INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S REJOINDER ON ANNULMENT OF THE AWARD

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CLAIMANT'S REJOINDER ON ANNULMENT OF THE AWARD

TABLE OF CONTENTS

CLAIMANT'S REJOINDER ON ANNULMENT OF THE AWARD

I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 dated 1 August 2014, as modified by agreement of the parties and with the Committee's consent,[1] TECO Guatemala Holdings, LLC ("TECO" or "Claimant") hereby submits this Rejoinder on Annulment of the Award rendered on 19 December 2013 (the "Award") in the matter *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23.[2]

2. As set forth in TECO's Counter-Memorial on Annulment of the Award dated 9 February 2015 ("TECO's Counter-Memorial on Annulment"), and contrary to Guatemala's contentions in its Memorial on Annulment of the Award dated 17 October 2014 ("Guatemala's Memorial on Annulment"), the Tribunal correctly and properly found that it had jurisdiction *ratione materiae* over the claim presented by TECO under the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA" or the "Treaty"), and that the Republic of Guatemala ("Guatemala" or "Respondent") breached its obligation under Article 10.5 of the DR-CAFTA to accord TECO's investment in EEGSA fair and equitable treatment. TECO also demonstrated that, contrary to Guatemala's contentions, the Tribunal correctly and properly awarded TECO damages for the period from Guatemala's breach until the date on which TECO sold its investment,[3] as well as three-fourths of its arbitration costs.

3. In its Reply on Annulment of the Award dated 8 May 2015 ("Guatemala's Reply on Annulment of the Award"), Guatemala fails to respond in any meaningful way to TECO's arguments in its Counter-Memorial on Annulment, but instead simply reiterates its previous unsupported assertions, which TECO already has demonstrated are meritless.

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[1] Procedural Order No. 1 dated 1 Aug. 2014, Art. 13.1.4.

[2] Abbreviations and terms used in TECO's Rejoinder on Annulment of the Award have the same meaning as in TECO's Memorial on Partial Annulment of the Award, TECO's Counter-Memorial on Annulment of the Award, and TECO's Reply on Partial Annulment of the Award.

[3] The Tribunal's improper denial of TECO's damages for loss of value upon the sale of its investment is the subject of TECO's application for partial annulment of the Award.

4. *First*, TECO demonstrated that, in asserting jurisdiction *ratione materiae* over the dispute, the Tribunal properly applied the *prima facie* test to the claim presented by TECO in its pleadings by assessing whether the facts presented by TECO (assuming they were proven) were capable of constituting a violation of the DR-CAFTA, and correctly found that the dispute was a dispute under international law arising out of Guatemala's arbitrary and unjustified actions during EEGSA's 2008-2013 tariff review, rather than a so-called mere domestic regulatory dispute under Guatemalan law, as Guatemala had contended. Guatemala's continued assertions to the contrary are baseless, because they misstate the *prima facie* test, mischaracterize the Tribunal's analysis, and rely upon legal authorities which do not support Guatemala's argument.

5. *Second*, TECO demonstrated that, in finding that Guatemala had breached its obligation under Article 10.5 of the DR-CAFTA to accord TECO's investment in EEGSA fair and equitable treatment, the Tribunal applied international law to the facts presented, and did not conflate a breach of domestic law with a breach of international law. TECO also demonstrated that, rather than reversing the decisions of the Guatemalan Constitutional Court, the Tribunal, in fact, granted deference to and incorporated those decisions in its Award, even though the Tribunal found that it was not bound by such decisions under principles of international law, and that they had no *res judicata* effect on the dispute. Guatemala's continued assertions to the contrary rely upon an erroneous and misleading presentation of investment treaty jurisprudence with respect to regulatory disputes; mischaracterizations of TECO's claim and the Guatemalan Constitutional Court's decisions; and a complete disregard of the Tribunal's findings in its Award.

6. *Third*, TECO demonstrated that, in awarding TECO historical damages, the Tribunal properly applied the methodology agreed by the Parties and, in doing so, found that Bates White's 28 July 2008 VAD study fully incorporated the Expert Commission's rulings, and therefore was a proper basis for calculating damages. TECO also demonstrated that the Tribunal's award of historical damages is reasoned and fully consistent with both the Tribunal's decision on liability and the requirements of due process. Guatemala's continued assertions to the contrary misconstrue the Tribunal's decision on liability, rely on inapposite legal authorities, and distort the evidentiary record that was before the Tribunal.

7. *Finally*, TECO demonstrated that, in awarding TECO three-fourths of its arbitration costs, the Tribunal acted in accordance with the Parties' shared position that costs should follow the event, and it did not fail to assess the reasonableness of TECO's costs or to provide the reasons for its decision on costs. Guatemala's continued assertions to the contrary simply repeat its incorrect arguments from the Memorial on Annulment, and are fully rebutted in TECO's Counter-Memorial on Annulment.

II. SUMMARY OF THE DISPUTE AND THE AWARD

8. In its Reply on Annulment, Guatemala continues to erroneously assert that TECO mischaracterizes the dispute and the Award. Specifically, Guatemala contends that TECO reiterates many of the arguments that it raised in the arbitration, but which were rejected by the Tribunal in its Award, and that TECO has done so "in order to give the false impression that this was more than a dispute regarding the correct interpretation and application of a domestic Regulatory Framework."[4] Guatemala also continues to assert that the dispute between the parties arose solely from EEGSA's mere disagreement "with the manner in which the CNEE interpreted certain aspects of the procedure for the review of electricity tariffs in Guatemala."[5]

9. In particular, with respect to the tariff review process, Guatemala repeats its prior argument that EEGSA's independent consultant, Bates White, was required to comply with the Terms of Reference ("ToR") adopted by the CNEE in preparing EEGSA's VAD study, and to incorporate all of the CNEE's corrections into that study, which Bates White failed to do.[6] Guatemala also continues to argue that the Expert Commission established by the CNEE and EEGSA to review and decide their disagreements relating to the Bates White VAD study "issued a report in favor of the CNEE with regard to more than half of the discrepancies," and that, "[h]aving received the positive pronouncements," the CNEE proceeded to dissolve the Expert

[4] Guatemala's Reply on Annulment ¶ 26.

[5] *Id*. ¶ 29.

[6] *Id*. ¶ 30.

Commission and, by Resolution No. CNEE-144-2008 dated 29 July 2008, to set EEGSA's tariffs based upon a VAD study prepared by its own independent consultant, Sigla.[7]

10. In addition, Guatemala repeats its prior assertions that the Tribunal, in its Award, "identified the dispute as a domestic one relating to the CNEE's compliance with the Regulatory Framework;"[8] that the Tribunal's "decision that Guatemala breached the Treaty's international minimum standard of fair and equitable treatment was based exclusively on CNEE Resolution 144-2008;"[9] and that "the Tribunal repeatedly pointed to the CNEE's lack of reasons [for its decisions to reject the Bates White study and not to implement the Expert Commission's report] as the basis for its Award."[10] According to Guatemala, the Tribunal further found that it was "not convinced that [. . .] the regulator acted improperly," and that "[t]he CNEE and Guatemala, generally speaking, held a correct interpretation of the regulatory framework."[11] Guatemala also contends that the Tribunal's "decision on damages is predicated on the CNEE's obligation to endorse the Bates White study and the Expert Commission's report, while the decision on liability is based on the opposite premise, i.e., that neither the study nor the report [was] binding, but that the CNEE should have provided reasons for its rejection."[12]

11. Like its previous submissions in these proceedings, Guatemala's assertions regarding the dispute and the Award are erroneous and deliberately misconstrue TECO's arguments in the underlying arbitration, as well as the Tribunal's findings in its Award.

12. First, as TECO has explained and as the Tribunal found, TECO's claim for breach of the fair and equitable treatment standard under Article 10.5 of the DR-CAFTA was not based upon a mere regulatory dispute between the CNEE and EEGSA with respect to "the manner in which the CNEE interpreted certain aspects of the procedure for the review of electricity tariffs

[7] *Id*.

[8] *Id*. ¶ 32.

[9] *Id*. ¶ 37.

[10] *Id*. ¶ 27.

[11] *Id*. ¶ 35.

[12] *Id*. ¶ 41.

in Guatemala."[13] Nor did the Tribunal identify the dispute as a mere domestic dispute relating to the CNEE's compliance with Guatemalan law, as Guatemala erroneously contends.[14] To the contrary, as TECO's pleadings and the Award reflect, TECO's claim arose out of Guatemala's deliberate and calculated actions taken in contravention of its prior representations; its fundamental changes to the regulatory framework, which was adopted specifically to induce foreign investment in Guatemala's failing electricity sector and upon which TECO relied in investing in EEGSA; and its arbitrary and bad faith conduct taken in connection with EEGSA's 2008-2013 tariff review to sharply decrease EEGSA's VAD and tariffs, when, objectively, EEGSA's VAD and tariffs should have increased.[15]

13. In addition, while Guatemala repeatedly attempted throughout the arbitration to mischaracterize TECO's claim as a purely domestic law claim arising out of a mere regulatory dispute, the Tribunal expressly rejected that characterization in its Award, finding that TECO's claim was *not* a "domestic dispute on the interpretation of Guatemalan law,"[16] but rather was "an international dispute in which the Arbitral Tribunal [would] be called to apply international law."[17] The Tribunal thus observed that "the fundamental question that this Arbitral Tribunal ultimately has to decide is, on the evidence, whether the Respondent's behavior is such as to constitute a breach of the minimum standard of treatment under international law."[18]

14. Moreover, as TECO explained in its Reply on Partial Annulment, each of these issues formed the basis of the dispute irrespective of whether the Tribunal found in favor of TECO on each issue.[19] Thus, Guatemala's repeated insistence that the Tribunal rejected some of TECO's arguments in support of its claims does not change the nature of the dispute; to the

[13] *Id*. ¶ 29.

[14] *Id*. ¶ 32.

[15] TECO's Counter-Memorial on Annulment ¶ 30; TECO's Reply on Partial Annulment ¶ 18; Award ¶¶ 460-461, 473, 487, 497.

[16] Award ¶ 466.

[17] *Id*. ¶ 467.

[18] *Id*. ¶ 470.

[19] TECO's Reply on Partial Annulment ¶ 18.

contrary, as the Award confirms, these were the liability issues decided by the Tribunal in its Award.[20]

15. Second, Guatemala's continued assertions regarding the tariff review process are erroneous. As TECO has explained, the Tribunal expressly rejected Guatemala's argument that the ToR were mandatory and binding on EEGSA.[21] As the Tribunal observes in its Award, the ToR expressly provide that they are "guidelines;"[22] such term, the Tribunal noted, "would not have been used if the drafters of the [ToR] had not intended to preserve a certain degree of flexibility in its application by the distributor's consultant and the Expert Commission."[23] Indeed, the Tribunal further found that Article 1.10 of the ToR, which EEGSA insisted on including as a condition for withdrawing its legal challenge to the original ToR,[24] "was designed precisely to allow the distributor's consultant, under the control of the Expert Commission, to depart from the Terms of Reference in case the Terms of Reference would not comport with the regulatory framework, thus avoiding the delays and complications of a judicial challenge."[25]

16. Similarly, contrary to Guatemala's continued assertions, the Tribunal found that the "distributor was under *no* obligation to incorporate in its VAD study observations made by the CNEE in respect of which there was a disagreement properly submitted to the Expert Commission," and that, "[u]nless the regulator provided valid reasons to the contrary, it is only if and when the Expert Commission had pronounced itself in favor of the regulator that such an obligation would arise."[26] Indeed, the Tribunal agreed with TECO that it would be "entirely nonsensical for the regulatory framework to provide that, in case of a disagreement between the CNEE and the distributor on the distributor's VAD study, a neutral Expert Commission would be constituted to pronounce itself . . . and at the same time to oblige the distributor to

[20] Award ¶¶ 264-332.

[21] *Id*. ¶¶ 590-610.

[22] *Id*. ¶ 596.

[23] *Id*.

[24] TECO's Memorial on Partial Annulment ¶¶ 19-20; Award ¶¶ 169-170, 303.

[25] Award ¶ 609.

[26] *Id*. ¶ 589 (emphasis added).

immediately incorporate any such point of disagreement in its VAD study."[27] The Tribunal properly concluded that it would be "even more nonsensical to allow the regulator to unilaterally impose its own VAD study because observations upon which there were disagreements and that were subject to a pending pronouncement of the Expert Commission had not been immediately incorporated in the VAD study."[28]

17. Third, as TECO has explained and as the Tribunal found, the CNEE's decision to dissolve the Expert Commission and to set EEGSA's tariffs based upon a VAD study prepared by its own independent consultant was not based upon the Expert Commission's alleged "positive pronouncements" in favor of the CNEE, but rather was based upon the CNEE's conclusion that complying with the Expert Commission's decisions would substantially increase EEGSA's VAD and tariffs.[29] As the Tribunal found, the evidence showed that CNEE "knew at the time that correcting the Bates White study [in accordance with the Expert Commission's report] would have led to a higher VNR than the one proposed by Sigla," its own consultant, and thus higher tariffs.[30] Indeed, as the Tribunal concluded, it could "find no justification, other than [the CNEE's] desire to reject the Bates White study in favor of the more favorable Sigla[] study," for the CNEE's behavior in failing to carefully review the Expert Commission's report and to incorporate its conclusions in the Bates White VAD study, which action violated the Treaty.[31]

18. Fourth, as TECO has explained and as the Award reflects, the Tribunal's finding of liability under Article 10.5 of the DR-CAFTA was not based exclusively on Resolution No. CNEE-144-2008.[32] To the contrary, the Tribunal's holding also was based upon the arbitrary manner in which the CNEE established EEGSA's 2008-2013 tariffs, including the CNEE's "preliminary review" of the Expert Commission's report and Bates White's revised VAD study

[27] *Id*. ¶ 579.

