
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 COUNTER-MEMORIAL ON ANNULMENT OF THE AWARD

WHITE & CASE LLP

Andrea J. Menaker

Petr Polášek

Kristen M. Young

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Counsel for Claimant

CLAIMANT’S COUNTER-MEMORIAL ON ANNULMENT OF THE AWARD

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CLAIMANT'S COUNTER-MEMORIAL ON ANNULMENT OF THE AWARD

I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 dated 1 August 2014, TECO Guatemala Holdings, LLC (“TECO” or “Claimant”) hereby submits this Counter-Memorial 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/10/23.¹

2. As set forth in TECO’s Application for Partial Annulment of the Award dated 18 April 2014 (“Partial Annulment Application”) and its Memorial on Partial Annulment of the Award dated 17 October 2014 (“TECO’s Memorial on Partial Annulment”), the Tribunal found that it had jurisdiction *ratione materiae* over the claims 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 fair and equitable treatment. The Tribunal then awarded TECO damages for the period from the date of Guatemala’s breach until the date on which TECO sold its investment as a direct consequence of Guatemala’s breach, as well as three-fourths of its arbitration costs.² As elaborated below, contrary to the contentions advanced by Guatemala in its Memorial on Annulment of the Award dated 17 October 2014 (“Guatemala’s Memorial on Annulment”),³ there are no grounds upon which to annul these portions of the Award under Article 52(1) of the ICSID Convention.

3. *First*, in asserting jurisdiction *ratione materiae* over the dispute, the Tribunal properly applied the *prima facie* test to the allegations advanced by TECO in its pleadings, and

¹ Abbreviations and terms used in TECO’s Counter-Memorial on Annulment of the Award have the same meaning as in TECO’s Memorial on Partial Annulment of the Award.

² As set forth in TECO’s Partial Annulment Application and Memorial, the Tribunal, however, improperly denied TECO’s claim for damages suffered as a result of the impaired value at which TECO sold its investment as a direct consequence of Guatemala’s breach, as well as TECO’s claims for interest for the period until the sale and pre-award interest at the agreed rate; as TECO has demonstrated, these portions of the Tribunal’s Award thus should be annulled on the grounds set forth in Article 52(1), subparagraphs (b), (d), and (e) of the ICSID Convention. *See generally* TECO’s Partial Annulment Application; TECO’s Memorial on Partial Annulment.

³ Guatemala’s Memorial on Annulment of the Award dated 17 Oct. 2014 (“Guatemala’s Memorial on Annulment”).

correctly found that the dispute was not a mere domestic regulatory dispute under Guatemalan law, but rather was a dispute under international law arising out of the arbitrary and unjustified actions taken by Guatemala during EEGSA's 2008-2013 tariff review. *Second*, in finding that Guatemala had breached its obligation to accord TECO's investment in EEGSA fair and equitable treatment under Article 10.5 of the DR-CAFTA, the Tribunal properly applied international law to the facts presented, and did not conflate a mere domestic law breach with a breach of international law. In so finding, the Tribunal also did not reverse the decisions of the Guatemalan Constitutional Court under Guatemalan law; to the contrary, the Tribunal granted deference to those decisions in its Award, even though it found that it was not bound by them under principles of international law, and that they had no *res judicata* effect on the dispute. *Third*, in awarding TECO historical damages, the Tribunal properly applied the methodology agreed by the Parties, *i.e.*, that damages should be calculated as the difference between EEGSA's actual value reflecting Guatemala's Treaty breach and a but-for scenario assessing EEGSA's value in the absence of the breach. In so doing, the Tribunal correctly determined that Bates White's 28 July 2008 VAD study fully incorporated the Expert Commission's rulings, and that it therefore should serve as the basis for calculating EEGSA's value in the but-for scenario. *Finally*, in assessing costs against Guatemala, the Tribunal acted in accordance with the Parties' shared position that costs should follow the event. The Committee thus should reject Guatemala's application for annulment of the Award.

