Annulment,[3] this case relates to the 2007/2008 tariff review process of *Empresa Eléctrica de Guatemala S.A.* (***EEGSA***).

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1 Capitalized terms not defined specifically in this document correspond to defined terms in Guatemala's Memorial on Annulment dated 17 October 2014.

2 To be clear, Guatemala's position as set out in its Memorial on Annulment is that the Tribunal should not have awarded TGH even the historical damages due to annullable flaws in the underlying reasoning on liability. *See* Guatemala's Memorial on Annulment, paras. 20, 213-224, 234, 241. The focus here, however, is on the Tribunal's decision on lost value damages, which rejected TGH's claim for lack of evidence. Nothing that Guatemala states in the present document may be construed as an acceptance of any part of the Award which Guatemala is challenging in its own annulment application.

3 *See* Guatemala's Memorial on Annulment, paras. 31-49.

EEGSA is a Guatemalan electricity distribution company in which TGH held shares until October 2010, when it sold them to the Colombian company *Empresas Públicas de Medellín* (***EPM***).

6. Electricity tariffs in Guatemala are reviewed every five years. In 2007/2008 the Guatemalan electricity regulator (*Comisión Nacional de Energía Eléctrica* or National Commission of Electric Energy, the ***CNEE***) conducted the process for the review and determination of the tariffs that each electricity distribution company would apply to consumers in the 2008-2013 period.

7. TGH claimed that the manner in which the CNEE conducted the tariff review process related to EEGSA was inconsistent with the Regulatory Framework, and thus violated the Dominican Republic-Central America Free Trade Agreement (the ***CAFTA-DR***). TGH thus sought monetary compensation amounting to the difference between the tariffs that were approved by the CNEE and the ones TGH considered pertinent.

8. TGH submitted two heads of damages: (i) alleged "historical losses," *i.e.*, the supposed tariff revenue lost between August 2008, when the new tariffs were approved, and October 2010, when TGH sold its shares to EPM; and (ii) alleged future losses, or "lost value," *i.e.*, the supposed decrease in value of EEGSA due to the lost tariff income from October 2010 until the end of the concession, which TGH argued was reflected in the impaired value at which TGH sold its participation in EEGSA. Historical losses were quantified at US$21,100,552 and the lost value losses at US$222,484,783.[4]

9. The Tribunal awarded the historical losses but dismissed the lost value claim, which is what TGH complains about in these proceedings. Guatemala notes that there is nothing surprising or extraordinary in the Tribunal's decision to dismiss the lost value claim. TGH simply failed to prove that loss. While irrelevant, because these proceedings are not an opportunity for TGH to reopen or reargue its claim, the following issues −among others− demonstrated the flawed nature of TGH's claim in the Arbitration:

   (a) TGH claimed that the tariffs approved by the CNEE for EEGSA in 2008 had impaired EEGSA's sale value.[5] However, despite repeated requests from

[4] Award, para. 717.

[5] TGH's Memorial on Partial Annulment, paras. 3-4, 50, 89, 92, 94.

Guatemala and the Tribunal,[6] TGH never provided direct evidence of how the price of EEGSA was negotiated, to what extent it was affected by the tariffs, or even what the sales price actually was.[7] TGH always said that EPM offered a price for the whole of DECA II, the Guatemalan company through which TGH and its partners held their participation in EEGSA and other Guatemalan companies, but that there was no specific valuation of EEGSA during the sale process.[8] Clearly, without evidence of how EEGSA's sale price was determined or negotiated, TGH's claim was never more than simple speculation.

(b) In the document production phase of the Arbitration, Guatemala requested TGH to produce documents relating to the sale, to be able to assess EEGSA's valuation in that process and thus TGH's lost value claim.[9] TGH answered Guatemala's requests with the following categorical refusal: "Claimant has not located any documents responsive to this request that are not either privileged or subject to a confidentiality agreement."[10] Subsequently, given Guatemala's insistence,[11] TGH submitted a privilege log that identified information on documents that it had withheld on the basis of privilege or confidentiality.[12] After further insistence from Guatemala,[13] an order from the Tribunal,[14] and a

6 *See* paras. 45-52.

7 *Ibid*. *See also* Memorial on Objections and Counter-Memorial, para. 613; Respondent's Post-Hearing Brief, para. 358; Tr. (English), Day Two, 403:16-20, Mourre; Tr. (English), Day Two, 402:22-403:15, Mourre; Letter from the Tribunal to the Parties, 11 March 2013, p. 2.

8 Claimant's Post-Hearing Brief, para. 168. *See also* Memorial on Objections and Counter-Memorial, para. 612.

9 *See* Letter from Nigel Blackaby to Andrea Menaker on document production, 7 November 2011, pgs. 5-6, requesting documents regarding the sale price under "Category C," entitled "Sale of the Shares of TECO in Deca II."

10 Letter from Andrea Menaker to Nigel Blackaby on document production, 18 November 2011, p. 2; Letter from Nigel Blackaby to the Tribunal on document production, 29 November 2011, p. 1 and Annex 3, which contains a list prepared by Guatemala of the documents produced by TECO in response to Guatemala's request for production of documents of 7 November 2011.

11 Letter from Nigel Blackaby to Andrea Menaker on document production, 21 November 2011, pgs. 1-2.

12 Letter from Andrea Menaker to Nigel Blackaby on document production, 28 November 2011, and enclosed privilege log; Letter from Nigel Blackaby to the Tribunal on document production, 29 November 2011, p. 2.

13 Letter from Nigel Blackaby to the Tribunal on document production, 29 November 2011.

14 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 21-22; 27-28.

confidentiality agreement signed by the Parties,[15] Guatemala managed to obtain just two documents from that log.[16] Those two documents were largely ignored by TGH during the proceedings.[17] Curiously, however, they now appear to form the basis of TGH's assertion that it provided evidence on how the sale price was calculated.[18] In reality those documents constitute no direct evidence of EEGSA's value. In relation to this issue, TGH adopted a hostile attitude during the Arbitration and essentially disregarded the Tribunal's order requesting that TGH produce all relevant documents.

(c) Similarly, TGH disregarded the Tribunal's requests for clarifications[19] as to how the 2008 tariffs were taken into account in setting EEGSA's sale price in 2010. For example, at the final Hearing, the President of the Tribunal asked "[H]ow was the 2008 tariff […] taken into account in the […] sale price"?[20] TGH responded in its Post-Hearing Brief (***PHB***) simply by reiterating its position that "[b]ecause EEGSA's VAD [*i.e.*, the main component of the tariff] was significantly decreased in 2008 […] EEGSA's value was diminished."[21] That was all, an empty assertion backed by no evidence.

(d) Further, as the above statement in TGH's PHB shows, TGH made a direct connection between the alleged value lost by EEGSA and the 2008 tariffs. But EEGSA was an electricity distributor with a concession that, in 2008, was to last for another 40 years, while the 2008 tariffs were to apply only up to 2013.

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15 Confidentiality Agreement between Teco Guatemala Holdings LLC and the Republic of Guatemala, 6 January 2012.

16 Document produced as C3-01: Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**; document produced as C1-01: Citibank Fairness Opinion, Presentation to the Board of Directors of TECO Energy, Inc., 14 October 2010, **Exhibit C-531**.

17 Exhibit C-557 was referred to only once: Reply, para. 293. Exhibit C-531 was referred to a total of four times, three of them in the next to last pleading in the case: Claimant's Post-Hearing Brief, paras. 169, 171, 173; Reply, para. 293. Exhibit C-531 was referred to in order to justify EEGSA's actual value and the reasonability of TGH's comparable companies analysis, while Exhibit C-557 was referred to exclusively to justify the reasonability of TGH's comparable companies analysis, as a response to Guatemala's argument that there were no companies comparable to EEGSA (Reply, para. 293, footnote 1427). *See also* paras. 50-95.

18 TGH's Memorial on Partial Annulment, paras. 98-108.

19 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 27-28. Letter from Andrea Menaker to the Tribunal regarding document production, 6 January 2012, failing to provide any documents under Category C3. The only document TGH subsequently produced was the Non-Binding Offer Letter.

20 Tr. (English), Day Two, 403:16-20, Mourre.

21 Claimant's Post-Hearing Brief, para. 172.

TGH failed to explain how the temporary nature of the tariffs could have had a permanent adverse effect on the value of EEGSA. In other words, TGH's case was based on the premise that the 2008 tariffs would not change for the remaining 40-year duration of EEGSA's concession.[22] That assumption was demonstrably wrong. Electricity tariffs in Guatemala are by definition subject to five-year tariff reviews. In fact the very dispute at issue in the Arbitration referred to a five-year tariff review process, which established tariffs from 2008 to 2013, but not for longer. This major conceptual error in TGH's case was noted by Guatemala in the proceedings,[23] and by the Tribunal in the Award.[24] Had the Tribunal awarded TGH the future losses it claimed, it would have unfairly punished Guatemala. Guatemala would have been penalized for an act (namely, the imposition of the same alleged low tariffs on EEGSA until 2048) that TGH simply could not prove.

(e) TGH's whole damages case was exaggerated and lacked credibility. TGH initiated the Arbitration on 20 October 2010 saying that the "long-term sustainability" of EEGSA was endangered and that its "operational viability" was "severely undermined."[25] Yet on the very next day, 21 October 2010, EEGSA was sold for an undisclosed sum,[26] which TGH itself calculated during the proceedings at US$498 million, a considerable amount on any view for a supposedly "unviable" company. Further, when presenting EEGSA to potential buyers, TGH and its partners characterized the company as nothing less than "[o]ne of the best and most solid companies in the country."[27]

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22 As is well known, according to the General Law on Electricity of Guatemala, the tariffs were to be reviewed every five years for the duration of the Concession. *See* LGE, **Exhibit R-8**, art. 77. Additionally, on 15 May 1998, EEGSA and the Ministry of Energy and Mines (***MEM***) executed an Authorization Contract for the distribution of electricity in the departments of Guatemala, Sacatepéquez, and Escuintla for a term of 50 years. Thus, at the time of the sale in 2010, thirty-eight years remained of the concession contract. *See* Authorization Contract between EEGSA and the Ministry of Energy and Mines, 15 May 1998, **Exhibit C-31**, p. 2, Fifth Term.

23 Respondent's Post-Hearing Brief, para. 355.

24 Award, para. 758.

25 Notice of Arbitration, para. 69.

26 *See* para. 38.

27 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22. The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país." *See also* Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

10. In short, there is nothing surprising or extraordinary in the Tribunal's decision to reject TGH's damages claim for the alleged lost value of EEGSA. However, all this is irrelevant for these annulment proceedings because they are not an opportunity for TGH to reargue its case, which is precisely what it seeks to do.

11. TGH says that the Tribunal did not provide reasons for rejecting its claim, but it is sufficient to read the Tribunal's decision to realize that reasons are provided:

- "[T]he Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale";[28]
- "There is however no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013";[29]
- "[T]here [is] no evidence in the record of how the transaction price has been determined. The Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013would have been reflected in the purchase price and to what extent";[30]
- "[T]he Arbitral Tribunal also finds no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever. […] The Arbitral Tribunal agrees with the Respondent that the claim is in this respect speculative. The Respondent rightly points out that 'it is actually impossible to know what will happen with the tariffs in the future.'"[31]

12. Thus the reasoning is clear: the Tribunal simply considered that there was no evidence of the loss incurred by TGH as a result of the sale, or of what such loss actually was. As is well known, an annulment committee "cannot […] enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties. […] it would not be proper for an *ad hoc* committee to overturn a

28 Award, para. 749.

29 *Ibid.*, para. 754.

30 *Ibid.*, para. 754.