[28] *Id*. ¶ 580.

[29] TECO's Reply ¶¶ 164, 174; Award ¶¶ 690-695.

[30] Award ¶ 695.

[31] *Id*. ¶ 690.

[32] Guatemala's Reply on Annulment ¶ 37.

dated 28 July 2008.[33] As the Tribunal observed, this preliminary review, which had been "performed in *less than one day* was clearly insufficient to discharge" the CNEE's obligation to seriously consider the Expert Commission's findings, and was further evidence of "[t]he arbitrariness of the regulator's behavior."[34] The Tribunal further observed that, "both under the regulatory framework and under the minimum standard of treatment, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White's study."[35]

19. The Tribunal's holding also was based upon the pretextual reasons given by the CNEE for allegedly not having enough time to consider and implement the Expert Commission's report and Bates White's 28 July 2008 VAD study. As the Tribunal noted, the CNEE had agreed to extend the deadline of the Expert Commission's report; in doing so, the CNEE "also had to accept that it would not be able to seriously consider the experts' conclusions, correct the Bates White VAD study accordingly, and publish the tariff by August 1, 2008."[36] The Tribunal also agreed with TECO that "there is nothing in the regulatory framework obliging the CNEE to publish the tariff on the first day of the tariff period. Quite to the contrary, Article 99 of the RLGE provides that the tariff is published once it has been approved and no later than nine months after the beginning of the tariff period. As a consequence, the CNEE had until May 1, 2009 at the latest to publish the new tariff."[37] As the Tribunal concluded, "[b]y accepting to receive the Expert Commission's report in the week of July 24, 2008, to then disregard it along with the Bates White study on the basis that such date did not leave enough time to publish the tariff by August 1, 2008, the CNEE acted in breach of the fundamental principles of due process as well as in a contradictory and aberrant manner," in violation of its obligations under the Treaty.[38]

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[33] Award ¶¶ 690-711.

[34] *Id*. ¶¶ 690-691 (emphasis added).

[35] *Id*. ¶ 690.

[36] *Id*. ¶ 687.

[37] *Id*. ¶ 685.

[38] *Id*. ¶ 688.

20. These findings, as the Award reflects, relate to the CNEE's conduct and failure to accord due process to EEGSA during its 2008-2013 tariff review, and are distinct from the irregularities in Resolution No. CNEE-144-2008.[39]

21. Fifth, Guatemala's assertions that the Tribunal found that it was "not convinced that [. . .] the regulator acted improperly," and that "[t]he CNEE and Guatemala, generally speaking, held a correct interpretation of the regulatory framework"[40] are misleading and incorrect. The sections of the Award to which Guatemala refers relate to the CNEE's *ex parte* communications with its own appointee to the Expert Commission regarding the disagreements between the CNEE and EEGSA;[41] the CNEE's unilateral dissolution of the Expert Commission after it had issued its report, but before it had reviewed Bates White's revised VAD study;[42] and whether the Expert Commission's rulings on the disagreements between the CNEE and EEGSA were binding upon the parties.[43] While the Tribunal found that the CNEE had not acted improperly in these respects,[44] as noted above, the Tribunal found, among other things, that, in disregarding the Expert Commission's report and Bates White's VAD study on the pretense that the CNEE did not have enough time to incorporate the Expert Commission's decisions into the Bates White VAD study, the CNEE had acted improperly and "in breach of the fundamental principles of due process as well as in a contradictory and aberrant manner," in violation of its obligations under the Treaty.[45]

22. In so holding, the Tribunal, moreover, did not find that "[t]he CNEE and Guatemala, generally speaking, held a correct interpretation of the regulatory framework," as Guatemala erroneously contends.[46] To the contrary, the Tribunal expressly found that the CNEE's positions with respect to the role of the Expert Commission were "inconsistent with the

[39] *Id*. ¶ 681.

[40] Guatemala's Reply on Annulment ¶ 35.

[41] Award ¶ 652.

[42] *Id*. ¶¶ 653-657.

[43] *Id*. ¶¶ 565, 670.

[44] *See id*. ¶¶ 651-657.

[45] *Id*. ¶¶ 684-690.

[46] Guatemala's Reply on Annulment ¶ 35.

regulatory framework, as interpreted by the Constitutional Court,"[47] and that the CNEE's "decision to apply its own consultant's study does not comport with Article 98 of the RLGE."[48] The Tribunal specifically found that the purported basis for the CNEE's decision to disregard Bates White's 28 July 2008 VAD study and to apply the VAD study prepared by the CNEE's own consultant, namely, that Bates White had failed to incorporate all of the CNEE's observations into its VAD study was "manifestly inconsistent with the regulatory framework and amount[ed] to ignoring without reasons the pronouncements of the Expert Commission,"[49] and that Guatemala's *post hoc* purported justification raised during the arbitration, namely, that Bates White had failed to incorporate all of the Expert Commission's rulings into its VAD study was "unconvincing" (as Bates White in fact did properly incorporate the Expert Commission's rulings into its 28 July 2008 VAD study).[50]

23. Finally, with respect to damages, Guatemala repeats its prior incorrect assertion that the Tribunal's decision on liability was limited to its finding that the CNEE had failed to provide sufficient reasons for its decision to ignore the Expert Commission's rulings and Bates White's 28 July 2008 VAD study, and that the Tribunal's quantification of historical damages based upon the Expert Commission's rulings and Bates White's 28 July 2008 VAD study thus cannot be reconciled with its decision on liability.[51] As TECO demonstrated in its Counter-Memorial on Annulment, the Tribunal's rulings on liability and historical damages, however, are fully consistent, because, contrary to Guatemala's continued assertions, the Tribunal's decision on liability is not so limited.[52] Specifically, although Guatemala repeatedly emphasizes that the Tribunal ruled that the Expert Commission's report was not binding, the Tribunal also found not only that the CNEE lacked sufficient reasons to ignore the Expert Commission's rulings, but also that no such sufficient reasons existed.[53] It was on this basis that the Tribunal held that the

[47] Award ¶ 677.

[48] *Id*. ¶ 679.

[49] *Id*. ¶ 731.

[50] *Id*. ¶ 709.

[51] Guatemala's Reply on Annulment ¶¶ 39-41.

[52] *See* TECO's Counter-Memorial on Annulment ¶¶ 34, 104-118.

[53] Award ¶¶ 704-708.

CNEE had carried out EEGSA's tariff review in an arbitrary and bad faith manner, in violation of EEGSA's due process rights, and in violation of its fair and equitable treatment obligation under the DR-CAFTA.[54] It thus was entirely consistent for the Tribunal to award damages on the basis of Bates White's VAD study, which it found did incorporate all of the Expert Commission's rulings.

III. LEGAL STANDARDS APPLICABLE TO ANNULMENT

24. In its Counter-Memorial on Annulment, TECO demonstrated that the annulment procedure under Article 52 of the ICSID Convention is not an appeal, but rather is a limited remedy confined to the five grounds enumerated in Article 52(1) of the ICSID Convention, each of which concerns the integrity of the arbitral process.[55] TECO further demonstrated that it is well established that an *ad hoc* committee may not review the merits of an award, or annul an award due to errors in the application of the law or mistakes of fact,[56] and that annulment is not a remedy against an incorrect decision.[57] As the *ad hoc* committee in *Iberdrola v. Guatemala* correctly observed, "a ruling on the substantive correctness of the award is out of place in a decision on annulment,"[58] and "annulment deals only with the legitimacy of the decision-making process, not its merits."[59]

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[54] *Id*. ¶ 711.

[55] TECO's Counter-Memorial on Annulment ¶ 35; *see also Soufraki v. UAE*, Decision on Annulment, ¶ 23 (CL-N-132); *Alapli v. Turkey*, Decision on Annulment, ¶ 32 (RL-51); *Iberdrola v. Guatemala*, Decision on Annulment, ¶ 74 (CL-N-153).

[56] TECO's Counter-Memorial on Annulment ¶ 36; *see also* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID, 10 Aug. 2012, ¶¶ 72-75 (CL-N-147).

[57] TECO's Counter-Memorial on Annulment ¶ 36; *see also MINE v. Guinea*, Decision on Annulment, ¶ 4.04 ("Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review of the merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52.") (CL-N-137). Guatemala's assertion that "annulment is required in 'unusual and important cases,'" moreover, misrepresents the *ad hoc* committee's observations in *CDC Group plc v. Republic of the Seychelles*; as the Decision on Annulment reflects, citing an expert report from Professor Christoph Schreuer, the *ad hoc* committee merely noted that, "*[b]ecause of its focus on procedural legitimacy*, annulment is 'an extraordinary remedy for unusual and important cases.'" *CDC v. Seychelles*, Decision on Annulment, ¶ 34 (CL-N-128) (emphasis added).

[58] *Iberdrola v. Guatemala,* Decision on Annulment, ¶ 74 (CL-N-153).

[59] *Id*.

25. As TECO further noted, there is no dispute between the parties with regard to the legal standards of failure to state reasons and serious departure from a fundamental rule of procedure.[60] With respect to Guatemala's description of the manifest excess of powers legal standard, however, TECO demonstrated that Guatemala's suggestions that an *ad hoc* committee is required to scrutinize a tribunal's decision on jurisdiction more closely than the tribunal's other decisions (if challenged); that *ad hoc* committees have a wider latitude to annul an award as regards jurisdiction than as regards other matters; and that the requirement that the excess of powers be "manifest" does not extend to jurisdictional issues, are erroneous.[61]

26. As TECO explained, the plain language of Article 52(1)(b) of the ICSID Convention does not provide for a heightened level of scrutiny or wider latitude to annul awards in respect of matters of jurisdiction, and neither does it dispense with the requirement than an excess of powers as regards jurisdiction be "manifest."[62] This is confirmed by numerous *ad hoc* committees, which have rejected the notion that decisions on jurisdiction require greater scrutiny than other decisions,[63] as well as by ICSID's Background Paper on Annulment, which expressly notes that "*ad hoc* Committees have acknowledged the principle specifically provided by the Convention that the Tribunal is the judge of its own competence," and that, "[i]n light of this principle, the drafting history suggests—and most *ad hoc* Committees have reasoned—that in order to annul an award based on a Tribunal's determination of the scope of its own jurisdiction, the excess of powers must be 'manifest.'"[64]

27. In its Reply on Annulment, Guatemala asserts that its argument to the contrary relies upon "abundant case law," and that, to the extent that TECO argues "that incorrect

[60] TECO's Counter-Memorial on Annulment ¶¶ 37-39.

[61] *Id*. ¶¶ 40-45.

[62] *Id*. ¶ 42; ICSID Convention, Art. 52(1)(b) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: . . . (b) that the Tribunal has manifestly exceeded its powers").

[63] TECO's Counter-Memorial on Annulment ¶ 44; *see, e.g.*, *Azurix v. Argentina*, Decision on Annulment, ¶ 67 (CL-N-124); *SGS v. Paraguay*, Decision on Annulment, ¶ 114 (CL-N-156), *Lucchetti v. Peru*, Decision on Annulment, ¶ 101 (RL-60), *MCI v. Ecuador*, Decision on Annulment, ¶ 55 (RL-62); *Soufraki v. UAE*, Decision on Annulment, ¶ 119 (CL-N-132); *Alapli v. Turkey*, Decision on Annulment, ¶ 238 (RL-51).

[64] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID, 10 Aug. 2012, ¶ 89 (CL-N-147).

decisions on jurisdiction can survive annulment," this position is incorrect.[65] Relying upon various secondary sources, Guatemala also continues to assert that *ad hoc* committees have wider latitude to annul an award as regards jurisdiction than as regards other matters, and that the requirement that the excess of powers be "manifest" does not extend to jurisdictional issues.[66] Guatemala's assertions are incorrect and misguided.

28. As TECO's Counter-Memorial on Annulment confirms, there is *no* dispute between the parties that a manifest excess of powers encompasses situations where a tribunal exceeds or fails to exercise its jurisdiction, or where a tribunal fails to apply the law agreed upon by the parties.[67] As TECO demonstrated, however, the tribunal's excess of powers must be "manifest," in that it must be obvious, self-evident, clear, flagrant (in other words, easily discernible), and substantially serious.[68] Guatemala is thus incorrect in arguing that the Committee should apply a heightened level of scrutiny to the Tribunal's decision on jurisdiction; that the requirement of a "manifest" excess of powers does not apply to the Tribunal' decision on jurisdiction; and that the Committee has wider latitude to annul the Tribunal's decision on jurisdiction than its decisions regarding other matters.[69] As TECO has demonstrated, there is no legal basis for this suggestion.[70]

29. Indeed, the decisions of the *ad hoc* committees cited by Guatemala in its Reply on Annulment do not support its arguments.[71] Those decisions merely confirm that, where a tribunal manifestly exceeds or fails to exercise its jurisdiction, this may constitute a manifest

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[65] Guatemala's Reply on Annulment ¶ 45.