II. SUMMARY OF THE DISPUTE AND THE AWARD

4. In its Memorial on Partial Annulment, TECO explained that its claim under Article 10.5 of the DR-CAFTA⁴ arose out of its investment in the Guatemalan electricity distribution company, EEGSA, which TECO held through DECA II, a Guatemalan company,⁵ and Guatemala's arbitrary and unjustified decision to decrease EEGSA's electricity tariffs for the 2008-2013 tariff period by unilaterally reducing the VAD component of those tariffs, through

⁴ See Dominican Republic – Central America – United States Free Trade Agreement dated 5 Aug. 2004, Chapter Ten, Art. 10.5.1 (“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”) (CL-1).

⁵ TECO's Memorial ¶¶ 61, 63; Award ¶¶ 1-7.

which the distributor recoups its investment and makes its profit,⁶ as well as the arbitrary and unjustified actions that Guatemala took to achieve that objective.⁷ As TECO demonstrated, these actions culminated in Guatemala's electricity regulator, the CNEE, arbitrarily disregarding EEGSA's entire 2008-2013 tariff review process and imposing its own unjustifiably and unreasonably low VAD on EEGSA, in breach of the specific representations that Guatemala had made during EEGSA's privatization process, in complete disregard of the legal and regulatory framework that Guatemala had adopted to induce foreign investment in EEGSA, and in violation of its obligation to accord EEGSA due process.⁸

5. As TECO further demonstrated, the actions that the CNEE took during EEGSA's 2008-2013 tariff review to decrease EEGSA's VAD and resulting tariffs were not the actions of an independent regulatory agency, nor were they motivated by a good faith interpretation of the law.⁹ Rather, as the CNEE's own internal documents confirm, the CNEE deliberately and arbitrarily disregarded the key principles set forth in the LGE and RLGE to achieve the outcome that it wanted—namely, an unjustified sharp reduction in EEGSA's VAD and resulting tariffs.¹⁰ Indeed, as TECO explained, by imposing its own unjustifiably low VAD on EEGSA, the CNEE unilaterally reduced EEGSA's VAD by more than 45 percent and its revenue by approximately 40 percent, leading to downgrades of EEGSA by the two major rating agencies, and requiring EEGSA to take drastic cost-cutting measures.¹¹ In view of the significant financial losses that Guatemala's arbitrary and unfair treatment had caused to TECO, as well as TECO's loss of faith in the transparency and fairness of Guatemala's implementation of its regulatory regime, TECO subsequently sold its interest in DECA II to EPM on 21 October 2010.¹²

6. In its Memorial on Annulment, Guatemala purports to summarize the dispute giving rise to the arbitration, as well as the Tribunal's Award, asserting that the dispute

⁶ TECO's Memorial ¶¶ 220-221; Award ¶¶ 270-287.

⁷ TECO's Memorial ¶¶ 84-219; Award ¶¶ 270-320.

⁸ Award ¶¶ 266-320.

⁹ TECO's Memorial ¶¶ 84-219; 259-280; Award ¶¶ 299-320.

¹⁰ TECO's Reply ¶¶ 164, 174; Award ¶¶ 299-320.

¹¹ See TECO's Memorial ¶ 32; Award ¶¶ 212, 225-226.

¹² See TECO's Memorial on Partial Annulment ¶ 34; Award ¶¶ 8, 236-237.

“concerned essentially whether the Guatemalan electricity regulator had acted properly under Guatemalan law in deciding how to establish tariffs for a Guatemalan electricity distribution company for the next five year period,”¹³ and that EEGSA essentially “disagreed with the manner in which the CNEE interpreted certain aspects of the procedure for the tariff review.”¹⁴ Guatemala further asserts that, under the legal and regulatory framework adopted by Guatemala, the CNEE has full discretion in conducting the distributor’s tariff review and in setting its VAD and tariffs,¹⁵ and that the CNEE thus was fully entitled to disregard EEGSA’s VAD study and to approve its own VAD study as the basis for setting EEGSA’s 2008-2013 VAD and tariffs, because EEGSA had not revised its VAD study in accordance with all of the comments made by the CNEE during the tariff review process.¹⁶