31 *Ibid.*, paras. 755, 757.

tribunal's treatment of the evidence to which it was referred"[32]; "it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party […] the Tribunal is the judge of the probative value of the evidence produced."[33] ICSID Arbitration Rule 34(1) is clear in this respect:

> **Rule 34. Evidence: General Principles**
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> (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

13. Clearly, TGH is dissatisfied with the Tribunal's assessment of the evidence and the reasons offered to reject its claim, but annulment committees "do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion."[34] Here the Tribunal's decision is perfectly understandable to any neutral reader: it is based on TGH's failure to prove the relevant loss. This conclusion cannot be challenged pursuant to annulment under the ICSID Convention. Likewise, the other subsidiary grounds of annulment invoked by TGH to challenge the Tribunal's decision of damages must also be rejected.[35]

14. With regard to TGH's challenge to the Tribunal's decision on interest, TGH argues that the Tribunal contradicted an agreement between the Parties as to the applicable interest rate and the date on which interest should start accruing. Guatemala categorically denies any such agreement and rejects TGH's continuous attempt throughout its Memorial to mislead the Committee on the existence of some sort of acquiescence by Guatemala on this and other matters.[36] Further, Guatemala notes that an arbitral tribunal has discretionary power on how to calculate interest: "the allocation of interest, [...] falls within the discretionary power of the Tribunal in the

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32 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (Caso CIADI No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110,** paras. 96, 98 (emphasis added).

33 *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL- 64**, para. 65.

34 *Caratube v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102 (emphasis added).

35 *See* sections IV.B and IV.C.

36 TGH's Memorial on Partial Annulment, paras. 90-91, 101-102, 118, 121, 125, 131-133, 137.

light of all relevant circumstances of the case."[37] The Tribunal's decision on interest is a manifestation of this discretion and gives rise to no ground for annulment.

III. THE DISPUTE AND THE AWARD

15. TGH's Memorial contains a "[s]ummary of the Dispute and the Award,"[38] which is neither a summary, given its length (almost half of the whole brief), nor objective or accurate. By contrast, Guatemala's Memorial on Annulment distinguishes the description of the dispute from the Parties' arguments in the Arbitration.[39] TGH instead confuses fact and argument, rearguing most of its own case, in an attempt to prepare the ground for its complaint about the damages and interest sections of the Award. Below Guatemala corrects the inaccuracies contained in TGH's account of the dispute and the Award. We focus first on the issues on liability and then on damages and interest.

A. ISSUES OF LIABILITY

1. TGH's description of the liability issues of the Arbitration is incorrect and misleading

16. There are many examples of TGH's incorrect and misleading "description" of the liability issues of the Arbitration. For example, TGH asserts that "Guatemala sought to attract and induce foreign investment in EEGSA," and repeatedly states that "Guatemala represented" to TGH certain principles of the tariff review process.[40] This is not an objective description of the factual background of the dispute. It is rather a restatement of TGH's arguments in the Arbitration.[41] However, TGH conveniently neglects to say that the Tribunal plainly rejected this claim, holding that TGH's alleged expectations were "irrelevant to the assessment of whether a State should be held liable," and that there was no "specific representation that the regulatory framework would not evolve."[42]

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37 *Compañía de Aguas del Aconquija and Vivendi v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 10 August 2010, **Exhibit RL-111**, para. 256 (emphasis added).

38 TGH's Memorial on Partial Annulment, paras. 7-74.

39 Guatemala's Memorial on Annulment, Sections II.A and II.B.

40 *E.g.*, TGH's Memorial on Partial Annulment, paras. 12-14.

41 TGH's Memorial on Partial Annulment, paras. 11-15; Claimant's Memorial, sections B through E; Reply, sections A, B and E.

42 Award, paras. 618, 621.

17. Another example is TGH's emphasis on the alleged changes in the Regulatory Framework that took place in 2007, arguing that they "subverted" key premises of that framework.[43] This is, again, argument and not description. Further, it ignores that the Tribunal held that such "amendments […] did not alter the fundamental principles upon which the regulatory framework was based,"[44] and that TGH's argument was "ill-grounded" as "Guatemala never […] represented that the regulatory framework would remain unchanged."[45]

18. The same applies to TGH's allegation that the CNEE breached, during the tariff review process, certain "Operating Rules" agreed with EEGSA with regard to the process that would be followed for the determination of the tariffs.[46] Here, too, TGH omits to mention that the Tribunal "[found]no evidence in the record that Operating Rules were ever agreed between the regulator and the distributor," and "therefore reject[ed] the Claimant's arguments that the CNEE arbitrarily disavowed the agreed Operating Rules."[47]

19. Similarly, TGH complains about the CNEE's dissolution of the Expert Commission,[48] ignoring again that the Tribunal categorically rejected such arguments as follows: "the Arbitral Tribunal finds that the CNEE was entitled, once its report had been submitted, to dissolve the Expert Commission."[49]

20. Given TGH's inaccuracies, Guatemala refers the Committee to the description of the dispute, the Arbitration and the Award contained in its Memorial on Annulment.[50] A summary is reiterated below.

2. Summary description of the liability issues in the Arbitration

21. This case concerned a dispute between the regulator of the electricity sector in Guatemala, the CNEE, and one of the electricity distributors in the country, EEGSA, in which TGH was a shareholder. The dispute regarded the manner in which, in

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43 *E.g.*, TGH's Memorial on Partial Annulment, paras. 18, 23-24.

44 Award, para. 619.

45 *Ibid.*, para. 629.

46 *E.g.*, TGH's Memorial on Partial Annulment, paras. 24, 28.

47 Award, paras. 649, 650.

48 TGH's Memorial on Partial Annulment, para. 27.

49 Award, para. 657.

50 Guatemala's Memorial on Annulment, paras. 31-66.

2007/2008, the CNEE interpreted certain aspects of the procedure for the review of electricity tariffs, which is a process that takes place every five years in Guatemala. The 2007/2008 process established the tariffs for the five-year period from 2008 to 2013. A new tariff review took place in 2012/2013, to determine the tariffs for the five-year period from 2013 to 2018.

22. The procedure for electricity tariff reviews in Guatemala is established in the General Electricity Law (the ***LGE)*** and its Regulations (the ***Regulations***) (together the ***Regulatory Framework***).[51] The CNEE, as regulator, is responsible for conducting the process and approving the tariffs.[52] The CNEE functions independently from the Government.

23. The main component in the electricity tariff to be recalculated every five years is the amount that the distributor can charge to consumers in order to cover the costs incurred by the distributor in providing the service. This is called "Value-Added for Distribution" (***VAD***, in Spanish *Valor Agregado de Distribución*). The central exercise, at each five-year review, is to reset the VAD for each distribution company.

24. The tariff review process starts with the CNEE's adoption of the "methodology for determination of the tariffs."[53] This methodology is established in the "Terms of Reference," which the distribution companies (through certain consulting firms pre-approved by the CNEE) use to prepare the "VAD studies", also known as tariff studies.[54] These studies provide a proposal by the distribution company to the regulator as to what VAD should be incorporated into the consumer price.

25. Once the VAD study is presented by the distribution company, the CNEE reviews it and may request any necessary corrections to bring it into conformance with the Terms of Reference.[55] The distributor must incorporate the corrections,[56] but in the event of a disagreement, article 75 of the LGE provides that an expert commission may be established to issue a report on the disagreements.[57] Once the expert

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51 LGE, **Exhibit R-8**; RLGE, **Exhibit R-36**.

52 LGE, **Exhibit R-8**, arts. 4(c), 61, 71, 77; RLGE, **Exhibit R-36**, art. 29.

53 LGE, **Exhibit R-8**, art. 77. *See also*, LGE, **Exhibit R-8**, art. 4(c).

54 *Ibid.*, art. 74; RLGE, **Exhibit R-36**, art. 97.

55 *Ibid.*, art. 98.

56 *Ibid.*

57 LGE, **Exhibit R-8**, art. 75.

commission issues its report, the Regulatory Framework requires the CNEE to establish the VAD and the tariffs.[58]

26. In the 2007/2008 tariff review, EEGSA commissioned the consulting firm Bates White, LLC (***Bates White***) to carry out its VAD study. Bates White presented the VAD study on 31 March 2008 (the ***Bates White March 2008 Study***). The CNEE, as empowered by the Regulatory Framework, commissioned a study in parallel from another of the pre-approved consulting firms, Sigla S.A./Electrotek (***Sigla***), in order to establish a benchmark to enable it to carefully review the studies prepared by the distribution companies.

27. The CNEE considered that the Bates White March 2008 Study contained numerous irregularities and departures from the Terms of Reference, and calculated a vastly overvalued VAD: the first version of the Study tripled the amount of the VAD of the previous tariff review; the second version of the Study doubled the prior VAD.[59]

28. In view of the disagreements between the CNEE and EEGSA, the Parties agreed to establish an expert commission to issue a pronouncement on the disagreements (the ***Expert Commission***). The report of the Expert Commission decided in favor of the CNEE with regard to more than 50% of its conclusions,[60] including the important question of the study's lack of linkage, traceability and auditability.

29. After receiving the Expert Commission's report, and in the absence of any regulatory provision for further studies, the CNEE considered that: (a) in accordance with the Regulatory Framework, it could not use the Bates White March 2008 Study to establish the new tariffs; and (b) it would set EEGSA's VAD on the basis of the tariff study established by the independent and pre-approved consultant Sigla, as permitted by the Regulatory Framework.[61] These decisions were contained in the CNEE Resolution 144-2008 of 29 July 2008.

30. EEGSA disagreed with this interpretation of the Regulatory Framework by the CNEE. In EEGSA's view, the CNEE could not reject the Bates White March 2008 Study and approve tariffs calculated on the basis of another independent study. According to

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58 *Ibid.*, arts. 4(c), 60, 61, 71, 76; RLGE, **Exhibit R-36**, arts. 82, 83, 92, 98, 99.

59 Memorial on Objections and Counter-Memorial, paras. 331, 349; Rejoinder, paras. 160, 356.

60 Memorial on Objections and Counter-Memorial, para. 390; Rejoinder, para. 440; Respondent's Post-Hearing Brief, para. 176.

61 CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

EEGSA, the Expert Commission's report was binding. For EEGSA, this meant that the CNEE had to allow Bates White to unilaterally prepare a revised version of its study, incorporating the corrections indicated in the Expert Commission's report, and submit it to the Expert Commission for approval. The CNEE was to use that study to calculate the new tariff.

31. Thus, Bates White and EEGSA submitted a new VAD study on 28 July 2008 arguing that it incorporated all the corrections indicated by the Expert Commission's report (the ***Bates White July 2008 Study***). However, the CNEE considered that this new study was not provided for in the Regulatory Framework, and that, in any case, it did not incorporate all the corrections indicated by the Expert Commission.[62]

32. EEGSA requested the local courts to endorse its interpretation of the Regulatory Framework. The proceedings went as far as the highest Guatemalan court, the Constitutional Court. The Constitutional Court issued two decisions rejecting EEGSA's position and upholding the legality of the CNEE's conduct during the tariff-review process.[63]

33. In the Arbitration proceedings, TGH argued that the CNEE's conduct during the 2007/2008 tariff review constituted a violation of the international minimum standard of fair and equitable treatment under article 10.5 of CAFTA-DR.[64] TGH argued that such breach arose from the acts of the CNEE during the tariff review process.

34. The Tribunal denied the following claims by TGH:

(a) That the CNEE had violated TGH's legitimate expectations;[65]

(b) That the CNEE and the Government had fundamentally altered the Regulatory Framework;[66]

(c) That the CNEE manipulated the Terms of Reference;[67]

(d) That the CNEE did not cooperate in the tariff review process;[68]

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62 *Ibid.*, p. 3.

63 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**; Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**.

64 Claimant's Memorial, section III, paras. 228-280.

65 Award, paras. 618, 621.

66 *Ibid.*, paras. 624-638.

67 *Ibid.*, paras. 639-643.