[66] *Id*. ¶ 51.

[67] TECO's Counter-Memorial on Annulment ¶ 40.

[68] *Id*.; *see also* TECO's Memorial on Partial Annulment ¶¶ 79-80.

[69] Guatemala's Reply on Annulment ¶¶ 44-51.

[70] TECO's Counter-Memorial on Annulment ¶¶ 42-45.

[71] Guatemala's Reply on Annulment ¶¶ 46-50 (citing *Soufraki v. UAE*, Decision on Annulment, ¶ 42 (CL-N-132); *MCI v. Ecuador*, Decision on Annulment, ¶ 56 (RL-62); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment of 3 May 1985 ("*Klöckner v. Cameroon*, Decision on Annulment I"), ¶ 4 (RL-49); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment of 12 Feb. 2015 ("*Tza Yap Shum v. Peru*, Decision on Annulment"), ¶ 76 (RL-132)).

excess of powers.[72] As TECO has explained, this is not in dispute.[73] The only additional authority that Guatemala relies upon are various secondary sources,[74] which, as TECO has demonstrated, are contradicted by numerous annulment decisions, which expressly reject the notion that decisions on jurisdiction require greater scrutiny than other decisions.[75] Indeed, the *ad ho*c committee in *Kılıç v. Turkmenistan* recently rejected the exact same argument advanced by Guatemala in these proceedings, finding that "there is no basis in the Convention for the distinction propounded by [the] Applicant and that, therefore, the same threshold applies to matters of jurisdiction and the merits in order for the Committee to find that an excess of powers is manifest."[76]

30. In short, there is no basis for the Committee to apply a heightened level of scrutiny to the Tribunal's decision on jurisdiction; the Committee thus should apply the same standard to *all* of Guatemala's arguments under Article 52(1)(b) of the ICSID Convention, which requires that the tribunal's excess of powers be "manifest."[77]

IV. THERE ARE NO GROUNDS TO ANNUL THE TRIBUNAL'S FINDING THAT IT HAD JURISDICTION *RATIONAE MATERIAE* OVER THE DISPUTE

31. In its Reply on Annulment, Guatemala continues to argue that "the Tribunal failed to address Guatemala's jurisdictional objection in any meaningful way," and that "the Tribunal did not even refer to article 10.16.1(a)(i)(A) of the CAFTA-DR, which was the consent provision that was the fundamental basis for Guatemala's objection."[78] According to Guatemala, TECO's response in its Counter-Memorial on Annulment, moreover, "pinpoints the fundamental

[72] *See id*. ¶¶ 45-50 (citing *Soufraki v. UAE*, Decision on Annulment, ¶ 42 (CL-N-132); *MCI v. Ecuador*, Decision on Annulment, ¶ 56 (RL-62); *Klöckner v. Cameroon*, Decision on Annulment I, ¶ 4 (RL-49); *Tza Yap Shum v. Peru*, Decision on Annulment, ¶ 76 (RL-132)).

[73] TECO's Counter-Memorial on Annulment ¶ 40.

[74] Guatemala's Reply on Annulment ¶ 51.

[75] TECO's Counter-Memorial on Annulment ¶¶ 42-45.

[76] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment of 14 July 2015, ¶ 56 (CL-N-160).

[77] ICSID Convention, Art. 52(1)(b) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: . . . (b) that the Tribunal has manifestly exceeded its powers").

[78] Guatemala's Reply on Annulment ¶ 56; *see also id.* ¶¶ 131-135.

shortcomings in the Tribunal's analysis," because TECO "had obviously invoked, or submitted its claim pursuant to, the above provision of the Treaty," and Guatemala's objection thus "required an analysis of the real and fundamental basis of the claim."[79] Instead, Guatemala argues that "the Tribunal just accepted the formal legal characterization of the claim as presented by [TECO]," and "did not apply the *prima facie* test of jurisdiction at all" to TECO's claim.[80]

32. Specifically, Guatemala argues that, while the Tribunal held that TECO had "made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard, as defined in previous sections of this award,"[81] the question was not what TECO had alleged, "but rather whether the facts supported, *prima facie*, those allegations," and that the Tribunal "incorrectly accepted [TECO]'s allegations as sufficient."[82] Guatemala further argues that the Tribunal's alleged "lack of analysis resulted in the Tribunal wrongly asserting jurisdiction on a pure[ly] domestic law dispute, which is also a manifest excess of powers,"[83] because "[m]ere domestic regulatory disputes fall under the jurisdiction of domestic courts, and an investment treaty claim may arise only in case of denial of justice by those courts."[84] As TECO demonstrated in its Counter-Memorial on Annulment, Guatemala's assertions regarding the Tribunal's decision on jurisdiction are baseless.

A. The Tribunal Correctly Applied The *Prima Facie* Test To TECO's Allegations, And Properly Found That It Had Jurisdiction *Ratione Materiae* Over The Dispute

33. As the Tribunal's Award confirms, the Tribunal did not fail "to address Guatemala's jurisdictional objection in any meaningful way,"[85] but rather addressed Guatemala's jurisdictional objection in full. As the Tribunal observed in its Award, it expressly disagreed with Guatemala's argument that TECO's claim was no more than a "domestic dispute on the

[79] *Id*. ¶ 57.

[80] *Id*. ¶¶ 57-58; *see also id*. ¶¶ 136-138.

[81] Award ¶ 464.

[82] Guatemala's Reply on Annulment ¶ 59 (emphasis omitted).

[83] *Id*. ¶ 61.

[84] *Id*. ¶ 63.

[85] *Id*. ¶ 56.

interpretation of Guatemalan law,"[86] and instead correctly endorsed TECO's view that the dispute concerned whether Guatemala had "breached its obligations under the minimum standard of treatment," and thus was "an international dispute in which the Arbitral Tribunal [would] be called to apply international law."[87] As the Tribunal remarked, "the fundamental question that [the Tribunal] ultimately has to decide is, on the evidence, whether the Respondent's behavior is such as to constitute a breach of the minimum standard of treatment under international law."[88] The Tribunal further remarked that, "[i]f the behavior of the CNEE is found to have been grossly unfair or idiosyncratic, or if the CNEE is found to have acted in bad faith or with a complete lack of candor in the regulatory process, such a behavior would constitute a breach of the minimum standard in international law,"[89] and that, if it were to "find – as the Claimant avers – that the CNEE willfully disregarded the fundamental principles of the regulatory framework in force at the time of the tariff review process in dispute, such a disregard would amount to a breach of international law."[90]

34. Moreover, there was no dispute between the parties that TECO had invoked Section A of Article 10.16.1(a)(i), *i.e.*, that TECO had submitted to arbitration a claim that Guatemala had breached its obligations under the Treaty.[91] The mere fact that TECO had invoked Article 10.16.1(a)(i)(A) does not mean that Guatemala's objection "required an analysis of the real and fundamental basis of the claim," or an analysis of whether the facts supported, *prima facie*, TECO's allegations, as Guatemala contends.[92] Nor is a tribunal required under Article 10.16.1(a)(i)(A) to "check the credibility" of the allegations presented to arbitration.[93]

35. As TECO demonstrated in its Counter-Memorial on Annulment, the *prima facie* test that applies to jurisdictional objections does not require the tribunal to determine whether the

[86] Award ¶ 466.

[87] *Id.* ¶ 467.

[88] *Id.* ¶ 470.

[89] *Id.* ¶ 480.

[90] *Id.* ¶ 481.

[91] TECO's Counter-Memorial on Annulment ¶ 50.

[92] Guatemala's Reply on Annulment ¶¶ 57, 59.

[93] *Id.* ¶ 135.

allegations advanced by the claimant are supported by the facts; this analysis is properly reserved for the merits of the dispute.[94] Instead, the *prima facie* test requires the tribunal to determine whether the facts, as alleged, "fall within [the Treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to."[95] As the tribunal in *Siemens v. Argentina* observed, the tribunal thus "is not required to consider whether the claims under the Treaty . . . are correct," but rather "simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them."[96] Indeed, the tribunal in *Chevron v. Ecuador* expressly rejected Ecuador's submission that the claimants in that case "must already have established their case with a 51% chance of success, i.e. on a balance of probabilities," adopting instead the claimants' submission that "their case should be 'decently arguable' or that it has 'a reasonable possibility as pleaded.'"[97]

36. As TECO has shown, the Tribunal, in determining whether it had jurisdiction *ratione materiae* under the DR-CAFTA and the ICSID Convention, properly applied the *prima facie* test to the allegations advanced by TECO, and correctly found that the dispute was not a mere domestic regulatory dispute under local law, but rather arose out of Guatemala's arbitrary and unjustified actions during EEGSA's 2008-2013 tariff review, and its failure to accord TECO's investment in EEGSA fair and equitable treatment under the DR-CAFTA.[98] As the Tribunal remarked, TECO had "made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard."[99] As the Tribunal further noted, there was "in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such

[94] TECO's Counter-Memorial on Annulment ¶¶ 53-61.

[95] *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶ 197 (CL-84); *see also Impregilo v. Pakistan*, Decision on Jurisdiction, ¶ 254 ("[T]he Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.") (emphasis in original) (CL-63).

[96] *Siemens A.G. v. Argentine Republic*, Decision on Jurisdiction, ¶ 180 (CL-94).

[97] *Chevron Corp v. Ecuador*, Third Interim Award on Jurisdiction and Admissibility, ¶ 4.8 (CL-85).

[98] TECO's Counter-Memorial on Annulment ¶¶ 53-61.

[99] Award ¶ 464.

behavior would constitute a breach of the minimum standard."[100] In so doing, the Tribunal correctly applied the *prima facie* test to TECO's allegations and properly found that it had jurisdiction over the dispute.

37. In support of its argument to the contrary, Guatemala relies upon the *Convial v. Peru* tribunal's observation that an "ICSID arbitral tribunal does not have jurisdiction to decide a dispute solely because one of the parties invokes an alleged violation of the investment treaty in question," but rather it is "the party who invokes such an international violation [which must] sufficiently prove that the alleged facts 'if proved, may constitute a violation of the Treaty.'"[101] This is precisely what the Tribunal found in the underlying arbitration. After reviewing the allegations presented by TECO, and considering the jurisdictional objection presented by Guatemala, the Tribunal expressly held that TECO had "*made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard*."[102] The Tribunal further found that TECO's allegations "*are supported by evidence* that the Arbitral Tribunal will have to assess."[103] The Tribunal's application of the *prima facie* test in its Award thus is fully consistent with the tribunal's decision in *Convial*.

38. Guatemala's reliance upon the tribunal's decision in *Duke v. Peru* likewise is misplaced. In support of its argument that, "[t]o determine if a dispute qualifies as an international claim, a tribunal must examine the fundamental basis of the claim, and cannot accept the formal legal characterization of the claim as presented by the claimant," Guatemala relies upon the *Duke* tribunal's finding that, "[i]n applying the presumed facts to the legal question of jurisdiction, the tribunal must objectively characterise those facts in order to determine finally whether or not they fall within the scope of the parties' consent," and "may not

[100] *Id*. ¶ 465.

[101] Guatemala's Reply on Annulment ¶ 59 (citing *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award of 21 May 2013 (RL-133)).

[102] Award ¶ 464 (emphasis added).

[103] *Id*. ¶ 462 (emphasis added).

simply adopt the claimant's characterisation without examination."[104] Contrary to Guatemala's contentions, the tribunal's finding in *Duke* does not support its argument that, in determining its jurisdiction *ratione materiae*, "a tribunal must examine the fundamental basis of the claim;"[105] rather, in *Duke*, the tribunal merely observed that it "may not simply adopt the claimant's characterisation without examination," but instead "must objectively characterise those facts in order to determine finally whether they fall within or outside the scope of the parties' consent."[106] In other words, the tribunal must objectively assess whether the facts, as asserted, provide a basis to sustain jurisdiction, rather than examine whether the facts, as asserted, are supported by the evidence presented. This is precisely what the Tribunal did in the underlying arbitration.

39. As elaborated above, the Tribunal objectively characterized TECO's claim as relating to whether "Guatemala acted arbitrarily and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process,"[107] and concluded that "this dispute is about whether the Respondent breached its obligations under the minimum standard of treatment. It is an international dispute in which the Arbitral Tribunal will be called to apply international law."[108] The Tribunal's application of the *prima facie* test in its Award thus also is fully consistent with the tribunal's decision in *Duke*. The mere fact that Guatemala disagrees with the Tribunal's conclusion in this regard does not mean that the Tribunal failed to carry out the required analysis.