7. Guatemala also contends that the Guatemalan Constitutional Court upheld and affirmed “the legality of the conduct of the CNEE during the tariff-review process,”¹⁷ finding that “the CNEE had acted within the scope of its jurisdiction” in setting EEGSA’s 2008-2013 tariffs.¹⁸ According to Guatemala, the dispute submitted by TECO to arbitration thus “related merely to the correct interpretation and application of the Regulatory Framework, equating a possible error by the regulator in such interpretation and application of the regulation, already examined and ruled upon by the local courts, with a breach of the Treaty.”¹⁹

8. Guatemala further contends that the Tribunal’s decision that Guatemala had breached Article 10.5 of the DR-CAFTA “was based exclusively on CNEE Resolution 144-2008,” but that this Resolution affirmed that the Expert Commission’s report was advisory, and that the CNEE had acted in accordance with the regulatory framework.²⁰ According to Guatemala, the Tribunal found that “the breach was not [the CNEE’s] decision [to set the tariffs

¹³ Guatemala’s Memorial on Annulment ¶ 16.

¹⁴ *Id.* ¶ 31.

¹⁵ *Id.* ¶¶ 32-38.

¹⁶ *Id.* ¶¶ 39-44.

¹⁷ *Id.* ¶ 47.

¹⁸ *Id.* ¶ 48.

¹⁹ *Id.* ¶ 53.

²⁰ *Id.* ¶ 63.

on the basis of its own VAD study] *per se* but [rather] the fact that [the CNEE’s decision to do so] was not sufficiently reasoned,” and that “the CNEE had failed to provide sufficient motivation for what the Tribunal considered was a ‘disregard’ of the report of the Expert Commission.”²¹

9. Guatemala further contends that in awarding TECO historical damages, the Tribunal provided contradictory reasons and improperly ignored an alternative version of a VAD study presented by Guatemala’s industry expert, Mr. Damonte,²² and that the Tribunal’s award to TECO of 75 percent of its costs is contradictory and fails to consider the reasonableness of the costs.²³

10. As set forth below, Guatemala’s assertions not only are erroneous, but mischaracterize the nature of the dispute between the Parties, distort the content of TECO’s arguments in the underlying arbitration, disregard the Tribunal’s rejection of Guatemala’s arguments, and misconstrue the Tribunal’s reasoning in the Award.

A. The Legal And Regulatory Framework Adopted By Guatemala Guaranteed Both A Depoliticized Tariff Review Process And Fair Returns For Electricity Distributors

11. As TECO demonstrated in its Memorial on Partial Annulment, in order to attract much needed foreign investment in EEGSA and to maximize its privatization proceeds, Guatemala undertook to establish a new legal and regulatory framework, which would unbundle and depoliticize the generation, transmission, and distribution of electricity, and establish the conditions necessary to attract foreign investment in its failing electricity sector.²⁴ Accordingly, and as reflected in the promotional materials circulated by Guatemala during EEGSA’s privatization process, the new legal and regulatory framework adopted by Guatemala guaranteed both a depoliticized tariff review process and fair returns for electricity distribution companies, such as EEGSA, by limiting the role of the regulator in the calculation of the distributor’s

²¹ *Id.* ¶ 64.

²² *Id.* ¶¶ 16-23, 213-224, 238-241.

²³ *Id.* ¶¶ 24-27, 225-230, 235.

²⁴ TECO’s Memorial on Partial Annulment ¶ 10; Award ¶¶ 91-94.

VAD,²⁵ and by adopting the model efficient company approach using the new replacement value of the assets (“VNR”) for calculating the VAD.²⁶

12. Specifically, Guatemala represented that EEGSA’s VAD would be recalculated every five years by EEGSA based upon a VAD study prepared by an external engineering firm prequalified by the CNEE and selected by EEGSA; that the CNEE’s authority during the VAD-calculation process would be limited to reviewing and making observations on EEGSA’s VAD study; and that any differences between the CNEE and EEGSA regarding that study would be resolved by an impartial, three-person Expert Commission appointed by the parties.²⁷ Guatemala also represented that EEGSA’s VAD was to be calculated through the model efficient

²⁵ TECO’s Memorial on Partial Annulment ¶ 11; Award ¶¶ 126-132; Preliminary Information Memorandum (C-27); Sales Memorandum (C-29); Roadshow Presentation (C-28).