(e) That the CNEE had breached an agreement with EEGSA (the alleged Operational Rules) by which it had accepted to delegate power to the Expert Commission;[69]

(f) That the CNEE tried to unduly influence the Expert Commission;[70]

(g) That the CNEE had engaged in reprisals against EEGSA;[71]

(h) That the CNEE could not dissolve the Expert Commission once it had issued its report;[72] and

(i) That the report of the Expert Commission was binding.[73]

35. The Tribunal's decision that Guatemala breached the international minimum standard of fair and equitable treatment under the Treaty was based exclusively on CNEE Resolution 144-2008. In that Resolution the CNEE considered that, since the Expert Commission's report confirmed that the Bates White July 2008 Study had deviated from the Terms of Reference, the CNEE was not bound to give any further consideration to that Study and could use the Sigla Study instead to set the tariffs. The CNEE did not consider that the Expert Commission's report was binding, in the sense that it did not require the CNEE to amend the Bates White March 2008 Study in the manner prescribed by the report, and then use that corrected Study to fix the tariffs.

36. Specifically, for the Arbitral Tribunal the breach of the minimum standard of treatment lied on the fact that Resolution 144-2008 was not sufficiently reasoned. The Tribunal found that the CNEE had failed to provide sufficient motivation for what the Tribunal considered was a "disregard" of the report of the Expert Commission. While the report was not binding, the Tribunal held that the CNEE should have explained properly why the Expert Commission's report could not be given more relevance, and specifically be used as a guide to correct the Bates White March 2008 Study rather than the CNEE endorsing directly the Sigla Study. In the Tribunal's words:

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68 *Ibid.*, para. 644.

69 *Ibid.*, paras. 649, 650.

70 *Ibid.*, paras. 645-652.

71 *Ibid.*, paras. 712-714.

72 *Ibid.*, para. 657.

73 *Ibid.*, paras. 565, 670.

> In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.
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> […]
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> The CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reason to consider that such conclusions were inconsistent with the regulatory framework, in which case it had the obligation to provide valid reasons to that effect. However, no such reasons were provided.[74] (Emphasis added.)

B. DAMAGES AND INTEREST

37. In its notice of Arbitration dated 20 October 2010, TGH asserted that the viability of the company had been severely undermined as a result of Guatemala's actions:

> TGH has suffered severe financial damage. EEGSA has been forced to implement extreme measures to reduce its costs, including foregoing planned capital expenditures and reducing operational costs […] to a degree that jeopardizes long-term sustainability. […] This situation has severely undermined EEGSA's operational viability and has had a significant financial impact on TGH's investment in EEGSA.[75] (Emphasis added.)

38. The day after filing its Notice of Arbitration, *i.e.*, on 21 October 2010, TGH and its partners in EEGSA sold their stakes in EEGSA to the Colombian company EPM, one of the largest public utility companies in Latin America.

39. However, a document obtained by Guatemala in the document production phase of the Arbitration revealed that EEGSA's foreign shareholders presented the company to the buyer in September 2010 as: "[o]ne of the best and most solid companies in the

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74 *Ibid.*, paras. 664, 665, 683.

75 Notice of Arbitration, para. 69.

country."[76] Other documentary evidence submitted by Guatemala indicated that TGH continued to consider Guatemala to be a stable country to invest in.[77]

40. EEGSA was therefore neither unviable nor severely undermined nor was it jeopardized. Nor, contrary to what TGH tells this Committee in its Memorial on Partial Annulment, was the VAD approved by the CNEE in 2008 "economically devastating."[78] Quite the contrary, in TGH's and its partners' own words: EEGSA was one of Guatemala's "best and most solid companies."[79]

41. The sale was implemented through the sale of *Distribución Eléctrica Centroamericana Dos, S.A.* (***DECA II***). DECA II was the holding company through which TGH, Iberdrola and their partners controlled 80.8 percent of the shares of EEGSA.[80] DECA II owned 80.8 percent of EEGSA, as well as other related companies. The DECA II partners received from EPM US$605 million for the whole of DECA II.[81]

42. In its presentations in the Arbitration, TGH refused to provide internal or external valuations reflecting the price that EPM paid for EEGSA specifically. TGH maintained that the buyer's offer was a "global value" for a larger asset, *i.e.*, DECA II comprising EEGSA and the related companies, and it was impossible to identify directly the price paid for EEGSA in this transaction. In this regard, TGH asked its expert in the Arbitration, Mr. Kaczmarek, to estimate the implicit value of EEGSA in

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76 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22 (Emphasis in bold in the original). The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país." *See also* Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

77 "Price reduced in Tampa Contract", *Prensa Libre*, 12 July 2010, **Exhibit R-125** (Spanish original reads as follows: "Bajan el precio en contrato de Tampa")**;** Press release of Teco Guatemala Holdings, LLC, "Teco Energy Reports Third Quarter Results," 28 October 2010, **Exhibit R-134**.

78 TGH's Memorial on Partial Annulment, title to Section II.A.4; Claimant's Memorial, title of Section II.F.7.

79 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22 (Emphasis in bold in the original). The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país."

80 Of the remaining 19.2 percent of EEGSA's shares, 14 percent remained in the hands of the Guatemalan State, and 5.12 percent in the hands of private investors. *See* Memorial on Objections and Counter-Memorial, para. 241; *see also* Teco Energy, Inc. Board of Directors Meeting (Proposed Sale of DECA II), 14 October 2010, **Exhibit C-353**.

81 Press release of Teco Guatemala Holdings, LLC, "Teco Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company," 21 October 2010, **Exhibit R-162**.

the sale of DECA II.[82] Mr. Kaczmarek calculated this value as US$498 million,[83] and TGH's share at US$115 million.[84]

43. As a result of the sale, TGH's initial claim for damages, which amounted to US$285.6 million,[85] was reduced to 243.6 million.[86] Furthermore, TGH distinguished two heads of damages:

(a) First, the losses allegedly incurred by TGH between August 2008, when EEGSA's new tariffs were approved, and October 2010, when TGH sold its shares in EEGSA to EPM. These losses, which TGH defined as "historical losses," were calculated on the basis of a discounted cash flow (***DCF***) analysis, comparing: (i) the revenue obtained by EEGSA considering the tariffs approved by the CNEE in 2008 (the so-called "actual scenario"); and (ii) the revenue that EEGSA would have earned with the higher tariffs that TGH considered pertinent (the so-called "but-for scenario").[87] The difference between the two scenarios allegedly showed that EEGSA had lost some revenue. The part of that revenue corresponding to TGH's 24 percent participation in EEGSA, which TGH claimed as compensation for historical losses, was quantified at US$21,100,552; and

(b) Second, the alleged losses from October 2010 onwards, which TGH defined as "lost value losses." TGH calculated these losses comparing: (i) the value of its participation in EEGSA as of October 2010 considering the revenue that EEGSA would obtain until the end of the remaining 40-years of its concession with the tariffs approved by the CNEE in 2008 (*i.e.*, the actual scenario); and (ii) the value of its participation in EEGSA, at the same date, considering the revenue that EEGSA would have obtained in the same period with the higher

82 Claimant's Memorial, para. 305; Kaczmarek, **Appendix CER-2**, para. 241.

83 *Ibid*., para. 240, Table 23 and para. 241.

84 Kaczmarek II, **Appendix CER-5**, para. 141, Table 14; TGH's Memorial on Partial Annulment, para. 45.

85 TGH's Notice of Arbitration, para. 79.

86 Claimant's Reply Post-Hearing Brief, para. 154.

87 TGH's Memorial on Partial Annulment, paras. 36-37; Kaczmarek, **Appendix CER-2**, paras. 129, 153-156, Chapter IX; Memorial on Objections and Counter-Memorial, paras. 591-598.

tariffs that TGH considered pertinent (*i.e.*, the but-for scenario).[88] TGH alleged that the value of its participation in EEGSA in the actual scenario was reflected in the price at which it sold its participation in EEGSA, *i.e.* US$115 million, while the DCF value in the but-for scenario amounted to US$337,683,311.[89] The difference between the two scenarios allegedly showed that TGH's participation in EEGSA had lost US$222,484,783[90] in value, which TGH also claimed as compensation in the Arbitration.

44. As is clear from the above, TGH's claim for lost value depended on a large number of key questions to which TGH simply did not respond with adequate evidence:

(a) What was the actual price at which TGH sold its participation in EEGSA to EPM? As explained above, the sale price was a key issue for TGH given its position that such price allegedly demonstrated, and crystallized, TGH's losses relating to the lost value of EEGSA.[91] However, TGH only disclosed the price paid by EPM for DECA II. The actual price received by TGH for EEGSA was only a calculation made by TGH's damages expert during the Arbitration, and thus for the exclusive purpose of the litigation;

(b) How was that price negotiated and calculated? This was important in order to determine whether the price that TGH obtained for EEGSA was conditioned only by the 2008 tariffs, and whether higher tariffs would have resulted in a higher price as argued by TGH, and if so to what extent;

(c) How could TGH assume in 2010 that the 2008 tariffs would remain unaltered for the life of the concession when in fact those tariffs were to be revised in 2013 and then every five years until the end of the concession? This was a fundamental issue, because for TGH the tariffs approved by the CNEE for EEGSA in 2008 had impaired the value of EEGSA forever. However, EEGSA held an electricity distribution concession due to expire in 2048, and the Regulatory Framework provided for the revision of tariffs every five years. It

88 TGH's Memorial on Partial Annulment, paras. 36-37; Kaczmarek, **Appendix CER-2**, paras. 129, 153-156, Chapter IX; Memorial on Objections and Counter-Memorial, paras. 591-598.

89 Respondent´s Post-Hearing Brief, paras. 333-360; Respondent´s Reply Post-Hearing Brief, paras. 161-172; Kaczmarek, **Appendix CER-5**, para. 141, Table 14.

90 Respondent´s Post-Hearing Brief, paras. 333-360; Respondent´s Reply Post-Hearing Brief, paras. 161-172; Kaczmarek, **Appendix CER-5**, para. 141, Table 14.

91 TGH's Reply Post-Hearing Brief, para. 125.

was simply impossible for TGH to demonstrate (because it could not predict the future) that EEGSA's tariffs could not increase in subsequent tariff reviews, thus offsetting the alleged lost value caused by the 2008 tariffs.

45. Given that TGH did not voluntarily disclose any document showing the actual value assigned to EEGSA by the sellers and the buyer at the sale, and how the price was negotiated, as per points (a) and (b) above, Guatemala requested such documents during the document production phase of the Arbitration. Those documents were key because the bulk of TGH's damages case was based on the alleged decrease in value of EEGSA.

46. Thus Guatemala's first letter for document production contained a section called "Category C," entitled "Sale of the Shares of TECO in DECA II,"[92] under which Guatemala requested in particular five types of documents:

> **Documentation C.1.** Documentation relating to the internal or external advice received by TECO, or by DECA II, or by other shareholders of DECA II, including legal, financial, tax, accounting or valuating matters, relating to the sale of DECA II (or to the participation of TECO in DECA II) to Empresas Públicas de Medellín, including any preparatory or final reports discussing legal, financial and valuation matters of DECA II, EEGSA [and Related Companies].
>
> **Documentation C.2.** Documentation relating to discussions between the shareholders of DECA II, or between EEGSA and said shareholders, or between EEGSA and DECA II, or between DECA II and its shareholders, in relation to the sale of DECA II to Empresas Públicas de Medellín.
>
> **Documentation C.3.** Documentation relating to the bid made by Empresas Públicas de Medellín, including drafts or preliminary versions which were exchanged, presented or discussed and their annexes.
>
> **Documentation C.4.** Documentation relating to preliminary provisions, umbrella agreements, memoranda of understanding, promises, pre-contracts, contract drafts, exchanged between the

[92] Letter from Nigel Blackaby to Andrea Menaker on document production, 7 November 2011, p. 5.