B. The Tribunal Correctly Found That TECO's Claim Did Not Arise Out Of A "Mere" Regulatory Dispute Under Guatemalan Law

40. Contrary to Guatemala's contentions, the Tribunal did not wrongly assert jurisdiction over "a pure[ly] domestic law dispute," nor is Guatemala correct in repeating its

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[104] Guatemala's Reply on Annulment ¶ 139 (citing *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment of 1 Mar. 2011 ("*Duke v. Peru*, Decision on Annulment"), ¶ 118 (RL-57)).

[105] Guatemala's Reply on Annulment ¶ 139.

[106] *Duke v. Peru*, Decision on Annulment, ¶ 118 (RL-57).

[107] Award ¶ 465.

[108] *Id*. ¶ 467.

prior argument that "[m]ere domestic regulatory disputes fall under the jurisdiction of domestic courts, and an investment treaty claim may arise only in case of denial of justice by those courts."[109] As TECO demonstrated in the underlying arbitration, numerous investment treaty tribunals have ruled on issues of domestic law in assessing the conduct of regulatory or administrative authorities under international law;[110] the fact that such conduct took place within a regulatory context did not divest those tribunals of jurisdiction *ratione materiae* or limit the claimant's claim to denial of justice.[111] Nor did those tribunals draw any distinction between regulatory and "mere" regulatory disputes, as Guatemala contends.[112] This is because, as TECO has explained, the issue of whether any action—regulatory or otherwise—by the State is arbitrary in violation of the minimum standard of treatment is a merits decision, and not a jurisdictional decision.[113] Indeed, as TECO noted in its Counter-Memorial on Annulment, all of the cases relied upon by Guatemala in support of its argument that so-called mere regulatory disputes cannot give rise to a Treaty breach – with the exception of *Iberdrola v. Guatemala* – were decided on the merits, not on jurisdiction.[114] The selective quotes relied upon by Guatemala from these cases, moreover, do not support Guatemala's arguments.[115]

41. For example, Guatemala relies upon the tribunal's finding in *ADF v. United States* that it had "no authority to review the legal validity and standing of the U.S. measures here in question *under U.S. internal administrative law*," and that "something more than simple

[109] Guatemala's Reply on Annulment ¶ 63 (emphasis omitted).

[110] TECO's Rejoinder on Jurisdiction ¶¶ 35-41 (citing the tribunals' decisions in *EDF Int'l S.A., Saur Int'l S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012 (CL-86), *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 (CL-92), *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 (CL-37), and *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003 (CL-95)); *see also Chemtura Corp. v. Canada*, UNCITRAL, Award of 2 Aug. 2010, ¶ 179 (noting that the customary international law minimum standard of treatment "seeks to ensure that investors from NAFTA member States benefit from *regulatory fairness*") (emphasis added) (CL-14).

[111] Guatemala's Reply on Annulment ¶ 63.

[112] *Id*.

[113] TECO's Counter-Memorial on Annulment ¶ 58.

[114] *Id*.; TECO's Reply ¶¶ 285-287.

[115] Guatemala's Reply on Annulment ¶¶ 64-76.

illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)."[116] Among the many arguments advanced by the claimant in *ADF*, was that a U.S. federal agency had acted *ultra vires* in excess of the authority granted to it pursuant to a U.S. statute.[117] The tribunal rejected that contention, finding that the claimant had "not established a *prima facie* case for holding that, as a matter of U.S. administrative law, the FHWA had acted without or in excess of its authority …."[118] The tribunal further observed that, even had the claimant made out a *prima facie* case of excess of authority, the tribunal lacked competence to determine the legal validity of the measures under U.S. administrative law, and, finally, that even if the measures were shown to be *ultra vires under U.S. law, that would not automatically render them grossly unfair or inequitable in violation of the customary international minimum standard of treatment*.[119]

42. As TECO demonstrated in its pleadings and as the Tribunal found, unlike the claimant in *ADF*, TECO expressly asked the Tribunal to review Guatemala's actions during EEGSA's 2008-2013 tariff review not in light of Guatemalan law, but rather in light of Guatemala's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment.[120] Similarly, as TECO demonstrated in its pleadings and as the Tribunal found, TECO did not allege simple illegality or lack of authority under Guatemalan law, but rather alleged "that, by failing to abide by the conclusions of the Expert Commission and by unilaterally imposing a tariff based on its own consultant's study, Guatemala repudiated the fundamental principles upon which the regulatory framework was based and upon which it relied when making the investment," and "that the CNEE failed to act in good faith in the

[116] *ADF Group Inc. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1, Award of 9 Jan. 2003 ("*ADF v. United States*, Award"), ¶ 190 (emphasis added) (CL-4).

[117] *Id*. ¶ 190 (CL-4).

[118] *Id*. ¶ 190 (CL-4).

[119] *Id*. ¶ 190 (emphasis added) (CL-4).

[120] *See, e.g.*, TECO's Rejoinder on Jurisdiction ¶¶ 14-24; TECO's Reply ¶¶ 228-282; *see also* Award ¶ 463 ("According to the Claimant, such behavior [by the CNEE] does not only constitute a breach of the regulatory framework established by Guatemala, but also a breach of Respondent's international obligations under CAFTA-DR.").

process of establishing the tariff for 2008-2013."[121] As the Tribunal correctly found, TECO had presented to arbitration "an international dispute in which the Arbitral Tribunal will be called to apply international law."[122] The tribunal's finding in *ADF* thus is inapposite.

43. Guatemala's reliance upon S*.D. Myers v. Canada* and *Saluka v. Czech Republic* also is misplaced.[123] The statement by the *S.D. Myers* tribunal that, "[w]hen interpreting and applying the 'minimum standard,' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making," was made in the context of its evaluation *on the merits* as to whether Canada had breached its fair and equitable treatment obligation; the tribunal merely noted that a fair and equitable treatment violation could not be established solely by demonstrating that a government had acted unwisely or in a manner different from that which the tribunal would have preferred.[124] TECO never based its claim on an assertion that the CNEE had merely taken unwise actions (and, indeed, the *S.D. Myers* tribunal found that the claimant in that case also had shown much more, as it determined that Canada, in fact, had breached its fair and equitable treatment obligation).[125] Similarly, the tribunal in *Saluka v. Czech Republic* merely observed that not every violation of domestic law gives rise to an international treaty breach,[126] before also finding that the respondent in that case had breached its obligation to accord fair and equitable treatment to the claimant's investment.[127]

44. Similarly, while Guatemala relies upon the tribunal's decision in *Generation Ukraine v. Ukraine*, as TECO demonstrated in its pleadings, that decision does not support Guatemala's argument, because the challenged acts were taken by low-level officials, as opposed

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[121] Award ¶¶ 460, 461.

[122] *Id*. ¶ 467.

[123] Guatemala's Reply on Annulment ¶¶ 66, 68.

[124] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award of 13 Nov. 2000 ("*S.D. Myers v. Canada*, Partial Award"), ¶ 261 (CL-41).

[125] *Id*. ¶ 268 (CL-41).

[126] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of 17 Mar. 2006 ("*Saluka v. Czech Republic*, Partial Award"), ¶ 442 (CL-42); *see also Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 21 Jan. 2010, ¶ 385 (CL-104); *Rompetrol v. Romania*, Award, ¶ 174 (CL-109).

[127] *Saluka v. Czech Republic*, Partial Award, ¶ 465 (CL-42).

to the highest levels of Government, as is the case here,[128] and because that decision properly has been the subject of criticism, including by the *ad hoc* committee in *Helnan v. Egypt*.[129] As the *ad hoc* committee observed, "[i]n numerous ICSID cases, tribunals have rendered awards in favour of the claimants as a result of administrative decisions, in which no such application to the local courts had been made," and, "[i]n the light of these precedents and considerations, the Award in *Generation Ukraine* . . . stands somewhat outside the *jurisprudence constante* under the ICSID Convention in the review of administrative decision-making for failure to provide fair and equitable treatment."[130] As the *ad hoc* committee further observed, "[a] requirement to pursue local court remedies would have the effect of disentitling a claimant from pursuing its direct treaty claim for failure by the Executive to afford fair and equitable treatment, even where the decision was taken at the highest level of government within the host State," and "[i]t would leave the investor only with a complaint of unfair treatment based upon denial of justice in the event that the process of judicial review of the Ministerial decision was itself unfair."[131]

45. Furthermore, the Tribunal, in its Award, expressly rejected Guatemala's efforts to interpose a denial of justice prerequisite, noting that "[t]he fact that the Claimant did not make the argument that there was a denial of justice in Guatemalan judicial proceedings cannot deprive the Arbitral Tribunal of its jurisdiction to assess whether the Respondent's conduct was in breach of its international obligations,"[132] and that "[t]he Claimant's case is in fact not based on denial of justice before the Guatemalan courts, but primarily on the arbitrary conduct of the CNEE in establishing the tariff, as well as on an alleged lack of due process in the tariff review

[128] TECO's Post-Hearing Brief ¶ 51; TECO's Reply ¶ 280.

[129] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 Sept. 2003, ¶ 20.36 (RL-6); Reply ¶¶ 279-280; *see also Siemens v. Argentina*, Award, ¶ 272 (finding that "the acts identified by the Tribunal as measures leading to the expropriation are acts of Argentina, decided at the highest levels of government, and not 'simple acts of maladministration by low level officials.' For that reason, Argentina's argument that simple acts of maladministration by low-level officials should be pursued in the local courts lacks validity in the circumstances of the instant case.") (CL-44).

[130] *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee of 14 June 2010 ("*Helnan v. Egypt*, Decision on Annulment"), ¶¶ 48-49 (CL-62).

[131] *Id*. ¶ 53 (CL-62).

[132] Award ¶ 472.

process."[133] The Tribunal concluded that there thus was "no need for the Claimant to establish a denial of justice in order to find the State in breach of its international obligations as a consequence of the actions taken by the CNEE."[134]

46. This is consistent with the tribunal's decision in *Azinian v. Mexico*. As the tribunal noted in that case, "an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials."[135] This also is consistent with the tribunal's decision in *Vivendi II*,[136] which, as TECO noted in its Counter-Memorial on Annulment, rejected the very argument advanced by Guatemala, finding that, "[t]o the extent that Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state's courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other."[137] As the tribunal observed, if it "were to restrict the claims of unfair and [in]equitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard."[138]

47. Guatemala's continued reliance on the tribunal's decision in *Iberdrola v. Guatemala* also is misplaced. In its Reply on Annulment, Guatemala continues to assert that "[t]he facts of the present case are identical to those in the *Iberdrola* arbitration, in which the tribunal clearly identified the claim as merely relating to a domestic regulatory dispute," and thus

[133] *Id*. ¶ 473.

[134] *Id*. ¶ 484.

[135] *Azinian v. Mexico*, Award, ¶ 98 (RL-2).

[136] *Vivendi II* (CL-18).

[137] *Id*. ¶ 7.4.10 (CL-18).

[138] *Id*. ¶ 7.4.11 (CL-18). Guatemala's assertion that *Vivendi II* is inapposite, because there is no suggestion in this case that there was a "bad faith political campaign underlying the application of a domestic regulatory framework" is erroneous on both legal and factual grounds. *See* Guatemala's Reply on Annulment ¶ 88. The principle set forth in *Vivendi II*, namely, that a fair and equitable treatment violation may exist irrespective of a denial of justice, does not depend upon a showing of a "bad faith political campaign," but rather Government action that is manifestly arbitrary, in bad faith, lacking in due process, or otherwise incompatible with fair and equitable treatment. *Id*. Moreover, TECO did allege that the CNEE's application of the regulatory framework to EEGSA's 2008-2013 tariff review was politically motivated and, in fact, was touted by Guatemala's President at the time as a significant achievement. *See* TECO's Post-Hearing Brief ¶ 49.

found that it was "not a genuine claim under the treaty over which it could have jurisdiction."[139] According to Guatemala, the Tribunal in the present case "should have reached the same conclusion," because TECO's claim, like Iberdrola's, concerned the regulatory framework in Guatemala.[140] These assertions are erroneous.

48. As TECO explained in its Counter-Memorial on Annulment, the tribunal's decision in *Iberdrola* was grounded on its finding that the claimant had asked the tribunal in that case to review "the regulatory decisions of the CNEE, the MEM and the judicial decisions of the Guatemalan courts, not in the light of international law, but of the domestic law of Guatemala."[141] As the *Iberdrola* tribunal observed, "*according to the claim of the Claimant*, [the tribunal] would have to act as regulator, as administrative entity and as court of instance, to define" various issues of Guatemalan law.[142] The tribunal further found that there was only marginally a "debate about violations of the Treaty or of international law, or about which actions of the Republic of Guatemala, in exercise of State authority, had violated certain standards contained in the Treaty,"[143] and that, "[f]rom the way the debate and hearings developed and from the issues raised, this process was more like an international trade arbitration than one of investment."[144] Indeed, Guatemala emphasized in that case that Iberdrola had not made *any* reference to international law during the hearing.[145]

49. As TECO demonstrated in the arbitration, no such findings could be made in this case.[146] TECO not only had expressly asked the Tribunal to review its claim in light of Guatemala's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment, but had shown by reference to investment treaty

[139] Guatemala's Reply on Annulment ¶¶ 74, 77.

[140] *Id*. ¶ 78.