²⁶ TECO’s Memorial on Partial Annulment ¶ 13; Award ¶ 100.

²⁷ TECO’s Memorial on Partial Annulment ¶ 12; Award ¶¶ 106-112; LGE, Arts. 74-77 (C-17); Sales Memorandum, at 53 (C-29); Roadshow Presentation, at 19 (C-28); Preliminary Information Memorandum, at 9 (C-27). As TECO demonstrated in the arbitration, the language in the LGE; the Sales Memorandum which Guatemala approved and its agents distributed to potential foreign investors in EEGSA, including TECO’s parent company; the CNEE’s submissions to Guatemala’s Constitutional Court; and the CNEE’s own internal documents all indicated that the Expert Commission’s rulings were binding. *See* TECO’s Memorial ¶¶ 41-43; TECO’s Reply ¶¶ 37-50; TECO’s Post-Hearing Brief ¶ 85; TECO’s Memorial on Partial Annulment ¶ 59; LGE Art. 75 (“The Commission shall review the studies performed and may make comments on the same. In case of differences made in writing, the Commission and the distributors shall agree on the appointment of an Expert Commission made of three members, one appointed by each party and the third by mutual agreement. The Expert Commission shall rule on the differences in a period of 60 days counted from its appointment.”) (C-17); Sales Memorandum, at 49 (“The Commission will review those studies and can make observations, but in the event of discrepancy, a Commission of three experts will be convened to resolve the differences.”) (C-29); CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 (“In the event of discrepancies, pursuant to article 98 of the Regulations of the Law and 75 of the Law, an Expert Commission shall be constituted, which shall resolve in a term of 60 days”) (C-81); Email from A. Campos to A. Garcia, J.F. Orozco, M. Santizo, M. Peláez, M. Estrada, D. Herrera, M. Ixmucane Cordova dated 16 May 2007, attaching Terms of Reference for VAD Studies and Replies to EEGSA Comments, at 2 (stating that “[n]either does the LGE provide that eventual comments should be resolved by the Expert Commission, but instead only *irresolvable discrepancies*,” in other words, that “irresolvable discrepancies” would be subject to resolution by the Expert Commission) (emphasis added) (C-483); Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 (“On May 5, 2008, EEGSA submitted the Stage I.2 Report, the Final and amended version of the previous report, which gave rise to Resolution CNEE 96-2008, detailing the CNEE’s disagreements with the report and ordering the formation of the Expert Commission that is referred to in Article 75 of the LGE and that will be responsible for resolving disagreements between EEGSA and the CNEE.”) (C-494). Despite this overwhelming contemporaneous evidentiary record—and the lack of any contemporaneous, countervailing evidence—the Tribunal, relying upon the decisions of the Guatemalan Constitutional Court, concluded that the Expert Commission’s rulings were “not technically binding in the sense that the Expert Commission has no adjudicatory powers.” Award ¶ 670.

company approach, and that EEGSA's regulatory asset base would be determined using the VNR method.²⁸ This meant that EEGSA's VAD was to be calculated off of the regulatory asset base of a hypothetical model efficient company whose assets were new, rather than off of EEGSA's actual assets, which were dilapidated and in need of significant investment.²⁹

13. In its Memorial on Annulment, Guatemala contends that, under the legal and regulatory framework, each tariff review begins with the CNEE's adoption of the methodology or terms of reference ("ToR") for the distributor's VAD study, which VAD study allegedly provides a mere "*proposal* by the distribution company to the regulator as to the VAD that should be incorporated in the tariff to be charged to customers."³⁰ Guatemala further contends that these VAD studies initially are prepared by the distributor,³¹ but that they must "follow the [ToR] set out by the regulator,"³² and that, although the distributor can challenge the ToR before the Guatemalan courts, once those ToR are confirmed, they "become binding for the distributors."³³