> parties and/or their advisors and representatives related to the preliminary talks which led to the sale or transfer by TECO of its shares in DECA II, EEGSA, and/or in the Relating Companies.
>
> **Documentation C.5.** Documentation relating to notifications by TECO or DECA II to securities authorities, lenders, guarantors, administrative or judicial authorities and brokers, agents, sales representatives, etc., in Guatemala or in the United States regarding the sale operation.[93] […] (Emphasis added.)

47. TGH's answer and production of documents under Category C was as follows:

> **Documentation C.1.** Claimant has not located any documents responsive to this request that are not either privileged or subject to a confidentiality agreement.
>
> **Documentation C.2.** Claimant has not located any documents responsive to this request that are not already in the record.
>
> **Documentation C.3.** Claimant has not located any documents responsive to this request that are not subject to a confidentiality agreement.
>
> **Documentation C.4.** Claimant has produced responsive documents that are not subject to a confidentiality agreement.
>
> **Documentation C.5.** Claimant has not located any documents responsive to this request that are not already in the record.[94] […] (Emphasis added.)

48. Given this categorical refusal to produce any documents, Guatemala's counsel requested from TGH a privilege log identifying information on the documents that it had withheld on the basis of privilege or confidentiality,[95] which TGH subsequently provided.[96]

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93 *Ibid.*, pgs. 5-6.

94 Letter from Andrea Menaker to Nigel Blackaby on document production, 18 November 2011, p. 2.

95 Letter from Nigel Blackaby to Andrea Menaker on document production, 21 November 2011, pgs. 1-2.

96 Letter from Andrea Menaker to Nigel Blackaby on document production, 28 November 2011, and enclosed privilege log; Letter from Nigel Blackaby to the Tribunal on document production, 29 November 2011, p. 2.

49. The Tribunal then ordered TGH to produce two documents identified in the privilege log as being confidential, which could provide information on how the sale price was calculated, but only after the Parties signed a confidentiality agreement,[97] and any other document under Category C that would lead the Tribunal to understand precisely how the sale price had been calculated.[98] The two documents were produced; namely, documents 19 and 20 of the privilege log,[99] which correspond to EPM's Non-Binding Offer Letter for the purchase of DECA II,[100] and to Citibank's Fairness Opinion, provided solely to TGH, relating to the fairness of the price offered by the buyer.[101]

50. The two documents, to which TGH only referred indirectly in the proceedings,[102] and which alone were insufficient to provide any direct proof on EEGSA's sale price, now form the basis of TGH's assertion that it provided evidence on how the sale price was calculated.[103]

51. Additionally, and particularly, the Non-Binding Offer Letter indicated that other documents existed that could show a better approximation as to the factors that were taken into account in calculating the sale price. For example, the Letter referred to subsequent steps (which would most likely include a more detailed analysis on how EPM arrived at the final purchase price) leading to a binding offer:

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97 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 21-22; 27-28. *See also* Confidentiality Agreement between Teco Guatemala Holdings LLC and the Republic of Guatemala, 6 January 2012.

98 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 20, 26-28, 30-31, 33, 39-40, 42-43, 45 regarding the need to produce documents, or with respect to certain documents, the need to produce the respective affidavits affirming that the documents whose production was in dispute contained protected information, indicating the nature of such information, and identifying the persons who provided such information.

99 Letter from Andrea Menaker to Nigel Blackaby on document production, 28 November 2011, and enclosed privilege log, pgs. 7-8.

100 Document produced as C3-01: Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**.

101 Document produced as C1-01: Citibank Fairness Opinion, Presentation to the Board of Directors of TECO Energy, Inc., 14 October 2010, **Exhibit C-531**.

102 Exhibit C-531 was referred to a total of four times: Claimant's Post-Hearing Brief, paras. 169, 171, 173; Reply, para. 293. Exhibit C-557 was referred to only once: Reply, para. 293. Exhibit C-531 was referred to in order to justify EEGSA's actual value and the reasonability of TGH's comparable companies analysis, while Exhibit C-557 was referred to exclusively to justify the reasonability of TGH's comparable companies analysis, as a response to Guatemala's argument that there were no companies comparable to EEGSA (Reply, para. 293, footnote 1427).

103 TGH's Memorial on Partial Annulment, paras. 98-108.

> **2. Stages of the Transaction**
>
> a) Evaluation and analysis on behalf of IBERDROLA, of the present Non-Binding Offer.
>
> b) In the event that the Non-Binding Offer is accepted by IBERDROLA, carrying out due diligence and on-site management meetings.
>
> c) Presentation of a Binding Offer on behalf of EPM, within a previously agreed upon period of time with IBERDROLA.
>
> d) In the event that the Binding Offer is accepted, closing the Transaction in accordance with the conditions previously defined between EPM and IBERDROLA.
>
> […]
>
> **9. Access to Information, Due Diligence**
>
> In the event that the Non-Binding Offer is accepted, IBERDROLA shall permit the employees, legal representatives, accounting and legal advisors of EPM and those hired by it to have access to the businesses´ facilities and the properties of the subject enterprises of The Transaction and all financial information, contracts, books, registries and other information relevant that is reasonably requested for the structuring of the binding offer. In the same manner, IBERDROLA shall cooperate with such review.[104] (Emphasis added.)

52. Despite the Tribunal's order requesting that TGH produce all such documents,[105] TGH failed to do so.[106]

53. Understandably, the Tribunal showed concern at the Hearing regarding the determination of the actual sale price of EEGSA, how it was established and negotiated, and in particular, whether it was determined solely by the 2008 tariffs. Accordingly, the Tribunal asked the Parties the following:

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104 Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**, p. 2, sections 2 and 9.

105 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 27-28.

106 Letter from Andrea Menaker to the Tribunal, 6 January 2012, failing to provide any documents under Category C3.

> PRESIDENT MOURRE: […] And the second question is: How was the 2008 tariff, which is in this interview [Exhibit R-133] referred to as being low, how was that taken into account in the sale –in fixing the sale− the sale price to Energía de Medellín?[107]

54. The President of the Tribunal also asked a question specifically regarding how the 2008 tariffs could be projected into future tariff periods as being unchanged, given that tariffs were reviewed every five years:

> There is an exhibit which has been discussed yesterday, which is R-133, which is the interview of the CEO, I believe, of Energía de Medellín; and there is a question there which says: "The shareholders argued that there would be low revenue and profitability due to the VAD. Despite this issue, you decided to buy." And the answer is: "This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout is the one that exists." So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods. And my question is: Why was there such an assumption, given that the tariff is reviewed every five years?[108] (Emphasis added.)

55. Guatemala's damages expert, Dr. Abdala, explained during the Hearing how TGH's assumptions that the 2008 tariffs would have a permanent effect were entirely wrong:

> Like any damages eventually if you were to do a DCF versus DCF, DCF but-for and DCF actual, then you have to control for the fact that we don't know the outcome in 2013, and thus there is no reason to assume that the gap between tariffs that we are modeling for the 2008-2013 period should be prolonged over perpetuity, and that's one of the issues as well in the Sr. Kaczmarek model because, I mean, he has just confirmed as this cap forever.[109]

56. On 11 March 2013, after the Hearing but before the Post-Hearing Brief submissions, the Tribunal wrote to the Parties reinforcing the importance of understanding how the

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107 Tr. (English), Day Two, 403:16-20, Mourre.

108 Tr. (English), Day Two, 402:22-403:15, Mourre.

109 Tr. (English), Day Six, 1604:21-1605:7, Abdala.

sale price was calculated and asking for evidence of the EEGSA's value in the sale to EPM:

> The Arbitral Tribunal also reminds the parties that the PHBs should address the questions raised by the Arbitral Tribunal on Monday 21 and Tuesday 22 of January […].
>
> The Arbitral Tribunal would also be grateful if the parties could address in their PHBs the following additional questions:
>
> […]
>
> - Evidence of the value attributed to EEGSA in the sale to EPM;
>
> - Is it right to assume for the purposes of loss assessment that the 2008-2013 tariff would remain in place forever? If not, what are the consequences on Teco's claim?[110]

57. In its PHB, TGH failed, again, to provide evidence of the sale price of EEGSA. It repeated once more that "the sale to EPM was for the holding company DECA II, and not for EEGSA."[111] It provided no other indication, and of course no evidence, as to what value was ascribed to EEGSA by EPM and TGH, nor how that value was determined. Furthermore, it confirmed that for its damages claim, TGH assumed that the 2008 tariffs would increase over time only by inflation, *i.e.*, they would not increase in real terms as a result of a five-year tariff review.[112] TGH concluded by simply asserting that "[b]ecause EEGSA's VAD was significantly decreased in 2008 […] EEGSA's value was diminished."[113] In other words, not only did TGH provide no evidence as to how the sale price was really influenced by the 2008 tariffs, but it insisted that temporary tariffs like those established in 2008 would result in a permanent loss of value of EEGSA.

58. Guatemala, for its part, answered the Tribunal's questions by reiterating what it had highlighted as early as its Counter-Memorial, *i.e.*, that TGH was "refus[ing] to provide internal or external valuations reflecting the price that EPM paid for

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110 Letter from the Tribunal to the Parties, 11 March 2013, p. 2.

111 Claimant's Post-Hearing Brief, para. 168

112 *Ibid.*, para. 169.

113 *Ibid.*, para. 172.

EEGSA."[114] With respect to the question regarding the value of TGH's share in EEGSA in the sale of DECA II, Guatemala indicated that it "does not have in its possession any direct evidence of the value assigned to EEGSA in the purchase price."[115] Further, in answering the question as to how the 2008 tariffs were taken into account in establishing EEGSA's sale price, Guatemala answered that "only the buyers and sellers, and not Guatemala, know that for certain."[116]

59. Guatemala added that with regard to "the concerns expressed by the Tribunal as to whether it is correct to assume for the purposes of calculation of damages the tariffs set in the 2008-2013 period will remain fixed forever", "[c]learly this is not correct given that there is potential for increases over this five-year period and in subsequent five-year periods."[117] Guatemala further explained:

> As was established at the Hearing, Mr. Kaczmarek's model not only contains projections for the 50 years of the contract, it also assumes that there will be automatic renewals of this contract in perpetuity. The main problem with this approach is that it is actually impossible to know what will happen with the tariffs in the future. The fact that a possible rate increase of 15% is being discussed in the 2013-2018 tariff review shows that the "measures" really cannot be considered beyond the five-year period.[118]

60. TGH had another opportunity to answer the Tribunal's concerns and Guatemala's position in its Reply PHB. However, TGH responded again with the bare assertion that "[b]ecause TECO sold its shares in EEGSA in October 2010, its losses have crystallized."[119] In other words, TGH asserted its loss regardless of the lack of evidence of the real value calculated for EEGSA in the sale or how such value was influenced by the 2008 tariffs. Curiously, TGH claimed that "[t]he fact that the tariffs may change over time does not matter."[120] Thus TGH took the untenable position

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114 Memorial on Objections and Counter-Memorial, para. 613.

115 Respondent's Post-Hearing Brief, para. 358.

116 *Ibid.*, para. 361.

117 *Ibid.*, para. 355.

118 *Ibid.*, para. 358.

119 Claimant's Reply Post-Hearing Brief, para. 125.

120 *Ibid.*, para. 127.

that while the 2008 tariffs impacted the value of EEGSA, the fact that tariffs would necessarily increase in the future was totally irrelevant.

61. In the Award, the Tribunal accepted TGH's claim for historical losses of US$21,100,552.[121] However, it rejected the lost value claim for lack of evidence: "the Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale;"[122] "[t]here is […] no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013"; there is "no evidence in the record of how the transaction price has been determined"; the "Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent."[123]

62. Further, the Tribunal found "no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever."[124] Thus, the claim was held to be "speculative,"[125] as "there was nothing preventing the distributor from seeking an increase of the tariffs at the end of the 2008-2013 tariff period."[126] The Tribunal thus concluded that "[a]s a consequence, the Arbitral Tribunal cannot accept that the sale price to EPM was based on the assumption that tariffs would remain forever unchanged post-2013."[127]

63. On interest, the Tribunal asserted that "calculating interest on the entire amount of the historical damages as from the first day of the tariff period would result in an unjust enrichment of the Claimant" because "the US$21,100,552 historical losses damages correspond to revenues that would have progressively flowed into EEGSA from

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121 Award, para. 742.