[141] TECO's Counter-Memorial on Annulment ¶ 59 (citing *Iberdrola v. Guatemala*, Award, ¶¶ 353-354 (CL-N-154)).

[142] *Iberdrola v. Guatemala*, Award, ¶ 354 (CL-N-154) (emphasis added).

[143] *Id*. ¶ 352 (CL-N-154) (emphasis added).

[144] *Id*. ¶ 353 (CL-N-154) (emphasis added).

[145] *Id*. ¶ 261 (CL-N-154) (emphasis added).

[146] TECO's Rejoinder on Jurisdiction ¶¶ 25-30.

jurisprudence and other sources of international law, both in its pleadings and at the hearing, that, if its allegations were proven correct, "it would follow that the Respondent violated the treaty or international law."[147] This was confirmed by the Tribunal in its Award. As the Tribunal remarked, "[a]lthough the factual matrix in both cases is similar, the applicable treaties and the parties are different," and "the legal arguments and the evidence have been presented differently."[148]

50. Moreover, while Guatemala continues to assert that the *Iberdrola* decision supports the purported "established principle that mere regulatory domestic law disputes, which do not give rise to treaty claims, may fall outside of the jurisdiction of investment treaty tribunals,"[149] the *ad hoc* committee in the *Iberdrola* annulment proceeding explicitly rejected that argument. As the committee noted, "[t]he Award does not point to a necessary incompatibility between domestic-law or regulatory disputes and international-law disputes under the BIT,"[150] and "Iberdrola was unable to accurately identify the portion of the Award in which the Tribunal allegedly stated, as a matter of principle, that local disputes preclude international disputes under the BIT."[151] In fact, the committee noted the improbability that the *Iberdrola* tribunal had dismissed the claim on the basis that so-called mere regulatory disputes could not give rise to ICSID jurisdiction, because no authority for such a novel legal principle was cited by the tribunal in its award.[152] Accordingly, the committee indicated that, had the claim been dismissed on such a ground, it would "be sufficient to warrant an annulment based on this specific ground, as *it does not seem tenable* to maintain that there is some necessary incompatibility, as a matter of principle, between a domestic-law violation and an international-

[147] *Id*. ¶ 27 (quoting *Iberdrola v. Guatemala*, Award, ¶ 357 (RL-32)); TECO's Reply ¶¶ 228-282; *see also* Award ¶ 463 ("According to the Claimant, such behavior [by the CNEE] does not only constitute a breach of the regulatory framework established by Guatemala, but also a breach of Respondent's international obligations under CAFTA-DR.").

[148] Award ¶ 486.

[149] Guatemala's Reply on Annulment ¶ 73.

[150] *Iberdrola v. Guatemala*, Decision on Annulment, ¶ 86 (CL-N-153).

[151] *Id*. (CL-N-153).

[152] *Id*. ¶ 87 ("Furthermore, it seems implausible for the Tribunal to have tried to so radically innovate in this regard without expressly mentioning it and referencing any authority in support.") (CL-N-153).

law one."[153] As a result, the committee concluded that "Iberdrola's application for annulment challenges a general thesis posed in the abstract to decline jurisdiction, namely the Tribunal's assumption that domestic-law issues preclude international ones, a thesis not put forth in the Award."[154]

V. THERE ARE NO GROUNDS TO ANNUL THE TRIBUNAL'S FINDING THAT GUATEMALA BREACHED ARTICLE 10.5 OF THE DR-CAFTA

A. The Tribunal Applied International Law To The Facts Presented

51. In its Reply on Annulment, Guatemala continues to assert that, although the Tribunal "was bound to apply international law, in particular the international minimum standard of treatment of article 10.5 of the Treaty," and was required to make "a careful distinction between the autonomous standard of 'fair and equitable treatment' and that under customary international law," the Tribunal failed to "carry out this task."[155] Specifically, Guatemala contends that "the Tribunal needed to examine customary international law in detail, as provided by the CAFTA-DR," and that "[t]he scope of this principle had been abundantly briefed by the Parties and by the non-disputing parties, which had also made clear the delicate task to be carried out by the Tribunal."[156] According to Guatemala, "the Tribunal just stated that the standard was linked to 'good faith' and that 'lack of due process' and 'total lack of reasoning' would infringe the standard."[157]

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[153] *Id*. ¶ 82 (CL-N-153) (emphasis added).

[154] *Id*. ¶ 89 (CL-N-153). Indeed, no tribunal has endorsed the reading of the *Iberdrola* award presented by Guatemala. *See, e.g.*, *Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL Award of 31 Jan. 2014, ¶ 257, nn.272 & 286 (noting the respondent's reliance on the *Iberdrola* case for the proposition that claims that "were actually utterly regulatory in relation to the tariffs applicable to the electricity sector . . . were not protected under the treaty;" noting the claimants' response that the *Iberdrola* decision was inapposite, because in that case, Iberdrola had "failed to prove that the claims submitted were of international nature" and the "tribunal in that case determined that whether the State had violated or not its obligations under the treaty was not in debate;" finding that the *Iberdrola* case was not applicable, because the claimant was not asking for the tribunal "to fix spot and PBP prices, but to find that their modification gave rise to a breach of international obligations;" and finding the respondent liable for a treaty breach) (CL-N-161).

[155] Guatemala's Reply on Annulment ¶¶ 116, 117.

[156] *Id*. ¶ 116.

[157] *Id*. ¶ 118.

52. Guatemala further asserts that "the Tribunal never showed how Guatemala's alleged breach of the Regulatory Framework also resulted in a breach of international law," but rather "simply conflated the concepts of a domestic and an international breach,"[158] and that "nowhere in the Award is there an examination of the terms 'arbitrariness' or 'due process' under international law."[159] Guatemala also repeats its prior argument that the Tribunal did not "refer to the *ELSI* case on the definition of arbitrariness under international law," or "provide any other definition of the notion of arbitrariness under international law."[160] Guatemala's arguments deliberately misconstrue the Tribunal's analysis, and are belied by the plain language of the Award.

53. First, as TECO demonstrated in its Counter-Memorial on Annulment, in defining the content of the minimum standard of treatment under Article 10.5 of the DR-CAFTA, the Tribunal relied directly upon relevant case law and commentary, noting specifically that it agreed with the standard as articulated by "many arbitral tribunals and authorities."[161] As noted by TECO in its Counter-Memorial[162] and as Guatemala has not contested and cannot contest, both parties in the arbitration relied upon that very same case law regarding the content of the minimum standard of treatment.[163] There thus was no need for the Tribunal to engage in any further analysis of the parties' positions in the Award, as Guatemala continues to assert.[164] The non-disputing State party submissions similarly did not present any views different from those previously articulated in other NAFTA and DR-CAFTA cases, and as reflected in relevant case law and commentary regarding the minimum standard of treatment.[165] There thus also was no

[158] *Id*. ¶ 123.

[159] *Id*. ¶ 151.

[160] *Id*. ¶ 152.

[161] TECO's Counter-Memorial on Annulment ¶ 81 (citing Award ¶ 455).

[162] *Id*.

[163] TECO's Memorial ¶¶ 229-258; TECO's Post-Hearing Brief ¶¶ 11-54; TECO's Reply ¶¶ 231-253; TECO's Post-Hearing Reply ¶¶ 25-50; Guatemala's Counter-Memorial ¶¶ 460-494; Guatemala's Rejoinder ¶¶ 79-104; Guatemala's Post-Hearing Brief ¶¶ 247-291; Guatemala's Post-Hearing Reply ¶¶ 116-138.

[164] Guatemala's Reply on Annulment ¶ 117.

[165] TECO's Post-Hearing Brief ¶¶ 11-46; TECO's Post-Hearing Reply ¶¶ 25-40; Guatemala's Counter-Memorial ¶¶ 460-494; Guatemala's Rejoinder ¶¶ 79-104; Guatemala's Post-Hearing Brief ¶¶ 247-291; Guatemala's Post-Hearing Reply ¶¶ 116-138.

need for the Tribunal to examine or to cite those submissions in its Award, and Guatemala notably has not pointed to any statement in any of the non-disputing Party submissions or in its own submissions that contradicts the understanding of the content of the minimum standard of treatment, as set forth by the Tribunal in its Award. In any event, as the *ad hoc* committee observed in *Impregilo v. Argentina*, "the failure to fully conceptualize the content of a standard is not a ground for annulment of an award."[166] And in the words of the *Alapli v. Turkey ad hoc* committee, "[a]s long as the tribunal correctly identified the applicable law, and strove to apply it to the facts that it established, there is no room for annulment."[167]

54. Second, the Tribunal did not fail to draw "a careful distinction between the autonomous standard of 'fair and equitable treatment' and that under customary international law."[168] As the Award reflects, the Tribunal expressly noted that, in order "to assess whether the Claimant ha[d] made a prima facie case of breach by Guatemala of its obligation to grant FET [fair and equitable treatment], *it [was] necessary, as a threshold matter, to define the applicable standard under Article 10.5 of the CAFTA-DR*."[169] In defining the applicable standard, the Tribunal observed that "Article 10.5(2) provides that FET under CAFTA-DR does not require treatment in addition to or beyond what is required by the minimum standard of treatment applicable under customary international law," and that "Article 10.5 also provides that the minimum standard 'includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.'"[170]

55. The Tribunal, moreover, expressly considered Guatemala's argument "that, under the minimum standard, the State conduct must be 'extreme and outrageous' in order to constitute a breach of Article 10.5," and "that, unless the State conduct constitutes 'a deliberate violation of the regulatory authority's duties and obligations or an insufficiency of action falling far below

[166] *Impregilo v. Argentina*, Decision on Annulment, ¶ 158 (CL-N-133).

[167] *Alapli v. Turkey*, Decision on Annulment, ¶ 234 (RL-51).

[168] Guatemala's Reply on Annulment ¶¶ 116-121.

[169] Award ¶ 447 (emphasis added).

[170] *Id*. ¶ 448 (emphasis omitted).

international standards', any dispute as to the State's regulatory conduct should be submitted to the local courts, and 'only if the local court has committed a denial of justice may a claim of unfair and inequitable treatment be submitted to an international tribunal.'"[171] The Tribunal also expressly considered TECO's argument that "the minimum standard of FET prohibits conduct that is arbitrary, grossly irregular, unjust or idiosyncratic, and behaviors that exhibit a complete lack of transparency and candor in an administrative proceeding," and that "although it is not necessary to prove bad faith in order to establish a violation of the minimum standard, such a violation is established if the State acted in bad faith."[172]

56. Having duly considered the parties' arguments, the Tribunal concluded that it "consider[ed] that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."[173] Citing arbitral awards and commentaries discussing the content of the minimum standard, the Tribunal further noted that it agreed "with the many arbitral tribunals and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law."[174] The Tribunal also observed that it considered that "the minimum standard is part and parcel of the international principle of good faith," and that "[t]here is no doubt in the eyes of the Arbitral Tribunal that the principle of good faith is part of customary international law as established by Article 38.1(b) of the Statute of the International Court of Justice, and that a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached."[175] Finally, the Tribunal remarked that, "pursuant to Article 10.5 of CEFTA-DR [*sic*], a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard," and that, "[i]n assessing whether there

[171] *Id*. ¶¶ 449, 451 (internal citations omitted).

[172] *Id*. ¶¶ 452-453.

[173] *Id*. ¶ 454.

[174] *Id*. ¶ 455 (internal citations omitted).

[175] *Id*. ¶ 456.

has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules."[176]

57. Based upon these principles, the Tribunal concluded that it "consider[ed] that a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."[177] As the Tribunal remarked, the standard thus "prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner," and "obliges the State to observe due process in administrative proceedings."[178] The Tribunal further remarked that "[a] lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was [a] lack of due process in administrative proceedings,"[179] and that "[i]t is particularly so in the context of a tariff review process that is based on the parties' good faith cooperation, and in the context of which the parties had contemplated the intervention of a neutral body to resolve differences."[180]

58. Guatemala's continued assertions that these sections of the Award "show the lack of any real examination of the standard by the Tribunal, let alone any consideration of the Parties' positions," and that "the Award is deficient in its treatment of international law" thus are baseless.[181] The Tribunal not only defined the applicable legal standard under customary international law, but reviewed the parties' positions and examined specifically how that standard would apply in the context of administrative proceedings, such as the tariff review process at issue in the present case.[182] As the Award confirms, the Tribunal's analysis of the content of the applicable legal standard thus was not "limited to a brief statement that the standard 'is infringed by conduct [that] […] is arbitrary, grossly unfair or idiosyncratic, is

[176] *Id*. ¶ 457.

[177] *Id*. ¶ 458.

[178] *Id*. ¶ 587.

[179] *Id*.

[180] *Id*.

[181] Guatemala's Reply on Annulment ¶¶ 117, 121.