14. Guatemala also asserts that, "[o]nce the VAD study is presented by the distribution company, the CNEE reviews it and may request, as the case may be, any necessary corrections for them to conform to the terms of reference;" that the distribution company "must incorporate the corrections;" and that, "if there are discrepancies between the CNEE and the distributor, [A]rticle 75 of the LGE provides that an expert commission may be established to issue a pronouncement."³⁴ Guatemala further asserts that the CNEE "is empowered to commission a study in parallel,"³⁵ and that "the Regulations expressly allow the CNEE to

²⁸ TECO's Memorial on Partial Annulment ¶ 13; Sales Memorandum, at 14 (C-29); Roadshow Presentation, at 19 (C-28); *see also* Preliminary Information Memorandum, at 9 (C-27).

²⁹ TECO's Memorial on Partial Annulment ¶ 13; Award ¶¶ 102-103.

³⁰ Guatemala's Memorial on Annulment ¶ 35 (emphasis added).

³¹ *Id.* ¶ 35.

³² *Id.* ¶ 36.

³³ *Id.* ¶ 37.

³⁴ *Id.* ¶ 38.

³⁵ *Id.* ¶ 39.

calculate the new tariffs on the basis of an independent expert report commissioned by it in the event that the distributor fails to incorporate its corrections to the study.”³⁶

15. Guatemala’s assertions are erroneous, and were expressly rejected by the Tribunal in its Award. Specifically, as the Tribunal found, the CNEE does “not enjoy unlimited discretion in fixing the tariff,” as Guatemala erroneously contends; to the contrary, “[t]he entire regulatory framework is based on the premise that it would not be so.”³⁷ As the Tribunal also found, “[b]y providing that the tariff would be established based on a VAD study realized by the distributor’s consultant, the regulatory framework guarantees that the distributor would have an active role in determining the VAD and prevents the regulator from determining it alone and discretionally, save in limited circumstances.”³⁸ As the Tribunal further observes, the LGE “clearly establishes the principle that the VAD component of the tariff would be established on the basis of a study realized by a consultant pre-qualified by the CNEE and chosen by the distributor,” and that, “[o]nce the VAD is so established, the CNEE can calculate and fix the tariffs.”³⁹ The Tribunal confirms that the CNEE thus does not have discretion under the regulatory framework “to reject without reasons the distributor’s study and – as the case may be – the Expert Commission’s pronouncements,” and that these principles were considered to be an “important element of the depolitization of the tariff review process” at the time of the privatization of Guatemala’s electricity sector.⁴⁰

16. The Tribunal also expressly rejected Guatemala’s argument that there was “no obligation to ensure that the VAD approved is the one determined by the distributor’s study.”⁴¹ As the Tribunal observes, “it would not make any sense for the regulatory framework to establish a process whereby the distributor is requested to submit a VAD study, the regulator is requested to comment on the same, and a neutral Expert Commission is called to make a pronouncement in

³⁶ *Id.* ¶ 44.

³⁷ Award ¶ 563.

³⁸ *Id.* ¶ 506.

³⁹ *Id.* ¶ 527.

⁴⁰ *Id.* ¶¶ 531, 533.

⁴¹ *Id.* ¶ 528.

case of disagreement, if the regulator had the discretion to disregard the distributor’s study.”⁴² As the Tribunal further notes, the amendment to “Article 98 RLGE is very clear in that the regulator may only disregard the distributor’s VAD study and apply its own unilateral VAD study in limited circumstances,”⁴³ and that, “if such circumstances are not met, the regulator has the obligation to set the VAD on the basis of the distributor’s study.”⁴⁴ As TECO has explained, and as the Tribunal confirmed, none of these circumstances applied in this case.⁴⁵ Moreover, according to the Tribunal, “[a]s to Guatemala’s view that the regulator was at liberty to fix the tariff based on a VAD study that did not reflect the Expert Commission’s pronouncements, it is also incorrect.”⁴⁶

17. In its Award, the Tribunal likewise rejected Guatemala’s argument that the ToR were mandatory and binding on EEGSA.⁴⁷ As the Tribunal observes, the ToR expressly provide that they are “guidelines;” the Tribunal noted that “such term 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.”⁴⁸ Indeed, the Tribunal 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,⁴⁹ “was designed precisely to allow the distributor’s consultant, under the control of the Expert Commission, to depart from the Terms of Reference

⁴² *Id.* ¶ 529.