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

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

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

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

126 *Ibid.*, para. 758.

127 *Ibid.*, para. 760.

August 2008 until October 2010, and because such amount has not been discounted to August 2008."[128]

64. In relation to the interest rate, the Tribunal rejected TGH's claim that the rate should be 8.8 percent, EEGSA's weighted average cost of capital (***WACC***), compounded annually:

> [A]pplying EEGSA's WACC post-October 2010 would not make sense since the Claimant had sold its interest in EEGSA and ceased to assume the company's operating risks. The Arbitral Tribunal thus agrees with the Respondent that a risk-free rate should be applied.[129]

65. On this basis, the Tribunal reasoned that since "the loss suffered by the Claimant corresponds to the cost of borrowing money in the United States […] the proper interest should be based on the US Prime rate of interest plus a 2 percent premium in order to reflect a rate that is broadly available to the market."[130]

66. The Tribunal thus concluded that damages granted should "bear pre and post-award interest at the US Prime rate of interest plus a 2 percent premium" from the date of the sale until full payment, and that such interest should be compounded annually.[131]

IV. THE TRIBUNAL'S DECISION ON THE ALLEGED "LOST VALUE" OF EEGSA DOES NOT GIVE RISE TO ANY GROUND FOR ANNULMENT

67. Article 53 of the ICSID Convention provides that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." Such statement implies that ICSID awards must be considered final in the sense that they are not subject to a review on the merits.[132] Indeed, "[a]nnulment is fundamentally different from appeal. Annulment […]is not concerned with […] substantive correctness."[133] As it is often said, "[t]he annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration

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128 *Ibid.*, para. 765 (emphasis added).

129 *Ibid.*, para. 766.

130 *Ibid.*, para. 767.

131 *Ibid.*, para. 768.

132 R Bishop, SM Marchili, *Annulment under the ICSID Convention* (2012), **Exhibit RL-112**, p. 20.

133 C Schreuer, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" (2011) 10 The Law and Practice of International Courts and Tribunals 211, **Exhibit RL-113**, p. 212 (emphasis added).

proceedings."[134] The annulment mechanism "does not empower the Committee to review the merits of the case."[135]

68. In the words of other annulment committees: "the role of an Annulment Committee is […] not to correct the award."[136] A request for annulment should avoid "any temptation to 'second guess' their [the awards'] substantive result."[137] The function of an annulment committee "is not a court of appeal, and that it is not the function of the Committee to pass judgment upon the substance of the Tribunal's decision."[138] And, "the committee has no competence to express any view on the substantive correctness of the Tribunal's reasoning."[139]

69. TGH's application for annulment does not accord with these fundamental principles. As will be seen below, TGH is dissatisfied with the outcome of the Arbitration, particularly with regard to damages. Thus TGH seeks a correction of what it sees as mistakes made by the Tribunal in assessing the evidence provided by TGH and in deciding on the merits of TGH's damages claim. These are not proper grounds for annulment.

A. THE DECISION DOES NOT FAIL TO STATE REASONS

1. The Tribunal's decision provides reasons

70. Apart from the alleged losses incurred between 2008 and October 2010 (historical losses), TGH also claimed losses for the period after it sold its stake in EEGSA, from October 2010 onwards. The latter were defined as "lost value" losses, because they were based on the alleged impaired value at which TGH sold its participation in EEGSA to EPM. TGH now challenges the Tribunal's decision on the lost value claim for failure to state reasons. TGH quantified this loss by comparing: (i) the value at

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134 L Reed, J Paulsson, N Blackaby, *Guide to ICSID Arbitration* (2010), **Exhibit RL-114**, p. 162.

135 *Daimler Financial Services v. Republic of Argentina* (ICSID Case No. ARB/05/1) Decision on Annulment, 7 January 2015, **Exhibit RL-115**, para. 76.

136 *Impregilo v. Argentine Republic* (ICSID Case No. ARB/07/17) Decision on Annulment, 24 January 2014, **Exhibit RL-116**, para. 118.

137 *CDC v. Republic of the Seychelles* (ICSID Case No. ARB/02/14) Decision on the Application for Annulment of the Republic of Seychelles, 29 June 2005, **Exhibit RL-58**, para. 35.

138 *Azurix v. Argentine Republic* (ICSID Case No. ARB/01/12) Decision on Annulment, 1 September 2009, **Exhibit RL-59**, para. 362.

139 *AES Summit Generation Limited v. Hungary* (ICSID Case No. ARB/81/2) Decision of the *Ad Hoc* Committee on Annulment, 29 June 2012, **Exhibit RL-53**, para. 17.

which TGH sold its participation in EEGSA in October 2010, which TGH argued was impaired by the tariffs approved by the CNEE in 2008; and (ii) the higher value that that it claims its participation would have had if the CNEE had approved higher tariffs for EEGSA in 2008.[140] TGH quantified the difference between the two values, and thus the value lost for which TGH ought to be compensated, at US$222,484,783.

71. It is sufficient to read the Tribunal's decision on this point to realize that it provided the reasons for its rejection of this claim:

(a) The tribunal first stated its general conclusion that "the Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale."[141]

(b) The Tribunal then explained that it "accepts that the existing tariffs were taken into account in fixing the price of the transaction."[142]

(c) Then, however, the Tribunal added that while "the existing tariff were [*sic*] considered as a relevant factor in determining the price of the transaction […] [t]here is however no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013."[143]

(d) The Tribunal also held as follows:

> [T]here [is] no evidence in the record of how the transaction price has been determined. The Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent.[144]

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140 TGH's Memorial on Partial Annulment, paras. 36-37; Kaczmarek, **Appendix CER-2**, paras. 129, 153-156, Chapter IX; Memorial on Objections and Counter-Memorial, paras. 591-598.

141 Award, para. 749.

142 *Ibid.*, para. 752.

143 *Ibid.*, para. 754.

144 *Ibid.*, para. 754.

(e) Further, the Tribunal pointed out that it simply could not be possible that the transaction price were based only on the 2008 tariffs, because by definition the Regulatory Framework provided that tariffs were to be reviewed in 2013 and every five years thereafter:

> The Arbitral Tribunal also finds no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever. […] The Arbitral Tribunal agrees with the Respondent that the claim is in this respect speculative. The Respondent rightly points out that "it is actually impossible to know what will happen with the tariffs in the future."[145]

72. Thus, the Tribunal simply considered that there was no evidence of any loss incurred by TGH as a result of the sale. Nor was there evidence of how to quantify such loss. There was insufficient evidence as to how the sale price had been determined, how it was influenced by the 2008 tariffs and whether with higher 2008 tariffs the price would necessarily have been higher, and if so by how much. In addition, it was simply impossible to make that assessment because by definition, tariffs had not been fixed indefinitely by the 2008 tariff review and would be changed at the next review in 2013.

73. In short, the Tribunal's decision provided reasons and is understandable. What TGH really complains about is that it disagrees with the assessment of the evidence provided by the Tribunal. But, as is often stated by annulment committees, "the committee has no competence to express any view on the substantive correctness of the Tribunal's reasoning."[146] In particular, an annulment committee should not interfere with the Tribunal's conclusions on the sufficiency of evidence. An *ad hoc* committee "cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties." [147] In other

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145 *Ibid.*, paras. 755, 757.

146 *AES Summit Generation Limited v. Hungary* (ICSID Case No. ARB/81/2) Decision of the *Ad Hoc* Committee on Annulment, 29 June 2012, **Exhibit RL-53**, para. 17.

147 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (Caso CIADI No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110** para. 96 (emphasis added).

words, "it would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred.[148]

74. Taking issue with whether reasons are correct or adequate would turn annulment into a re-evaluation of the record before the tribunal and thereby turn annulment into an appeal. In the words of another committee:

> [A]n examination of the reasons presented by a tribunal cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based. Committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion. Broadening the scope of Article 52(1)(e) to comprise decisions with inadequate reasons would transform the annulment proceeding into an appeal.[149] (Emphasis added.)

75. The case law is abundant on this point. In *Enron v Argentina*, for example, the annulment committee held:

> It is generally accepted that this ground of annulment only applies in a clear case when there has been a failure by the tribunal to state any reasons for its decision on a particular question, and not in a case where there has merely been a failure by the tribunal to state correct or convincing reasons.[150]

76. In the words of the committee in *Mine v Guinea* (curiously cited by TGH in its favour):[151]

> The adequacy of the reasoning is not an appropriate standard of review under paragraph

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148 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (Caso CIADI No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110** para. 98 (emphasis added).

149 *Caratube v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102.

150 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **Annex RL-117**, para. 74.

151 TGH's Memorial on Partial Annulment, para. 97.

> (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.[152]

77. Another committee has put it as follows:

> The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not.[153]

78. The Tribunal's reasons for rejecting TGH's lost value claim were correct, but even if they were not, it clearly provide reasons. A failure to award damages due to lack of evidence is fully comprehensible. In such circumstances, there is no basis for annulment.

2. The Tribunal's decision contains no contradiction warranting annulment

79. TGH argues that there is a contradiction in the Tribunal's holding on damages and that this amounts to a failure to state reasons. According to TGH, given the Tribunal's decision to award damages for lost tariff revenue between 2008 and 2010 as a result of the 2008 tariffs, it had to award damages for the rest of the tariff period, *i.e.*, up to 2013.[154] Further, TGH argues that since "[t]he Arbitral Tribunal accept[ed] that the existing tariffs were taken into account in fixing the price of the transaction,"[155] it had to find that TGH sold at a loss due to the 2008 tariffs, and thus award lost value losses.[156]

80. It must be noted that annulment for lack of reasoning is warranted only in the most extreme case of contradictory reasoning. As held by an annulment committee, only

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152 *Maritime International Nominees Establishment (MINE) MINE v. Government of Guinea* (ICSID Case No. ARB/84/4) Decision on the Application by Guinea for Partial Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08.

153 *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL-64**, para. 78.

154 TGH's Memorial on Partial Annulment, para. 90.

155 Award, para. 752.

156 TGH's Memorial on Partial Annulment, para. 92.

"outright or unexplained contradictions can involve a failure to state reasons."[157] In the words of one annulment committee:

> [W]hen dealing with an annulment request based on an alleged failure to state reasons, an *ad hoc* committee must look beyond what may, at a first glance, appear to be a contradiction and seek to follow the logic and the reasoning of the award. In other words, an award must be upheld unless the logic is so contradictory as to be "as useful as no reasons at all.[158] (Emphasis added.)

81. There are no such contradictions in the Award. First, while TGH claimed losses for the period 2008-2010 based on lost tariff revenue, the losses between 2010 and 2013 and from 2013 onwards were based on the alleged diminished value at which TGH sold its participation in EEGSA.[159] In this respect, as explained by the Tribunal, TGH did not provide sufficient evidence to: (i) ascertain how the sale price was determined; (ii) what other factors apart from the 2008 tariffs may have come into play in determining the sale price; and (iii) whether such price would have really increased with higher tariffs for the period 2010-2013, and if so by how much.[160]

82. In other words, the Tribunal's holdings can be perfectly reconciled: up to October 2010, the Tribunal considered it clear that TGH had incurred losses due to diminished revenues received by EEGSA. In October 2010, however, TGH received a substantial amount for the sale of its shares in EEGSA and the Tribunal could no longer ascertain whether, or to what extent, TGH actually incurred a loss. Even if the 2008 tariffs were taken into account for the sale price, other factors could also have had an influence and there was simply no evidence that higher tariffs between 2010 and 2013 would have necessarily produced a higher sale price. Nor was there evidence of how much higher a sales price might be.