[182] Award ¶¶ 457-458.

discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety,'" as Guatemala continues to erroneously assert.[183]

59. Third, Guatemala's assertion that "the Tribunal never showed how Guatemala's alleged breach of the Regulatory Framework also resulted in a breach of international law," but rather "simply conflated the concepts of a domestic and an international breach"[184] likewise is meritless. As TECO demonstrated in its Counter-Memorial on Annulment, in holding Guatemala liable, the Tribunal examined the content of the minimum standard of treatment obligation under Article 10.5 by reference to arbitral decisions, upon which both parties had relied, as well as legal commentaries; duly reviewed and analyzed the CNEE's conduct in view of the applicable legal standard under Article 10.5; and found that "the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters," by, among other things, adopting Resolution No. 144-2008, disregarding without valid reasons the Expert Commission's report, and unilaterally imposing a tariff based upon its own consultant's VAD calculation.[185] As the Tribunal observed, in its view, "*both under the regulatory framework and under the minimum standard of treatment*, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White's study," and "[t]he 'preliminary review' that the CNEE performed in less than one day was clearly insufficient to discharge that obligation."[186] As the Tribunal concluded, it could "find no justification, other than its desire to reject the Bates White study in favor of the more favorable Sigla's study, for such a behavior."[187]

60. The Tribunal further held that, "[b]ecause the regulator did not consider the Expert Commission as a neutral advisory body, but rather as the guardian of its own positions, the CNEE did not even consider the Expert Commission's pronouncements when fixing the tariff," and that, "[i]n doing so, the regulator has repudiated the two fundamental principles upon

[183] Guatemala's Reply on Annulment ¶ 149 (quoting Award ¶ 454).

[184] *Id*. ¶ 123.

[185] Award ¶ 664.

[186] *Id*. ¶ 690 (emphasis added).

[187] *Id*.

which the regulatory framework bases the tariff review process: first that, save in the limited cases provided in Article 98 RLGE, the tariff would be based on the VAD study prepared by the distributor's consultant; and, second, that any disagreement between the regulator and the distributor regarding such VAD study would be resolved by having regard to the pronouncements of a neutral Expert Commission."[188] The Tribunal concluded that it found that "such repudiation of the two fundamental regulatory principles applying to the tariff review process is arbitrary and breaches elementary standards of due process in administrative matters," and that "[s]uch behavior therefore breaches Guatemala's obligation to grant fair and equitable treatment under article 10.5 of CAFTA-DR."[189] As the Tribunal observed, "under the minimum standard, international law prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner," and "obliges the State to observe due process in administrative proceedings."[190] Based upon the evidence presented, the Tribunal found that Guatemala had breached that standard, and thus had breached its international law obligation under Article 10.5 to accord fair and equitable treatment to TECO's investment in EEGSA.[191] In so finding, the Tribunal did not apply Guatemalan law, but rather international law to the facts presented, and explained why the CNEE's conduct was arbitrary in violation Article 10.5 of the DR-CAFTA.

61. Finally, Guatemala's continued complaint that the Tribunal failed to examine "the terms 'arbitrariness' or 'due process' under international law," and "did not refer to *ELSI*" or "provide any other definition of the notion of arbitrariness under international law" similarly is baseless.[192] As TECO demonstrated in its Counter-Memorial on Annulment and as reflected in the parties' pleadings, both parties had referred to the *ELSI* case as setting forth the applicable definition of arbitrariness under international law;[193] there thus was no need for the Tribunal to

[188] *Id*. ¶¶ 709-710.

[189] *Id*. ¶ 711.

[190] *Id*. ¶ 587.

[191] *Id*. ¶¶ 658-711.

[192] Guatemala's Reply on Annulment ¶¶ 151-152.

[193] TECO's Counter-Memorial on Annulment ¶ 79; TECO's Memorial ¶ 240; TECO's Reply ¶ 231; TECO's Post-Hearing Brief ¶ 41; TECO's Post-Hearing Reply ¶ 25; Guatemala's Counter-Memorial ¶ 528;

discuss or to examine the definition of arbitrariness in the *ELSI* case in its Award, which was not in dispute between the parties. In its Reply on Annulment, Guatemala contends that, based upon the *ELSI* case, it had argued in the arbitration that "there is no arbitrariness when acts, even if censurable, have been performed on the basis of an effective legal system providing appropriate judicial remedies," that TECO had disagreed, and that the Tribunal allegedly "gave no relevance to the Parties' diverging opinions on this issue."[194] This is incorrect.

62. Guatemala's argument did not relate to the definition of arbitrariness in the *ELSI* case, which was not in dispute between the parties, but rather to whether the tribunal's decision in *ELSI* supported Guatemala's argument that the CNEE's actions were not arbitrary, because they were "carried out in the context of a functioning legal system with appropriate legal remedies available."[195] As the Award reflects, the Tribunal duly considered this argument and rejected it.[196] As the Tribunal observed, the regulator had "repudiated the two fundamental principles upon which the regulatory framework base[d] the tariff review process," and such repudiation was "arbitrary and breache[d] elementary standards of due process in administrative matters."[197] Guatemala's contentions thus are baseless.

63. Moreover, as set forth in TECO's Counter-Memorial and above, in defining the applicable legal standard under Article 10.5, the Tribunal examined both "arbitrariness" and "due process," noting specifically that "[a] lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was [a] lack of due process in administrative proceedings,"[198] and that, "[i]n assessing whether there has been such a breach of due process, it

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Guatemala's Rejoinder ¶¶ 165-166; Guatemala's Post-Hearing Brief ¶¶ 274-278; Guatemala's Post-Hearing Reply ¶ 147.

[194] Guatemala's Reply on Annulment ¶ 152.

[195] Guatemala's Counter-Memorial ¶ 529 ("In particular, there is no arbitrariness when the acts, although subject to criticism, were carried out in the context of a functioning legal system with appropriate legal remedies available."); *see also* Guatemala's Rejoinder ¶ 167 ("Note that arbitrariness relates to acts that do not respect the principles of the rule of law, or in other words, the principle that all public authorities are subject to the rule of law; there is no arbitrariness when the acts of a public authority, though worthy of criticism, are taken in the context of a well-functioning legal system that provides appropriate legal remedies.").

[196] Award ¶¶ 497-610, 658-711.

[197] *Id*. ¶ 711.

[198] *Id*. ¶ 587.

is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules."[199] Guatemala simply ignores these portions of the Award, which demonstrate that the Tribunal did examine the concepts of "arbitrariness" and "due process," and considered what actions would run afoul of those obligations in the context of this case.

B. The Tribunal Did Not "Reverse" The Decisions Of The Guatemalan Constitutional Court

64. In its Reply on Annulment, Guatemala contends that "international law precludes review of domestic court decisions on questions of local law," and that an investment tribunal cannot "find a breach of domestic law, where a local court has found none, and base its decision of breach of the treaty on that very same breach of domestic law."[200] On this basis, Guatemala repeats its prior argument that the Tribunal "reviewed and in fact reversed the Constitutional Court's decisions,"[201] asserting that there was no "distinct Treaty dispute and the Tribunal adjudicated on the purely Guatemalan law controversy already resolved by the Constitutional Court, thus reversing the Court's holdings."[202] According to Guatemala, "[t]he Tribunal's decision that Guatemala breached the international minimum standard of the Treaty was based solely on Resolution 144-2008, and its alleged unlawfulness under the Regulatory Framework," which "was the very measure under review in the decision of the Constitutional Court of 18 November 2009."[203] Guatemala further asserts that "[t]he Constitutional Court concluded that Resolution 144-2008 fell within the scope of the CNEE's powers and that the CNEE had 'follow[ed] the process regulated by law' and had not acted arbitrarily," and that, "[i]n reaching the opposite conclusion, i.e., that Resolution 144-2008 breached the Regulatory Framework and was arbitrary, the Award reversed the decision of the Constitutional Court."[204] Guatemala's arguments are baseless, and continue to mischaracterize the scope of both the Constitutional Court's decisions and the Tribunal's findings.

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[199] *Id*. ¶ 457.

[200] Guatemala's Reply on Annulment ¶ 87.

[201] *Id*. ¶ 90.

[202] *Id*. ¶ 92.

[203] *Id*. ¶¶ 93, 98.

[204] *Id*. ¶ 99.

65. First, Guatemala's assertions that "international law precludes review of domestic court decisions on questions of local law," and that an investment tribunal cannot "find a breach of domestic law, where a local court has found none, and base its decision of breach of the treaty on that very same breach of domestic law,"[205] are inapposite, because the Tribunal in this case found a breach of international law, not a breach of Guatemalan law.[206] As set forth above, the Tribunal expressly found that TECO's claim was *not* a "domestic dispute on the interpretation of Guatemalan law,"[207] but rather was "an international dispute in which the Arbitral Tribunal [would] be called to apply international law."[208] The Tribunal further expressly found that "the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters,"[209] because, among other things, "*both under the regulatory framework and under the minimum standard of treatment*, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White's study," and "[t]he 'preliminary review' that the CNEE performed in less than one day was clearly insufficient to discharge that obligation."[210]

66. Second, the Tribunal expressly disagreed with Guatemala's argument that there was no "distinct Treaty dispute," and that TECO's claim "already [had been] resolved by the Constitutional Court" in EEGSA's *amparo* proceedings.[211] As the Tribunal correctly found, "the disputes resolved by the Guatemalan judiciary are not the same as the one which this Arbitral Tribunal now has to decide," and, while "[t]he Arbitral Tribunal may of course give deference to what was decided as a matter of Guatemalan law by the Guatemalan Constitutional Court," "such decisions made under Guatemalan law cannot be determinative of this Arbitral Tribunal's assessment of the application of international law to the facts of the case."[212]

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[205] *Id*. ¶ 87.

[206] *See, e.g.*, *id*.

[207] Award ¶ 466.

[208] *Id*. ¶ 467.

[209] *Id*. ¶ 664.

[210] *Id*. ¶ 690 (emphasis added).

[211] Guatemala's Reply on Annulment ¶ 92.

[212] Award ¶ 483.

67. The Tribunal further found that "the decisions of the Constitutional Court cannot have the effect of a precedent or have any *res judicata* effect in this arbitration," and that they "obviously have [not] disposed of the present dispute."[213] As the Tribunal correctly observed, "[n]ot only [were] the parties different (EEGSA and the CNEE before the national court and Teco and Guatemala in this arbitration), but this Tribunal has to resolve an entirely different dispute on the basis of different legal rules," and must "assess whether the regulator's conduct materializes a breach of the State's obligations under the customary international law minimum standard."[214] The Tribunal also found that it was "not bound by the Constitutional Court's decisions,"[215] but that "[t]he findings of the Constitutional Court may nevertheless be relevant to the solution of the present international law dispute . . . insofar as the Constitutional Court interpreted aspects of the regulatory framework that are submitted to Guatemalan law and which the Arbitral Tribunal finds of relevance in order to assess whether the State's international obligations were breached."[216]

68. Third, as TECO demonstrated in its Counter-Memorial on Annulment, the Tribunal's holding that Guatemala breached the minimum standard of treatment did not "review and in fact reverse" the Constitutional Court's rulings in EEGSA's *amparo* proceedings,[217] nor is the Tribunal's reasoning contradictory, or based solely upon Resolution No. CNEE-144-2008.[218] As TECO has explained, the Tribunal found that the Constitutional Court had made two specific rulings in EEGSA's *amparo* proceedings: first, the Court ruled that "the CNEE was entitled to disband the Expert Commission" after the Expert Commission had issued its report on the discrepancies between the parties; second, the Court ruled that, "because the Expert Commission's report [was] not binding upon the CNEE and because the regulator has the exclusive power to set the tariffs, the CNEE was entitled to fix the tariffs on the basis of its own

[213] *Id*. ¶ 516.

[214] *Id*. ¶ 517.

[215] *Id*. ¶ 518.

[216] *Id*. ¶ 519.

[217] Guatemala's Reply on Annulment ¶ 90.

[218] *Id*. ¶ 160.

independent study."[219] In holding Guatemala liable under Article 10.5, the Tribunal did not "reverse" these rulings, nor did the Tribunal make "a different interpretation of the Regulatory Framework," as Guatemala erroneously contends.[220] To the contrary, the Tribunal expressly incorporated these rulings into its decision.[221]

69. Moreover, as the Tribunal expressly found, neither EEGSA nor the CNEE had requested the Constitutional Court to decide whether, in the circumstances of the case, EEGSA had failed to correct its VAD study in accordance with the CNEE's observations within the meaning of amended RLGE Article 98, which would have entitled the CNEE to set EEGSA's tariffs on the basis of its own VAD study.[222] The Tribunal accordingly found that the Constitutional Court had not opined "on whether, pursuant to Article 98 of the RLGE, EEGSA indeed failed to correct its VAD report,"[223] and that "[t]he mention, in the Constitutional Court's decision, of an 'omission' on the part of EEGSA to implement the [CNEE's] corrections, [] appears to be no more than a factual reference to the CNEE's submissions."[224] As the Tribunal observed, this finding was supported and confirmed by Guatemala's own submissions in the arbitration, which had emphasized that amended RLGE Article 98 "does not form the basis for the Court's decision," and "had no influence on the Court's decision."[225]

70. The Tribunal further found that, despite holding that the Expert Commission's report was not binding under Guatemalan law, the Constitutional Court had not decided whether the CNEE nonetheless had the duty to consider it and to provide reasons for its decisions to disregard it; this question, the Tribunal noted, "will thus have to be decided by the Arbitral Tribunal."[226] As the Tribunal remarked, "the Constitutional Court [could not] have intended to say that the CNEE could arbitrarily and without reasons disregard the Expert Commission's

[219] Award ¶¶ 513-514.