⁴³ *Id.* ¶ 530. As TECO explained in its Memorial on Partial Annulment, the amendment to RLGE Article 98 was enacted shortly before EEGSA’s 2008-2013 tariff review was scheduled to commence and fundamentally changed the regulatory framework by subverting the requirement in LGE Article 74 that the distributor calculate the VAD through its own consultant prequalified by the CNEE, and by introducing the possibility for the very first time that the CNEE could calculate the distributor’s VAD itself on the basis of its own VAD study, albeit in limited circumstances. *See* TECO’s Memorial on Partial Annulment ¶ 18; Award ¶¶ 120-121, 625; Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) (C-104).

⁴⁴ Award ¶ 530.

⁴⁵ TECO’s Memorial ¶¶ 264-266, 272; Award ¶¶ 304-306, 704-707, 725-726, 731.

⁴⁶ Award ¶ 698.

⁴⁷ *Id.* ¶¶ 590-610.

⁴⁸ *Id.* ¶ 596.

⁴⁹ TECO’s Memorial on Partial Annulment ¶¶ 19-20; Award ¶¶ 169-170, 303.

in case the Terms of Reference would not comport with the regulatory framework, thus avoiding the delays and complications of a judicial challenge.”⁵⁰

18. Similarly, as TECO demonstrated, and as the Tribunal found, EEGSA was not required to incorporate the CNEE’s observations into its VAD study, as Guatemala asserts.⁵¹ In its Award, the Tribunal notes 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.”⁵² 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 immediately incorporate any such point of disagreement in its VAD study.”⁵³ 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.”⁵⁴ Guatemala’s contention that the distributor “must incorporate the corrections” from the CNEE thus is incorrect, and was expressly rejected by the Tribunal.⁵⁵

B. EEGSA’s 2008-2013 Tariff Review Was Conducted In An Unlawful, Arbitrary, And Non-Transparent Manner, To Obtain The Lowest VAD

19. As TECO demonstrated in its Memorial on Partial Annulment, several factors indicated that EEGSA’s VAD and resulting tariffs would increase significantly in its 2008-2013

⁵⁰ Award ¶ 609.

⁵¹ Guatemala’s Memorial on Annulment ¶ 38.

⁵² Award ¶ 589.

⁵³ *Id.* ¶ 579.

⁵⁴ *Id.* ¶ 580.

⁵⁵ Guatemala’s Memorial on Annulment ¶ 38.

tariff review, including that EEGSA's network had grown considerably; that the cost of materials used in electricity distribution, such as copper and aluminum, had far outpaced the rate of inflation from 2003 to 2008; and that electricity prices had increased, requiring the use of wider, more expensive cables to decrease electricity losses.⁵⁶ In order to prevent an inevitable, but politically undesirable, increase in EEGSA's VAD, the CNEE undertook from the very beginning of EEGSA's tariff review to manipulate and to control its outcome, culminating in the CNEE's decision to ignore both the Expert Commission's rulings and EEGSA's revised VAD study, and to approve its own VAD study, which neither EEGSA nor its prequalified consultant even had an opportunity to review.⁵⁷

20. In its Memorial on Annulment, Guatemala asserts that the VAD study submitted by EEGSA's independent consultant, Bates White, allegedly contained "numerous irregularities" and departed from the ToR on "numerous occasions," including, for example, that it allegedly did not contain a database of reference prices and did not link the data contained in the cells of the study's electronic spreadsheets, resulting in a "vastly over-valued VAD."⁵⁸ Guatemala further asserts that, "[i]n view of the reluctance of Bates White and EEGSA to incorporate the corrections indicated by the CNEE as required by the Regulation, the parties agreed to establish an expert commission to issue a pronouncement on the disagreements,"⁵⁹ and that "the report of the Expert Commission decided in favour of the CNEE with regard to most of the disagreements" between the Parties, such as with respect to the alleged "lack of linkage, traceability and auditability" of the Bates White study.⁶⁰ According to Guatemala, after "receiving the report of the Expert Commission and in the absence of any regulatory provision for further studies, the CNEE considered that: (a) in accordance with the Regulatory Framework, it could not use the Bates White study to establish the new tariffs; and (b) it would set EEGSA's

⁵⁶ See TECO's Reply ¶ 313.