83. Likewise, with regard to the period from 2013 onwards, there is no contradiction in the Tribunal's holding. The claim of permanent impairment to the value of EEGSA as a result of the 2008 tariffs was simply not credible to the Tribunal, since those tariffs

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157 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, para. 78.

158 *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18) Decision on Annulment, 3 July 2013, **Exhibit RL-48**, para. 45.

159 TGH's Memorial on Partial Annulment, paras. 3-4, 50, 89, 92, 94, 95, 96, 109, 119, 121.

160 Award, para. 754.

would be replaced by new tariffs in 2013 −likewise in 2018− and in every five-year period thereafter. It would have been absurd if the Tribunal had found Guatemala liable for an alleged loss from 2013 onwards due to the 2008 tariffs, considering that by then such tariffs would no longer be in place.

84. In short, while the loss between 2008 and 2010 was considered by the Tribunal as certain, from October 2010, given the sale, that loss was no longer certain and in any case not proven. Beyond 2013 there could be no loss attributable to the measures (the 2008-2013 tariffs) as these would have ceased to be in effect.

85. Therefore, TGH's alleged contradiction in the Tribunal's holding on damages does not exist.

3. The Tribunal's treatment of the evidence does not give rise to annulment

86. TGH also argues that the Tribunal's decision on lost value damages should be annulled for failure to state reasons because the Tribunal "failed to address or even acknowledge the extensive expert and documentary evidence adduced by the parties regarding the loss of value of TECO's interest in EEGSA," and "failed to explain why" a certain piece of evidence "should prevail over that evidence."[161]

87. TGH's claim is flawed. An ICSID tribunal's treatment of the evidence on the record is within its discretion and is beyond the scope of annulment under the ICSID Convention. Indeed, ICSID Arbitration Rule 34(1) is clear in this respect:

> **Rule 34. Evidence: General Principles**
>
> (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

88. If an annulment committee could question why a tribunal considered one piece of evidence more convincing than another, it would be clearly stepping into the tribunal's role and engaging in a full review of the evidentiary record of the case. This would amount to second guessing the merits determinations made by the tribunal, which a committee simply cannot do.[162]

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161 TGH's Memorial on Partial Annulment, para. 96.

162 *See* paras. 9-14.

89. It is curious that TGH cites only one annulment decision to support its claim on this point, the decision in *Rumeli v Kazakhstan*.[163] However, TGH neglects to mention that the *Rumeli* committee held it could not review the probative value that the tribunal assigned to evidence produced in the case:

> An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties. […]it would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred […] the Tribunal took into account and considered the Parties' positions […] and the Applicant's arguments to the contrary amount to an attempt to appeal on questions of evidence which the Tribunal was entitled to, and did, determine.[164] (Emphasis added.)

90. A similar holding is contained in the decision on annulment in *Wena v Egypt*:

> [I]t is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced.[165]

91. The committee in *Industria Nacional de Alimentos v Peru* also held that annulment cannot be sought on the basis of the incorrect weight given by the tribunal to certain pieces of evidence:

> [T]he Ad hoc Committee does not consider it to be its task to determine whether the test employed by the Tribunal and the weight given by the Tribunal to various elements were "right" or "wrong". […] It is no part of the Committee's function, as already indicated above, to purport

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163 TGH's Memorial on Partial Annulment, para. 97.

164 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (Caso CIADI No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110,** paras. 96, 98.

165 *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL- 64**, para. 65.

> to substitute its own view for that arrived at by the Tribunal.[166]

92. In the words of the annulment committee in *Fraport v Philippines*:

> It is not for the ad hoc Committee to review, within the confines of the annulment proceeding, the consideration of the factual record by the Arbitral Tribunal.[167]

93. The *Rumeli* committee also held that an annulment committee cannot censure an award just because the tribunal may not have cited or referenced every piece of evidence provided by the parties:

> The purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party, surely an excessive burden for any court or tribunal.[168]

94. The above case law clearly demonstrates that TGH's annulment challenge based on the alleged incorrect manner in which the Tribunal treated or assessed the evidence is flawed. In any case, there is nothing incorrect in the Tribunal's treatment of the evidence.

95. TGH complains that the Tribunal did not address its evidence as to how the sale price of EEGSA had been negotiated. However, it refers to only two documents. Curiously enough, the two documents referred to by TGH are documents that were disclosed in the Arbitration in response to a document request by Guatemala for documents related to the sale.[169] TGH only produced these documents to comply with the Tribunal's

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166 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, **Exhibit RL-60**, para. 112.

167 *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25) Decision on Annulment, 23 December 2010, **Exhibit RL-118**, para. 84.

168 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 104.

169 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 21-22; 27-28.

order. Further, during the proceedings TGH made virtually no reference to these documents to support its case.[170]

96. The first of these two documents is EPM's Non-Binding Offer Letter to Iberdrola dated 26 July 2010, in which EPM offered to purchase DECA II for US$597 million (the ***Letter***).[171] The Letter provides no purchase price for EEGSA, but TGH argues that it shows that EPM had undertaken a DCF analysis of EEGSA and that such analysis assumed no increase in tariffs for 2013 and 2014.[172] According to TGH, this document proves that the sale price was calculated without assuming a future tariff increase, and thus is a reliable reference for the loss in value of EEGSA due to the 2008 tariffs.

97. However, TGH does not mention that the Letter also says that such analysis would be subject to a proper due diligence analysis: "the approval of the final offer price on behalf of EPM's Board of Directors [is] subject to an on-site due diligence."[173] Hence the Letter provides not only no sale price of EEGSA, but also no reliable indication as to how it would be calculated (with or without tariff increases in 2013 and thereafter). In fact, the Letter noted that EPM would conduct a due diligence before providing a "Binding Offer" that would be used for the final sale.[174] Presumably, the due diligence documents would have included the analysis of possible tariff increases in 2013 and thereafter, and the binding offer would have detailed these assumptions, but TGH declined to provide any such documentation in the course of the Arbitration.[175] Rather, it chose to rely upon a non-binding offer presented months prior to the sale.

98. The Non-Binding Offer Letter was mentioned only once in all of TGH's pleadings in the proceedings. It was in its Reply Memorial, when it relied on this document to note

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170 Exhibit C-531 was referred to in order to justify EEGSA's actual value and the reasonability of TGH's comparable companies analysis, while Exhibit C-557 was referred to exclusively to justify the reasonability of TGH's comparable companies analysis, as a response to Guatemala's argument that there were no companies comparable to EEGSA (Reply, para. 293, footnote 1427).

171 Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**.

172 TGH's Memorial on Partial Annulment, para. 98.

173 See Guatemala's translation of the Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit R-126**, p. 1 (emphasis added). Guatemala refers to its own translation of this document filed in the Arbitration because TGH's translation of this sentence in **Exhibit C-557** is inaccurate.

174 Document C3-01 became Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**, pgs. 1-3.

175 *See* paras. 45-52.

that "EPM conducted a comparable publicly-traded company and comparable transaction approach," to respond to Guatemala's argument that there were no companies comparable to EEGSA.[176] TGH never said that the Non-Binding Offer Letter somehow proved that the 2008 tariffs impacted the purchase price. Thus, even if TGH could prove that the Tribunal disregarded this piece of evidence (which it cannot), it would have been perfectly reasonable for the Tribunal to have done so, since TGH did not explain in its briefs its use and particular relevance for determining the sale price of EEGSA or how the 2008 tariffs impacted such price.

99. Further, the most the Letter could show is the buyer's conservative expectations for the 2013 tariff review, but of course it could not mean that no tariff increase would not occur in 2013, 2018 or in any subsequent tariff review. Thus, the Letter simply confirms how unreliable it was to consider that the sale price crystallized any loss caused by the 2008 tariffs, since tariffs would be reviewed and could increase in 2013.

100. The only other evidence that TGH points to is the 14 October 2010 Fairness Opinion, in which Citibank assessed the fairness of the price offered by EPM for DECA II.[177] Contrary to TGH's allegations, the Fairness Opinion does not provide any evidence of EEGSA's sale value (it refers to DECA II). Nor does the Fairness Opinion explain how the 2008 tariffs were taken into account in determining such value. Indeed, TGH never even made such an argument in the course of the arbitration.[178] Thus, the Tribunal cannot be expected to have made such a radical inference absent an attempt to even brief the argument.

101. In any event, it is obvious that the Tribunal did not disregard the Fairness Opinion as TGH alleges, since the Tribunal made express reference to that document in its final Award, including the fact that it was originally produced in response to Guatemala's request for documents.[179]

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176 Reply, para. 293, footnote 1427.

177 Citibank Fairness Opinion, Presentation to the Board of Directors of TECO Energy, Inc., 14 October 2010, **Exhibit C-531**, p. 2.

178 TGH submitted Exhibit C-531 with its Reply Memorial, and only discussed that document at para. 293 with respect to the validity of the comparatives analysis. The document is again mentioned in TGH's Post-Hearing Brief at paras. 169, 171, 173, in reference to assessing the reasonability of TGH's expert valuation. TGH therefore did not put forth the argument that this exhibit, or exhibit C-557, demonstrated how the 2008 tariffs were taken into account in calculating the sale price.

179 Award, paras. 424, 426 (referenced in Abdala and Schoeters, **Appendix RER-4**, para. 78, Table VI). *See also* Guatemala's initial document production request: Letter from Nigel Blackaby to Andrea

102. There was other evidence on the record that demonstrated that the loss of value claimed by TGH was flawed, but TGH does not refer to it. For example, in the Management Presentation dated September 2010, in which TGH and its partners presented EEGSA for sale to interested parties, EEGSA was characterized as "one of the best and most solid companies in the country" due to *inter alia*, the "solidity of the value of its shares."[180] This statement completely contradicts any suggestion that EEGSA had permanently lost value as a consequence of the 2008 tariffs approved by the CNEE. Another example is the Press Release following the sale, which confirmed that EPM bought EEGSA because they considered it "the largest and most solid electricity distribution and marketing company in Central America."[181] Again, the sale could in no way indicate a permanent lost value of EEGSA.

103. TGH also complains that the Tribunal did not cite the expert reports on damages provided by the Parties.[182] This is incorrect as the Award does refer to those reports in its section on damages, including in the section relating to the alleged lost value of EEGSA.[183]

104. In any event, the Tribunal did not need to refer to those reports in detail in rejecting the lost value claim because those reports provided no contemporary evidence relating to how the sale price of EEGSA to EPM had been determined. Nor did they provide contemporary evidence that higher tariffs for the period 2008-2013 would have increased that price, and if so by how much.

105. This was fundamental, because TGH framed its claim, as stated in its reply PHB, as follows: "[b]ecause TECO sold its shares in EEGSA in October 2010, its losses have crystalized" and the "measure of damage equals […] the difference between TECO's

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Menaker on document production, 7 November 2011, Category C1 (Document was produced on 6 january 2015). It is also revealing that the Tribunal, in support of its conclusion that the claim is too speculative (Award, para. 757), refers with agreement to paragraph 38 of Guatemala's Counter-Memorial on the Merits where Guatemala discusses in a series of paragraphs the abusive nature of TGH's claim and its speculative character. Specifically paragraph 35, which the Tribunal must have surely examined, includes a reference to Citibank's Fairness opinion in the form of Guatemala's Exhibit R-127.

180 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22 (Emphasis in bold in the original). The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país." *See also* Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

181 Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

182 TGH's Memorial on Partial Annulment, paras. 96, 98-99, 101.

183 Award, paras. 718, 720, 730, 750.

share of the purchase price that it received from EPM and what it would have received had Guatemala not breached the DR-CAFTA in setting EEGSA's VAD [*i.e.*, the 2008 tariffs.]"[184] Thus, it was logical that the Tribunal focused on whether there was any evidence to prove that TGH could have sold at a higher price if the 2008-2013 tariffs had been higher.