[220] Guatemala's Reply on Annulment ¶ 104.

[221] Award ¶¶ 477, 483, 519.

[222] *Id*. ¶ 540.

[223] *Id*. ¶ 543.

[224] *Id*. ¶ 541.

[225] *Id*. ¶¶ 543-544 (quoting Guatemala's Post-Hearing Brief ¶ 62).

[226] *Id*. ¶ 545.

recommendations," and that "at no point in either of its two decisions does the Constitutional Court say that fixing the tariff would be an entirely discretionary exercise on the part of the regulator."[227] The Tribunal further observed that such a conclusion would be "manifestly at odds with the regulatory framework,"[228] as the entire regulatory framework is based upon the premise that "the regulator did not enjoy unlimited discretion in fixing the tariff."[229]

71. The Tribunal also found that the Constitutional Court itself had confirmed that "it had not been called [upon] to assess the '*rationality*' of the adopted tariff;" such term, the Tribunal found, could "be understood both with respect to the content of the tariff and with the process leading to its establishment."[230] As the Tribunal observed, "[w]hat the Constitutional Court intended to say is clearly that, because the CNEE retains the exclusive power to fix the tariff, such power could not be delegated in all or part to the Expert Commission;" this did not mean, however, "that the Expert Commission's report should not have been given serious consideration by the CNEE," or that "the CNEE had unlimited discretion to depart from it without valid reasons."[231] The Tribunal thus concluded that, although the decisions "of the Expert Commission were not binding in the sense that it had no adjudicatory powers, the CNEE nevertheless had the duty, under the regulatory framework, to give them serious consideration and to provide valid reasons in case it decided to depart from them,"[232] and that "*[t]he obligation to provide reasons derives from both the regulatory framework and from the international obligations of the State under the minimum standard*."[233]

72. In its Reply on Annulment, Guatemala simply ignores these factual findings, and instead argues that "[t]he Constitutional Court concluded that Resolution 144-2008 fell within the scope of the CNEE's powers and that the CNEE had 'follow[ed] the process regulated by law' and had not acted arbitrarily," and that "[i]n reaching the opposite conclusion . . . the Award

[227] *Id*. ¶ 562.

[228] *Id*.

[229] *Id*. ¶ 563.

[230] *Id*.

[231] *Id*. ¶ 564.

[232] *Id*.

[233] *Id*. ¶ 583 (emphasis added).

reversed the decision of the Constitutional Court."[234] Guatemala's argument not only is inconsistent with the Tribunal's findings, as elaborated above,[235] but also with the plain language of the Court's decision.

73. As its 18 November 2009 decision reflects, the Constitutional Court did not find that the CNEE had not acted arbitrarily in setting EEGSA's 2008-2013 VAD and tariffs, but rather merely observed that "[i]t is estimated that tariffs fixed, when the report by the Experts' Commission has not been accepted as valid to guide this policy, cannot be, within its discretion, harmful or unreasonably arbitrary, in view of the indicators of efficient operators as a reference, as the one conditioned in temporary Section 2 of the related law, which made reference to the 'values used in other countries applying a similar methodology.'"[236] The Court then expressly noted that "*the rationality of the tariff schemes approved was not reported as damage or as evidence in this amparo action, and the only damage reported focused on the concept of legal due process, which was already analyzed (paragraph a) of section VI of the conclusions*."[237] Contrary to Guatemala's suggestions, the Court thus did *not* find that the CNEE had not acted arbitrarily in conducting EEGSA's 2008-2013 tariff review; to the contrary, the Court confirmed that it had not considered "the rationality of the tariff schemes."[238]

74. Moreover, as the Award reflects, applying the applicable standard under customary international law to the facts presented, the Tribunal did not review and "reverse" the Constitutional Court's rulings, but rather held that the *process* by which EEGSA's 2008-2013 VAD and tariffs had been established breached the minimum standard of treatment—an issue which had not been submitted to the Court.[239] Analyzing the evidence presented by the Parties, the Tribunal held that "both the regulatory framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with the fundamental

[234] Guatemala's Reply on Annulment ¶ 99.

[235] *See supra* ¶¶ 64-71.

[236] Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 19-20 (C-331).

[237] *Id*., at 20 (emphasis added).

[238] *Id*.

[239] Award ¶¶ 707-711.

principles on the tariff review process in Guatemalan law," and that, "[b]y rejecting the distributor's study because it had failed to incorporate the *totality* of the observations that the CNEE had made in April 2008 [before the parties' discrepancies were even submitted to the Expert Commission], with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review."[240] As the Tribunal explained, "the CNEE did not consider the report of the Expert Commission as the pronouncement of a neutral panel of experts which it had to take into account in establishing the tariff," but rather had "used the expert report to ascertain that some of the observations it had made in April 2008 had not been incorporated in the study, regardless of whether there was a disagreement, and irrespective of the views that had been expressed by the experts on such disagreements."[241] In establishing EEGSA's tariffs, the CNEE thus "failed without any reasons to take the Expert Commission's pronouncements into account."[242]

75. The Tribunal further held that "the regulator's decision to apply its own consultant's study [did] not comport with Article 98 of the RLGE," and that, "in order for the regulator's decision to comport with Article 98, it should have [shown] that the distributor failed to correct its study according to the pronouncements of the Expert Commission, or explained why the regulator decided not to accept the Expert Commission's pronouncements."[243] The Tribunal found that, once the CNEE "had received the Expert Commission's report, [it] should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reasons to consider that such conclusions were inconsistent with the regulatory framework, in which case it had the obligation to provide valid reasons to that effect."[244] No such reasons, however, were provided in Resolution No. CNEE-144-2008 or otherwise.[245]

[240] *Id*. ¶¶ 681-682 (emphasis in original).

[241] *Id*. ¶ 678.

[242] *Id*.

[243] *Id*. ¶¶ 679-680.

[244] *Id*. ¶ 683.

[245] *Id*.

76. In addition, Guatemala's assertion that the Tribunal's decision on liability appears in Section 3(d) of the Award, which "is entirely dedicated to Resolution 144-2008,"[246] is erroneous. The heading of Section 3(d) of the Award is "[t]he CNEE's rejection of the Expert Commission's report and decision to fix the tariff based on its own consultant's VAD study."[247] As its heading reflects and as the subsequent paragraphs in the section reveal, this section is not limited to the content of Resolution No. CNEE-144-2008, but rather also addresses the manner in which EEGSA's 2008-2013 tariff review was conducted and the manner in which its 2008-2013 VAD and tariffs were established.[248]

77. Indeed, as TECO demonstrated in its Counter-Memorial on Annulment and noted above, separate and apart from Resolution No. CNEE-144-2008, the Tribunal also found that the CNEE's "preliminary review" of EEGSA's revised VAD study "performed in less than one day was clearly insufficient to discharge" its obligation to seriously consider the Expert Commission's findings, and was further evidence of "[t]he arbitrariness of the regulator's behavior."[249] In addition, while Guatemala had argued that "incorporating the Expert Commission's pronouncements in the Bates White's study would have taken too much time and would not have been compatible with the need to publish the tariff on August 1, 2008," the Tribunal found that there was "nothing in the regulatory framework obliging the CNEE to publish the tariff on the first day of the tariff period," and that, "[q]uite to the contrary, Article 99 of the RLGE provides that the tariff is published once it has been approved and no later than nine months after the beginning of the tariff period."[250]

78. The Tribunal further observed that the CNEE itself had agreed to extend the deadline of the Expert Commission's report, and that it was well "aware of the complexity of the issues raised and could not ignore that it would take more than a few days to consider the Expert

[246] Guatemala's Reply on Annulment ¶¶ 94, 98.

[247] Award § VIII(B)(3)(d).

[248] *Id*.

[249] *Id*. ¶¶ 690-691.

[250] *Id*. ¶¶ 684-685.

Commission's conclusions and implement them in the VAD study."[251] The Tribunal thus held that, by "accepting to receive the Expert Commission's report in the week of July 24, 2008, to then disregard it along with the Bates White study on the basis that such date did not leave enough time to publish the tariff by August 1, 2008, the CNEE acted in breach of the fundamental principles of due process as well as in a contradictory and aberrant manner."[252]

79. As TECO explained in its Counter-Memorial on Annulment, none of these issues was decided by the Constitutional Court, nor was the evidence of the CNEE's "preliminary review" of the Expert Commission's report even submitted to the Court for its consideration in EEGSA's *amparo* proceedings.[253] To the contrary, the Constitutional Court simply found that, under the laws and regulations, the CNEE had the authority to set EEGSA's new tariffs, and that it had not delegated that authority to the Expert Commission, whose report was not binding.[254] It was on that basis that the Constitutional Court considered that the CNEE had acted "in accordance with the Law and Rules."[255] As the Tribunal found, the Constitutional Court, however, did not make any findings as to whether the CNEE had the obligation to give "serious consideration" to the Expert Commission's report, or whether the CNEE had the authority under amended RLGE Article 98 to set EEGSA's new tariffs based upon its own VAD study.[256] Contrary to Guatemala's continued assertions, there thus is no contradiction between the Tribunal's statement that its "task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law" and its holding on liability.[257]

80. Moreover, in so holding, the Tribunal did not find that Resolution No. CNEE-144-2008 was unlawful as a matter of Guatemalan law, nor did the Tribunal "censure" the Constitutional Court "for failing to recognize what the Tribunal deem[ed] a 'fundamental' tenet

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[251] *Id*. ¶ 686.

[252] *Id*. ¶ 688.

[253] Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009 (C-331); Resolution of the Constitutional Court regarding Amparo 37-2008 dated 24 Feb. 2010 (C-345).

[254] Award ¶ 542.

[255] Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 13 (C-331).

[256] Award ¶¶ 561, 564.

[257] Guatemala's Reply on Annulment ¶ 157 (citing Award ¶ 477 (emphasis omitted)).

of the Regulatory Framework," as Guatemala contends.[258] To the contrary, the Tribunal found that the CNEE, in conducting EEGSA's tariff review, had "acted in breach of the fundamental principles of due process as well as in a contradictory and aberrant manner."[259]

81. In any event, as TECO explained in its Counter-Memorial on Annulment, even if the Tribunal's holding were inconsistent with the Constitutional Court's decisions—which it is not—the Tribunal was not bound by those decisions.[260] As noted above, the Tribunal correctly found that the decisions could not "have the effect of a precedent or have any *res judicata* effect in this arbitration," and that the Tribunal thus was "not bound by the Constitutional Court's decisions."[261] Indeed, as set forth above, were it otherwise, a State would be able to use its own judicial system to insulate itself from a violation of an international law obligation by validating its actions under national law.[262] In addition, to the extent that the Tribunal's interpretation of the Constitutional Court's decisions were wrong—which it is not—this, as TECO has explained, would not provide a valid basis for annulment under ICSID Convention Article 52(1).[263]

VI. THERE ARE NO GROUNDS TO ANNUL THE TRIBUNAL'S DECISION AWARDING TECO COMPENSATION FOR THE PERIOD BEFORE THE SALE OF EEGSA

82. As explained in TECO's prior submissions, the Tribunal properly found that, as a consequence of Guatemala's breach of the Treaty, TECO suffered losses, and awarded TECO historical damages in the full amount claimed, *i.e.*, US$ 21,100,552, for the period from 1 August 2008, when the CNEE arbitrarily imposed on EEGSA the VAD calculated by the CNEE's own consultant, Sigla, until 21 October 2010, when TECO sold its investment as a result of Guatemala's breach.[264] In quantifying TECO's losses, the Tribunal properly ruled that

[258] *Id*. ¶ 104.

[259] Award ¶ 688.

[260] TECO's Counter-Memorial on Annulment ¶ 102.

[261] Award ¶¶ 516, 518.

[262] *See* TECO's Counter-Memorial on Annulment ¶ 88; TECO's Post-Hearing Reply ¶ 19; TECO's Reply ¶ 282.

[263] *See* TECO's Counter-Memorial on Annulment ¶ 36.

[264] *See* TECO's Memorial on Partial Annulment ¶¶ 64-66; TECO's Counter-Memorial on Annulment ¶¶ 104-106; TECO's Reply on Partial Annulment ¶¶ 34, 64. The Tribunal's denial of TECO's damages for loss of

Bates White's 28 July 2008 VAD study, which incorporated the Expert Commission's rulings, was the proper basis for calculating historical damages.[265] As TECO demonstrated in its Counter-Memorial on Annulment, Guatemala's stated two grounds for annulment of the Tribunal's ruling on historical damages are meritless.[266] Nothing in Guatemala's Reply on Annulment detracts from that conclusion.