⁵⁷ Award ¶¶ 164, 224-226, 315-317; see also TECO's Memorial on Partial Annulment ¶¶ 16-31.

⁵⁸ Guatemala's Memorial on Annulment ¶ 40.

⁵⁹ *Id.* ¶ 41.

⁶⁰ *Id.* ¶ 42.

VAD on the basis of the tariff study established by the independent and pre-qualified consultant Sigla, as permitted by the Regulatory Framework.”⁶¹

21. Guatemala further asserts that, even though “the Expert Commission’s report is not defined as binding; it is not contemplated that the distributor may submit an amended version of its VAD study after the Expert Commission’s report; and the Expert Commission has no other function than to issue a report on disagreements, not to approve the VAD study (which is a matter for the CNEE).”⁶² Guatemala complains that EEGSA and its consultant Bates White “nevertheless submitted a new unilateral VAD study on 28 July 2008 [*i.e.*, after the Expert Commission issued its Report] not contemplated by the Regulatory Framework arguing that it incorporated all the corrections indicated by the Expert Commission’s report,” and that this VAD study did not, in fact, incorporate many of the required corrections.⁶³ Guatemala also asserts that, while “EEGSA requested the local courts to endorse its interpretation of the Regulatory Framework,” those requests were rejected, and the Guatemalan Constitutional Court, in its 18 November 2009 decision, concluded not only that the Expert Commission’s report was not binding, but that “the CNEE had acted within the scope of its jurisdiction and that it ‘followed the process regulated by law’ during the tariff review, including in deciding which of the VAD studies, that of Bates White or that of Sigla, it should use to set the tariff.”⁶⁴

22. Guatemala’s assertions are erroneous, and were rejected by the Tribunal in its Award. As TECO has demonstrated, although the CNEE and its consultants had worked directly with EEGSA and its prequalified consultant during EEGSA’s 2003-2008 tariff review,⁶⁵ the CNEE held only one meeting with EEGSA and Bates White during EEGSA’s 2008-2013 tariff review to discuss EEGSA’s Stage A Report, following which neither the CNEE nor its consultants submitted any comments for several months.⁶⁶ Bates White nonetheless finished all

⁶¹ *Id.* ¶ 42.

⁶² *Id.* ¶ 44.

⁶³ *Id.* ¶ 45.

⁶⁴ *Id.* ¶¶ 46, 48.

⁶⁵ TECO’s Memorial ¶¶ 74-75, 82; Award ¶¶ 144-149.

⁶⁶ TECO’s Memorial ¶¶ 110-114; Award ¶¶ 171-174.

nine stage reports on time, and EEGSA delivered the complete VAD study, along with revised versions of each stage report, to the CNEE on 31 March 2008, as scheduled.⁶⁷ In addition, after receiving the CNEE's observations on its VAD study, Bates White responded to each of the CNEE's observations as required, either by revising its VAD study to incorporate its observations or by explaining the reasons that justified excluding them.⁶⁸ Because Bates White did not accept all of the CNEE's observations, and because the CNEE did not accept Bates White's justifications, the CNEE called for the establishment of an Expert Commission under LGE Article 75 to "decide on the discrepancies" between the parties.⁶⁹