106. In its Post Hearing Brief, TGH argued that "[t]he fact that tariffs may change over time does not matter" in determining whether TGH could prove its loss.[185] How could this be right when what TGH was selling was a participation in an electricity distribution business with a 50-year concession of which 40 years where still remaining, and tariffs would be reviewed every five years? How could the value of EEGSA be calculated, and thus any loss incurred or demonstrated, without taking into account the possibility of future tariff reviews? This and other unsubstantiated arguments raised by TGH prompted the dismissal of its claim for lost value.

107. TGH also complains that the Tribunal, rather than citing other evidence, referred to a press interview dated 23 October 2010 of the CEO of EPM, Mr. Federico Restrepo, in which Mr. Restrepo mentioned only as a possibility that with higher tariffs EEGSA's sale price may have been higher.[186] TGH also argues that the Tribunal emphasized one aspect of this interview rather than others.[187] TGH says that "Mr. Restrepo's interview thus establishes, if EEGSA's VAD and tariffs had been higher […] EPM would have paid a higher purchase price."[188]

108. It is clear that what TGH argues is that the Tribunal wrongly attributed relevance to this interview over other evidence, and interpreted the interview incorrectly. But this is completely irrelevant for annulment. The Tribunal was perfectly entitled to choose the evidence that it considered to be more significant, and to interpret the evidence as it thought appropriate.

109. The Tribunal's decision was based on its own assessment of the evidence and this cannot be reviewed in annulment. In the words of the Tribunal:

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184 Claimant's Reply Post-Hearing Brief, para. 125.

185 *Ibid.*, para. 127.

186 TGH's Memorial on Partial Annulment, paras. 95-97, 106, 119; Award, paras. 753-754.

187 TGH's Memorial on Partial Annulment, para. 118.

188 *Ibid.*, para. 107.

> [T]he Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale.[189]
>
> [T]he existing tariff were [*sic*] considered as a relevant factor in determining the price of the transaction. There is however no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013. […] [T]here [is] no evidence in the record of how the transaction price has been determined. The Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent.[190]
>
> The Arbitral Tribunal also finds no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever.[191] (Emphasis added.)

110. The Tribunal indeed considered all of the evidence before it. It first spent 30 pages and 158 paragraphs explaining the facts,[192] and 34 pages and 169 paragraphs summarizing the position of the Parties on the merits based on the evidence submitted by each Party.[193] In its damages analysis on the merits, it referred, directly or by reference to the Parties' pleadings, to the following expert reports and witness statements: CER-2, CER-5, RER-1, RER-2, RER-4, RER-5, CWS-2, CWS-4, CWS-5, CWS-6, CWS-8;[194] as well as to at least the following pieces of documentary evidence: C-217, C-218, C-246, C-267, C-297, C-303, C-324, C-326, C-352, C-353,

189 Award para. 749.

190 *Ibid.*, para. 754.

191 *Ibid.*, para. 755.

192 *Ibid.*, Part IV, pgs. 21-51, paras. 79-237.

193 *Ibid.*, Part VI, pgs. 58-92, paras. 264-433.

194 Kaczmarek, **Appendix CER-2**; Kaczmarek II, **Reply Appendix CER-5**; M Abdala and M Schoeters, **Appendix RER-1**; Damonte **Appendix RER-2**; Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**; Damonte Rejoinder, **Appendix RER-5**; Callahan I, **Appendix CWS-2**; Giacchino, **Appendix CWS-4**; Gillette, **Appendix CWS-5**; Maté, **Appendix CWS-6**; Callahan II, **Appendix CWS-8**.

C-354, C-356, R-8, R-80, R-83, R-130, R-132, R-133, R-134, R-162.[195] The Tribunal also referred to the Hearing transcript abundantly.[196]

111. To conclude, TGH incorrectly challenges the Tribunal's treatment of the evidence in the Arbitration as a failure to state reasons. TGH's claim for annulment entails precisely what the *Rumeli* annulment committee warned against, that "[a]n *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties," a committee cannot "overturn a tribunal's treatment of the evidence to which it was referred,[197] and "[t]he purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party, surely an excessive burden for any court or tribunal."[198]

B. THE DECISION DOES NOT DEPART FROM ANY FUNDAMENTAL RULE OF PROCEDURE

112. TGH argues that the Tribunal's rejection of its claim for lost value seriously departed from three fundamental rules of procedure: (i) the rules relating to "treatment of evidence and burden of proof,"[199] (ii) "that a party need not prove an allegation that is

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195 Award, paras. 716-768; *See also* Email from M. Calleja to G. Perez forwarding Email from M. Quijivix to L. Maté and M. Calleja, 28 May 2008, **Exhibit C-217**; Email from M. Calleja to L. Giacchino, forwarding Email from M. Quijivix to L. Maté and M. Calleja, 28 May 2008, **Exhibit C-218**; Expert Commission's Report, **Exhibit C-246**; Sigla Report, 28 July 2008, **Exhibit C-267**; Standard & Poor's, *Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB' from 'BB'/in CreditWatch Neg*, **Exhibit C-297**; TECO Guatemala, Inc. Operations Summary for Periods Ended September 30, Board Book Write-up, October 2008, **Exhibit C-303**; TECO Energy Form 10-k, 26 February 2009, **Exhibit C-324**; TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, **Exhibit C-326**; Letter from EPM to Iberdrola, TPS, and EDP, 6 October 2010, **Exhibit C-352**; Teco Energy, Inc. Board of Directors Meeting (Proposed Sale of DECA II), 14 October 2010, **Exhibit C-353**; Minutes of TECO Energy, Inc. Board of Directors meeting dated 14 Oct. 2010, 14 October 2010, **Exhibit C-354**; Stock Purchase Agreement between Iberdrola, TPS, EDP, and EPM, 21 October 2010, **Exhibit C-356**; LGE, **Exhibit R-8**; Notarial Act Establishing the Expert Commission, 6 June 2008, **Exhibit R-80**; Letter from Jean Riubrugent, Carlos Bastos, and Leonardo Giacchino to Carlos Colom Bickford and Luis Maté, 12 June 2008, **Exhibit R-83**; Press Release by EDP, "EDP sells its stake in DECA II", 21 October 2010, **Exhibit R-130**; Press Release from Iberdrola Energía S.A., 22 October 2010, **Exhibit R-132**; "We won't wave a flag. We respect people's roots," *Prensa Libre*, 23 October 2010, **Exhibit R-133**; Press release of Teco Guatemala Holdings, LLC, "Teco Energy Reports Third Quarter Results," 28 October 2010, **Exhibit R-134**; Press release of Teco Guatemala Holdings, LLC, "Teco Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company," 21 October 2010, **Exhibit R-162**.

196 Award, paras. 273, 298, 323, 324, 330, 355, 384, 389, 395, 396, 402, 453, 601, 602, 648, 726, 739, 740, 746.

197 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (Caso CIADI No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110** paras. 96, 98.

198 *Ibid.*, para. 104.

199 TGH's Memorial on Partial Annulment, paras. 110, 124.

accepted by the opposing party,"[200] and (iii) "the right to be heard."[201] TGH is wrong on all three counts.

1. The Tribunal did not depart from any rule of procedure relating to the treatment of evidence and standard of proof

113. TGH's allegation is that the Tribunal imposed on TGH too "onerous" an "evidentiary burden" regarding its damages claim for lost value, and that this is a serious departure from a fundamental rule of procedure.[202] TGH affirms that there is authority for the proposition that "'treatment of evidence and burden of proof' is among the fundamental rules of procedure."[203]

114. However, TGH does not identify the rule of procedure that the Tribunal has allegedly breached. TGH's contention that "'treatment of evidence and burden of proof' is among the fundamental rules of procedure" is a mere assertion.

115. What TGH appears to be complaining about is the "standard" of proof that the Tribunal applied, i.e. it takes issue with the type of "evidence that would have satisfied the Tribunal" with regard to its allegation of damages for the lost value of EEGSA. However, it is well established that tribunals have discretion in relation to the standard of proof to be applied:

> Whichever party bears the burden of proof on a particular issue and presents supporting evidence "must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof." The degree to which evidence must be proven can generally be summarized as a "balance of probability," "reasonable degree of probability" or a preponderance of the evidence. Because no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.[204]

116. This principle arises from the fact that each tribunal is the judge of the probative value of evidence, as explained in *Alpha Projektholding v Ukraine*:

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200 *Ibid.*, para. 124.

201 *Ibid.*, paras. 116, 120, 134.

202 *Ibid.*, para. 112.

203 *Ibid.*, citing *Impregilo v. Argentine Republic* (ICSID Case No. ARB/07/17) Award, 21 June 2011, **Exhibit RL-119** paras. 83, 110.

204 *Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) Award, 16 May 2012, **Exhibit RL-120** para. 34.

> An additional question is the standard of proof – more specifically, what level of evidentiary showing would be sufficient to prove an assertion […] It is generally understood that "the probative force of the evidence presented is for the Tribunal to determine," there being no "strict judicial rules of evidence" binding upon international arbitral tribunals. This general principle is confirmed by Rule 34(1) of ICSID's Arbitration Rules, which provides: "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."[205] (Emphasis added.)

117. Similarly, the tribunal in *Soufraki v UAE* held:

> What weight is given to oral or documentary evidence in an ICSID arbitration is dictated solely by Rule 34(1) of the ICSID Arbitration Rules:
>
> The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
>
> In the present instance, it is thus for this Tribunal to consider and analyse the totality of the evidence and determine whether it leads to the conclusion that Claimant has discharged his burden of proof.[206]

118. Another example is the award in *Rompetrol v Romania*:

> The Tribunal is unable to accept, in full, the position of either Party. It starts from the position that in international arbitration – including investment arbitration – the rules of evidence are neither rigid nor technical. If further confirmation of that were necessary, in the specific ICSID context, it can be found in Articles 43-45 of the Washington Convention, the intention behind which is plainly that a tribunal should possess a large measure of discretion over how the relevant facts are to be found and to be proved – a general principle which finds strong reinforcement in the

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205 *Alpha Projektholding v.* Ukraine (ICSID Case No. ARB/07/16) Award, 8 November 2010**, Exhibit RL-121** para. 238.

206 *Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Award, 7 July 2004**, Exhibit RL-122**, para. 61.

> Arbitration Rules, notably in paragraphs (1) and (3) of Rule 34. The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, whether particular evidence or kinds of evidence should be admitted or excluded, what weight (if any) should be given to particular items of evidence so admitted, whether it would like to see further evidence of any particular kind on any issue arising in the case, and so on and so forth.[207] (Emphasis added.)

119. Hence, contrary to TGH's contentions, there is no "fundamental rule of procedure" imposing a given standard of proof on a tribunal. The standard of proof is an issue regarding which arbitral tribunals have wide discretion because they alone are responsible for assessing the probative value of evidence.