83. First, Guatemala repeats its mistaken assertions that the Tribunal held that the Treaty was violated solely by the CNEE's failure to provide reasons for its decisions to disregard the Expert Commission's rulings and Bates White's 28 July 2008 VAD study.[267] Specifically, in its Reply on Annulment, Guatemala quotes at length from the Award's section on liability, in which it underscores certain portions, and asserts that these portions of the Award show that the "entire liability section of the Award is premised on the CNEE's failure to provide reasons"[268] and that, according to the Tribunal's decision, the "CNEE was entitled to reject the Bates White study and the Expert Commission's report."[269] According to Guatemala, because the Tribunal found that the Expert Commission's rulings were not binding upon the CNEE, the Tribunal's decision to quantify historical damages based on the Expert Commission's rulings and Bates White's 28 July 2008 VAD study, which incorporated those rulings, was contradictory to the Tribunal's decision on liability.[270]

84. As TECO demonstrated in its Counter-Memorial on Annulment, however, the Tribunal held that the CNEE had the duty to give the Expert Commission's rulings "serious consideration" and could depart from them only if "valid reasons" existed for doing so.[271] The

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value upon the sale of its investment is the subject of TECO's application for partial annulment of the Award. *See* TECO's Memorial on Partial Annulment § IV; TECO's Reply on Partial Annulment § III.A.

[265] Award ¶¶ 724-728, 742; *see also* TECO's Memorial on Partial Annulment ¶¶ 64-66; TECO's Counter-Memorial on Annulment ¶¶ 104-106; TECO's Reply on Partial Annulment ¶¶ 34, 64.

[266] *See* TECO's Counter-Memorial on Annulment ¶¶ 107-118.

[267] *See* Guatemala's Reply on Annulment ¶¶ 18, 170-176; *see also* Guatemala's Memorial on Annulment ¶ 17.

[268] Guatemala's Reply on Annulment ¶ 166 (quoting Award ¶¶ 457, 531, 545, 561-562, 564-565, 576, 583-588, 633, 664, 670, 678, 683, 687, 698, 700, 708).

[269] *Id*. ¶ 167.

[270] *See id*. ¶¶ 18-21, 161-180; Guatemala's Memorial on Annulment ¶ 18.

[271] Award ¶¶ 564-565, 588-589, 683, 726, 731, 735; TECO's Counter-Memorial on Annulment ¶ 109.

Tribunal also held that Guatemala violated the Treaty, not only because the CNEE had failed to express reasons for not adopting the Expert Commission's rulings, but also because the CNEE had ignored the Expert Commission's rulings where no valid reasons existed for doing so.[272]

85. The portions of the Tribunal's Award devoted to its findings of liability quoted by Guatemala clearly state that the CNEE not only was required to provide reasons for its decision, but also was required to give the Expert Commission's rulings "serious consideration" or "good faith" consideration,[273] and that the CNEE could depart from the Expert Commission's rulings only if "good reasons" or "valid reasons" existed for doing so.[274] The Award also makes clear that, rather than giving the Expert Commission's rulings serious consideration, the CNEE ignored them; that the CNEE did not provide any reasons for doing so; and that no valid reasons, in fact, existed for disregarding the Expert Commission's rulings.[275] Likewise, it is clear from the Award that the Tribunal concluded that the CNEE's foregoing conduct constituted a violation of the Treaty.[276]

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[272] Award ¶¶ 564-565, 588-589, 683; *see also* TECO's Counter-Memorial on Annulment ¶¶ 87, 109-112.

[273] *See, e.g.*, Guatemala's Reply on Annulment ¶ 166 (quoting Award ¶ 561, which states that the CNEE "had the obligation . . . to give it [*i.e.*, the Expert Commission's report] serious consideration") (Guatemala's emphasis omitted); *id*. (quoting Award ¶ 564, which states that the CNEE's discretion to establish tariffs "does not mean . . . that the Expert Commission's report should not have been given serious consideration by the CNEE") (Guatemala's emphasis omitted); *id*. (quoting Award ¶ 565, which states that the CNEE "had the duty . . . to give them [*i.e.*, the Expert Commission's rulings] serious consideration and to provide valid reasons in case it decided to depart from them") (Guatemala's emphasis omitted); *id*. (quoting Award ¶ 588, which states that the "CNEE had the duty to seriously consider them [*i.e.*, the Expert Commission's rulings]"); *id*. (quoting Award ¶ 670, which states that the "regulator had the duty to give them [*i.e.*, the Expert Commission's rulings] serious consideration") (Guatemala's emphasis omitted); *id*. ¶ 166 (quoting Award ¶ 531, which states that the "regulator would in good faith have to consider with care" the Expert Commission's rulings) (Guatemala's emphasis omitted).

[274] *See, e.g.*, *id*. (quoting Award ¶ 683, which states that the "CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions on board in establishing a tariff based on the Bates White VAD study, unless it had good reasons to consider that such conclusions were inconsistent with the regulatory framework") (Guatemala's emphasis omitted); *see also* Guatemala's Reply on Annulment ¶ 166 (quoting Award ¶ 564, which states that the CNEE's discretion to establish tariffs "does not mean . . . that the CNEE had unlimited discretion to depart from it [*i.e.*, the Expert Commission's report] without valid reasons") (Guatemala's emphasis omitted).

[275] Award ¶¶ 690, 701; *see also* TECO's Counter-Memorial on Annulment ¶¶ 109-112.

[276] *See* Award ¶¶ 707-711.

86. The Tribunal further found Guatemala's assertions that Bates White's 28 July 2008 revised VAD study failed to incorporate the Expert Commission's rulings to be "unconvincing."[277] Because the Tribunal held, among other things, that Guatemala breached the Treaty by ignoring without good reason the Expert Commission's rulings; that, in fact, no valid reasons existed to disregard the Expert Commission's rulings; and that Bates White's 28 July 2008 revised VAD study fully incorporated all of the Expert Commission's rulings, the Tribunal's decision to quantify historical damages based upon the Expert Commission's rulings and Bates White's 28 July 2008 VAD study was fully consistent with the Tribunal's decision on liability.[278]

87. Second, Guatemala repeats its erroneous assertion that the Tribunal improperly rejected a VAD study prepared for the purposes of the arbitration by Guatemala's industry expert, Mr. Damonte, as a means to calculate TECO's historical damages, on the ground that Mr. Damonte failed to implement the Expert Commission's ruling on the FRC, when Mr. Damonte had purportedly implemented the Expert Commission's ruling on the FRC in an alternative version of his study.[279] According to Guatemala, by failing to use Mr. Damonte's alternative study, and instead using Bates White's 28 July 2008 revised VAD study, as a means to calculate TECO's historical damages, the Tribunal denied Guatemala due process and seriously departed from a fundamental rule of procedure.[280]

88. As TECO demonstrated in its Counter-Memorial on Annulment, the Tribunal had valid grounds for rejecting both versions of Mr. Damonte's study: both versions suffered from various flaws, including the fact that Mr. Damonte understated the VNR and failed to implement

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[277] *Id*. ¶¶ 703-705.

[278] The *Pey Casado v. Chile* and *MINE v. Guinea* decisions on annulment are thus inapposite. *See* Guatemala's Reply on Annulment ¶¶ 177-179 (citing both cases); *Pey Casado v. Chile*, Decision on Annulment, ¶ 285 (annulling the damages portion of the award where the tribunal awarded the claimants damages for a violation of fair and equitable treatment notwithstanding that the parties' pleadings focused almost exclusively on damages relating to the claimants' expropriation claim) (CL-N-143); *MINE v. Guinea*, Decision on Annulment, ¶ 5.08 (stating that the award "must enable the reader to follow the reasoning of the tribunal on points of fact and law") (CL-N-137).

[279] Guatemala's Reply on Annulment ¶¶ 22, 190-192.

[280] *See id*. ¶¶ 22, 188-192.

the Expert Commission's ruling relating to reference prices.[281] In addition, Guatemala's quantum expert, Dr. Abdala, did not even present an alternative quantification of damages based on Mr. Damonte's alternative VAD study.[282] In its Reply on Annulment, Guatemala provided no response on these points.[283] Nor did it contest that it had mischaracterized the purported impact that the application of Mr. Damonte's alternative study would have had on damages: the amount that Guatemala presented as the purported reduction of damages arising from the application of Mr. Damonte's alternative FRC calculation was based, in fact, on Mr. Damonte's *own* FRC calculation (not his alternative FRC calculation), which, as the Tribunal expressly found, was not an appropriate basis for calculating damages.[284]

89. Guatemala likewise failed to respond in its Reply on Annulment to TECO's observation that Guatemala's purported basis for annulment amounts to an impermissible attempt to have the Committee revisit and reverse the Tribunal's assessment of Mr. Damonte's documentary and testimonial evidence.[285]

VII. THERE ARE NO GROUNDS TO ANNUL THE TRIBUNAL'S DECISION AWARDING TECO COSTS

90. In its Award, the Tribunal, applying the principle that costs follow the event, ordered Guatemala to carry the entirety of its costs and to reimburse TECO for 75 percent of its costs, *i.e.*, US$ 7,520,695.39.[286] The Tribunal's decision on costs was fully justified also in light of Guatemala's egregious breach of the Treaty and its misconduct in the underlying arbitration.[287]

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[281] *See* TECO's Counter-Memorial on Annulment ¶¶ 114-115.

[282] *See id*.

[283] *See* Guatemala's Reply on Annulment ¶¶ 188-192.

[284] *See* TECO's Counter-Memorial on Annulment ¶ 117; *compare* Guatemala's Reply on Annulment ¶¶ 188-192.

[285] *See* TECO's Counter-Memorial on Annulment ¶ 116; *compare* Guatemala's Reply on Annulment ¶¶ 188-192.

[286] *See* TECO's Counter-Memorial on Annulment ¶ 119; *see also* Award ¶ 779.

[287] *See* TECO's Counter-Memorial on Annulment ¶ 119; *see also* TECO's Memorial on Partial Annulment ¶ 74; TECO's Submission on Costs dated 24 July 2013; TECO's Reply on Costs dated 7 Aug. 2013.

91. In its Reply on Annulment, Guatemala repeats its mistaken arguments that the Tribunal's decision on costs should be annulled for failure to state reasons and because it allegedly is inconsistent with the Tribunal's decision to apply the principle that costs follow the event.[288] In this regard, Guatemala contends that the principle that costs follow the event does not support an award to TECO of 75 percent of its costs, because the Tribunal rejected several of TECO's arguments and awarded it only a portion of the damages that it sought.[289] Guatemala further complains that the Tribunal allegedly failed to provide any analysis in support of its finding that TECO's costs were reasonable and that the costs awarded, as a percentage of the amount of damages awarded, is one of the highest among ICSID cases.[290]

92. TECO thoroughly rebutted all of Guatemala's foregoing assertions in its Counter-Memorial on Annulment.[291] Specifically, TECO demonstrated that in no instance has an *ad hoc* committee annulled a tribunal's determination with respect to cost allocation; that the Tribunal's reasoning regarding costs is clear and consistent and provides a similar level of detail as the cost awards of other investment treaty tribunals; that, as is evident from the Award, the Tribunal concluded that TECO was the party that substantially prevailed in the arbitration, and the Tribunal's allocation of costs applying the principle that costs follow the event is fully consistent with that conclusion; that it is clear from the Award that, upon consideration of the Parties' submissions on costs, the Tribunal concluded that TECO's costs were justified and appropriate in view of the complexity of the case; and that Guatemala's assertions concerning the alleged unusual nature and size of the cost award as well as Guatemala's mathematical exercise of comparing the amount of costs awarded to the amount of compensation claimed and awarded run contrary to the Tribunal's discretion to allocate costs (which discretion, both Parties agreed, the Tribunal possessed) and, in any event, do not provide a basis for annulment.[292]

[288] *See* Guatemala's Reply on Annulment ¶¶ 23-25, 181-186.

[289] *See id*. ¶¶ 23-24, 184-185.

[290] *See id*. ¶¶ 182-183.

[291] *See* TECO's Counter-Memorial on Annulment ¶¶ 123-130.

[292] *See id*. ¶¶ 119-130.

93. In its Reply on Annulment, Guatemala simply summarizes its earlier incorrect arguments concerning costs, without providing any substantive response to TECO.[293] Accordingly, Guatemala's request for annulment of the Tribunal's ruling on costs should be denied, for the reasons elaborated in TECO's Counter-Memorial on Annulment.[294]

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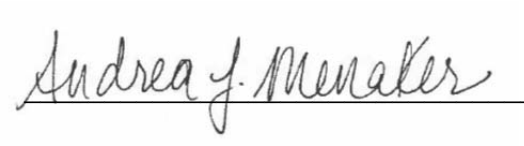
[293] *See* Guatemala's Reply on Annulment ¶¶ 181-186; *compare* Guatemala's Memorial on Annulment ¶¶ 225-230; TECO's Counter-Memorial on Annulment ¶¶ 119-130.

[294] Guatemala's assertion that Guatemala approached the arbitral proceeding in a cooperative manner and that it did not exacerbate TECO's costs (*see* Guatemala's Reply on Annulment ¶ 183) is contradicted by the record, as TECO also explained. *See* TECO's Counter-Memorial on Annulment ¶ 119; *see also* TECO's Memorial on Partial Annulment ¶ 74; TECO's Submission on Costs dated 24 July 2013; TECO's Reply on Costs dated 7 Aug. 2013.

VIII. CONCLUSION

94. For the above reasons, TECO respectfully requests that the Committee reject Guatemala's request for annulment of the Award and order Guatemala to pay TECO's legal fees and costs incurred in these proceedings.

Respectfully submitted,



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