120. Further, and in any case, TGH is wrong that the Tribunal imposed a too onerous an evidentiary burden on it to prove its lost value damages. TGH relies on *Gemplus v. Mexico* for support,[208] but that tribunal clearly held that the claimant bears the burden of proof on damages:

> Burden of Proof: Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.[209]

121. In a similar manner, in *Grand River v United States* the tribunal held that "a claimant has the burden of proving both the breach and the claimed loss or damage".[210] Likewise, in *Gold Reserve v Venezuela*, the tribunal held that the "Claimant bears the

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207 *Rompetrol v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013, **Exhibit RL-123,** para. 181

208 TGH's Memorial on Partial Annulment, para. 110.

209 *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4) Award, 16 June 2010, **Exhibit RL-124**, paras. 12-56

210 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, **Exhibit RL-125**, para. 237.

burden of proving its claimed damages" and that "damages cannot be speculative or merely 'possible'".[211]

122. The latter point, that speculative or uncertain damages cannot be awarded is well-established. For example, the Iran-US Claims Tribunal in *Amoco v Iran* held that: "[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."[212] The same idea is expressed in Article 36.2 of the ILC Articles on State Responsibility, which provides that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established."[213] As the commentary to this article notes, "[t]ribunals have been reluctant to provide compensation for claims with inherent speculative elements."[214]

123. In the present case, the Tribunal clearly found that the evidence offered by TGH to prove its damages for the lost value of EEGSA was insufficient and that its claim was too uncertain and speculative: "[t]he Arbitral Tribunal cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent," and "agrees with the Respondent that the claim in this respect is speculative."[215]

124. In short, the claim was too speculative and uncertain, and it was properly rejected. In any case, the Tribunal's approach to the standard of proof fell within its powers, including its power to judge the probative value of the evidence. Its approach in this regard could in no way be considered a serious departure from an unidentified fundamental rule of procedure.

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211 G*old Reserve Inc. v. Bolivarian Republic of* Venezuela (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, **Exhibit RL-126**, para. 685.

212 *Amoco International Finance v. Islamic Republic of Iran* (Iran-US Claims Tribunal Case No. 56) Partial Award, 14 July 1987, **Exhibit RL-127**, para. 238.

213 International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, United Nations (2001), **Exhibit RL-128**, Art. 36.2.

214 United Nations, "Materials on the Responsibility of States for Internationally Wrongful Acts" (ST/LEG/SER.B/25), in *United Nations Legislative Series* (2012), **Exhibit RL-129**, p. 241.

215 Award, para. 757.

2. The Tribunal did not depart from any rule of procedure providing that a party need not prove an allegation that is accepted by the opposing party

125. TGH claims also that the Tribunal departed from another fundamental rule of procedure providing that "a party need not prove an allegation that is accepted by the opposing party."[216] TGH argues that "Guatemala conceded that, if liability were found, TECO would have suffered damages upon the sale of its interest in EEGSA."[217] Thus the Tribunal had to award the alleged damages relating to the fact that it sold EEGSA at a loss.

126. This is a flawed allegation. Guatemala never conceded that TGH suffered any damages. It actually argued the contrary, for example that "TGH has not suffered any loss,"[218] and that "[t]he hearing demonstrated that TGH's claim for damages is not credible."[219] Guatemala reviewed TGH's damages valuation model in order to demonstrate that even under that model there had been no losses.[220] Nowhere in the pleadings can TGH identify the statement that it attributes to Guatemala, that "if liability were found, TECO would have suffered damages upon the sale of its interest in EEGSA."[221]

127. Thus, the issue of whether TGH had suffered loss, and any quantification of such a loss, had to be decided by the Tribunal, as there was no agreement in this respect. The fundamental rule of procedure applicable in this scenario is provided in article 48(3) of the ICSID Convention, which states that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." To comply with this rule, the Tribunal decided on the merits of all aspects of TGH's claim for damages.

128. Guatemala clearly explained that it did not accept that TGH had proven losses due to the alleged lost value of EEGSA. It pointed to evidence to the contrary: that Guatemala "does not have in its possession any direct evidence of the value assigned

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216 TGH's Memorial on Partial Annulment, para. 124.

217 TGH's Memorial on Partial Annulment, para. 124.

218 Rejoinder, Section VI.

219 Respondent's Post-Hearing Brief, Section V.

220 *Ibid.*, paras. 362-363.

221 TGH's Memorial on Partial Annulment, para. 124.

to EEGSA in the purchase price";[222] that "it is incorrect to consider the alleged measures as perpetual in nature for the purposes of calculating damages […] given the imminent possibility that a tariff increase will be granted to EEGSA in the tariff review that is under way;"[223] that in the Management Presentation dated September 2010, TGH and its partners presented EEGSA for sale to interested parties as "one of the best and most solid companies in the country" due to *inter alia*, the "solidity of the value of its shares,"[224] and that similarly, the Press Release following the sale confirmed that EPM bought EEGSA because it considered it to be "the best and most solid electricity distribution and marketing company in Central America".[225]

3. The Tribunal did not depart from any rule of procedure relating to the right to be heard

129. With its allegations regarding the right to be heard, TGH again second-guesses the Tribunal's assessment of the probative value of the evidence on the record. In particular, TGH complains that the Tribunal relied on Mr. Restrepo's press interview "without warning" and "failed to inform the parties of the central importance that it intended to attach to this statement."[226]

130. Guatemala submits that there is no rule imposing upon a tribunal a duty to communicate, consult or check with the parties as to whether they agree with or have any comments on the analysis that it conducts or the conclusions it reaches on a piece of evidence during deliberation. As recently held in the annulment decision in *Iberdrola v Guatemala*, a tribunal has "no obligation to advance to the parties what will be its decision" on any given point, "nor ask their opinion on the same"; "it is in the award that the Tribunal decides."[227]

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222 Respondent's Post-Hearing Brief, para. 358.

223 Respondent's Reply Post-Hearing Brief, para. 161.

224 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22 (Emphasis in bold in the original, emphasis added). The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país." *See also* Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

225 Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129** (emphasis added).

226 TGH's Memorial on Partial Annulment, para. 117.

227 *Iberdrola v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision on Annulment, 13 January 2015, **Exhibit RL-130**, para. 108.

131. Here, TGH had ample opportunity to present its case. The Tribunal even took care to ask questions of the parties, particularly of TGH, on the issue of damages for the alleged lost value of EEGSA. As explained above, at the hearing the Tribunal asked as follows:

> PRESIDENT MOURRE: […] There is an exhibit which has been discussed yesterday, which is R-133, which is the interview of the CEO, I believe, of Energía de Medellín; and there is a question there which says: "The shareholders argued that there would be low revenue and profitability due to the VAD. Despite this issue, you decided to buy." And the answer is: "This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout is the one that exists." So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods. And my question is: Why was there such an assumption, given that the tariff is reviewed every five years?
>
> And the second question is: How was the 2008 tariff, which is in this interview [Exhibit R-133] referred to as being low, how was that taken into account in the sale –in fixing the sale– the sale price to Energía de Medellín?[228] (Emphasis added.)

132. Later the Tribunal sent a letter to the parties similarly asking the following questions:

> The Arbitral Tribunal also reminds the parties that the PHBs should address the questions raised by the Arbitral Tribunal on Monday 21 and Tuesday 22 of January (Transcripts pages 386 et seq.).
>
> The Arbitral Tribunal would also be grateful if the parties could address in their PHBs the following additional questions:
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> […]
>
> - Evidence of the value attributed to EEGSA in the sale to EDM;
>
> - Is it right to assume for the purposes of loss assessment that the 2008-2013 tariff would

[228] Tr. (English), Day Two, 402:22-403:20, Mourre.

> remain in place forever? If not, what are the consequences on Teco's claim?[229]

133. TGH had the opportunity to address all of these questions in two rounds of pleadings. Beyond that, the Tribunal had no further duty to consult TGH on any aspect of its decisions expressed in the Award. TGH certainly was not deprived of the right to be heard on any aspect of its claim for damages.

C. THE DECISION DOES NOT CONSTITUTE A MANIFEST EXCESS OF POWERS

134. TGH repeats its argument that Guatemala accepted certain aspects of its damages claim, and thus argues that the Tribunal's dismissal of the claim for alleged lost value in its entirety constituted a manifest excess of powers, because the Tribunal did not have to decide upon issues agreed between the parties.[230]

135. As explained above, Guatemala emphatically denies that it ever agreed to any aspect of TGH's claim. In fact it denied it entirely.[231] Guatemala merely reviewed TGH's methodology in order to demonstrate that under that methodology, TGH could not show any damages. This in no way constituted an agreement to TGH's claim. Therefore, the Tribunal did have to decide all claims for damages, including TGH's claim for EEGSA's alleged lost value.

V. THE TRIBUNAL'S DECISION ON INTEREST DOES NOT INCUR IN ANY GROUND OF ANNULMENT

136. TGH challenges the Tribunal's decision on interest, arguing that it constitutes a manifest excess of powers because Guatemala agreed both on the date from which interest would start accruing, this date being 1 August 2008, and on the rate of interest applicable, *i.e.* 8.8 percent corresponding to EEGSA's WACC.[232] Thus, the Tribunal did not need to decide this issue.

137. This is incorrect. Nowhere did Guatemala agree that interest would start accruing as of 1 August 2008. TGH points to no pleading from Guatemala on which that agreement would be expressed. Further, Guatemala challenged the rate of interest as well. For example, as stated in Guatemala's Reply PHB, "[t]he interest rate applicable

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229 Letter from the Tribunal to the Parties, 11 March 2013, p. 2.

230 TGH's Memorial on Partial Annulment, paras. 125-133, 137.

231 *See* sections 0 and IV.B.

232 TGH's Memorial on Partial Annulment, paras. 126-132.

between the sale and the date of the Award is not the WACC,"[233] but "a risk-free rate, such as (for example) US 10-year government bonds."[234] Hence the issue of the interest applicable had to be decided by the Tribunal.

138. TGH also argues that the decision on interest constitutes a departure from a fundamental rule of procedure. It claims that the Tribunal decided not to award interest before the date of the sale, 21 October 2010, because otherwise that would result in "unjust enrichment," and the application of this "theory" had not been briefed by the parties.[235]

139. As stated above there is no rule imposing upon a Tribunal a duty to communicate, consult or check with the parties regarding its analysis or the conclusions it reaches during deliberation. Clearly, the Tribunal's reference to the notion of "unjust enrichment" is a conclusion that it reached after considering and deliberating on TGH's claim for interest, and needed not, indeed could not, be debated with the Parties. As recently held in the annulment decision in *Iberdrola v Guatemala*, a tribunal has "no obligation to advance to the parties what will be its decision" on any given point, "nor ask their opinion on the same"; "it is in the award that the Tribunal decides."[236] Further, TGH could have exercised its rights under Article 10.20.9(a) of the CAFTA-DR, to be able to comment on a draft of the Award but it did not do so.

140. In any event, TGH's challenge to the Tribunal's decision on interest ignores the well-established principle that an arbitral tribunal enjoys discretionary power on how to calculate and allocate interest. In the words of the *Vivendi II* annulment committee:

> In the matter of interest and its calculation, the *ad hoc* Committee considers that no *ultra petita* exists, even with regard to the issue of determining the starting date for the calculation of the interest due to the Claimants, since the allocation of interest, like the evaluation of damages, falls within the discretionary power of the Tribunal in

233 Respondent's Reply Post-Hearing Brief, title to section V.D.

234 *Ibid.*, para. 175.

235 TGH's Memorial on Partial Annulment, paras. 125, 133-135.

236 *Iberdrola v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision on Annulment, 13 January 2015, **Exhibit RL-130**, para. 64.

> the light of all relevant circumstances of the case.[237] (Emphasis added.)

141. Thus, the decision of the Tribunal on interest does not constitute a manifest excess of powers, nor does it represent a serious departure from a fundamental rule of procedure.

[237] *Compañía de Aguas del Aconquija and Vivendi v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 10 August 2010, **Exhibit RL-111**, para. 256 (emphasis added).

VI. REQUEST FOR RELIEF

142. In light of the above, the Republic of Guatemala respectfully requests the Annulment Committee to:

(a) Reject TGH's annulment application in full;

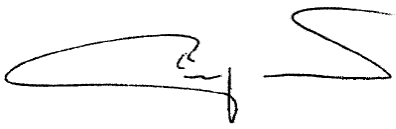
(b) Order TGH to pay Guatemala's legal fees and costs, and all the fees and costs of the *ad hoc* Committee and ICSID in these proceedings

Respectfully submitted,

Nigel Blackaby

Alejandro Arenales

Alfredo Skinner Klée



Rodolfo Salazar