23. As TECO remarked throughout the arbitration, the very fact that the CNEE had called for the establishment of an Expert Commission demonstrated that the CNEE recognized that it lacked the authority, under the laws and regulations, to simply unilaterally impose the VAD that it wanted on EEGSA.⁷⁰ Likewise, as TECO explained, because Bates White expressly disagreed with many of the CNEE's observations and thus refused to implement them into its VAD study, Respondent's argument in the arbitration that the Expert Commission was established for the sole purpose of determining whether the Bates White VAD study incorporated the CNEE's observations was disingenuous; there was no dispute at the time that Bates White had expressly disagreed with the CNEE's observations, and that the Expert Commission would be established to resolve those disagreements.⁷¹

24. As TECO explained in its Memorial, despite the CNEE's interference in the Expert Commission process, including its attempts to rely upon a hastily-enacted amendment to allow itself to unilaterally appoint the presiding member of the Expert Commission and to improperly influence the Expert Commission through *ex parte* communications with its own appointee,⁷² the Expert Commission ultimately ruled against the CNEE on several key

⁶⁷ TECO's Memorial ¶ 118; Award ¶ 185.

⁶⁸ TECO's Memorial ¶ 122; Award ¶ 188.

⁶⁹ TECO's Memorial ¶ 124; Award ¶¶ 190-207.

⁷⁰ TECO's Post-Hearing Reply ¶ 91.

⁷¹ TECO's Memorial ¶¶ 118-125, 193; TECO's Post-Hearing Reply ¶¶ 87-89; Award ¶¶ 546-581.

⁷² TECO's Memorial ¶¶ 133-135, 267; TECO's Reply ¶¶ 138-140; Award ¶¶ 310-313.

discrepancies, including the improper calculation of the FRC (the Capital Recovery Factor, which converts the VNR into cash flow payments to the distributor), which the CNEE had devised with its consultant specifically to decrease EEGSA's VAD and tariffs.⁷³

25. As TECO also demonstrated in the arbitration, and as the Tribunal confirmed, EEGSA's consultant, Bates White, submitted a revised VAD study to the CNEE, which fully incorporated each of the Expert Commission's decisions.⁷⁴ As the CNEE's own documents reflect, however, the CNEE reviewed the Expert Commission's report, and concluded that complying with the Expert Commission's decisions would substantially increase EEGSA's VAD and tariffs.⁷⁵ 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.⁷⁶ The CNEE consequently proceeded to ignore the Expert Commission's report, as well as EEGSA's revised VAD study, and to approve its own VAD study, which intentionally did not comply with the Expert Commission's decisions and instead applied many of the CNEE's inputs that had been expressly rejected by the Expert Commission, as the basis for setting EEGSA's 2008-2013 tariffs.⁷⁷

26. The Tribunal further found that the "regulator's decision to reject the Bates White study and apply the Sigla study was not based on an alleged failure by Bates White to incorporate the Expert Commission's pronouncements,"⁷⁸ and that Guatemala's contentions regarding EEGSA's alleged failure to incorporate the Expert Commission's decisions were "unconvincing."⁷⁹ The Tribunal also rejected as baseless Guatemala's assertions regarding the

⁷³ TECO's Memorial ¶¶ 159-162; Award ¶¶ 297, 726, 735.

⁷⁴ TECO's Memorial ¶¶ 187-188; Award ¶¶ 297, 731.

⁷⁵ TECO's Reply ¶¶ 164, 174; Award ¶¶ 690-695.

⁷⁶ Award ¶ 695.

⁷⁷ TECO's Memorial ¶¶ 189-199; Award ¶¶ 222-224, 664-665.

⁷⁸ Award ¶ 704.

⁷⁹ *Id.* ¶ 705.

alleged lack of linkage of the data in EEGSA's revised VAD study,⁸⁰ as well as Guatemala's complaints that the study was "overinflated" and that certain reference prices used in the study were excessive," finding that the explanations contained therein were not "unjustified or unreasonable."⁸¹

27. The Tribunal concluded that, "[a]fter careful review of the evidence, [it was] not convinced that the Bates White 28 July study failed to incorporate the Expert Commission's pronouncements or that there [was] any reason to depart from such pronouncements."⁸² In other words, the Tribunal held that (i) the CNEE did not have any valid reasons to depart from the rulings of the Expert Commission, and (ii) EEGSA's revised VAD study properly implemented the Expert Commission's rulings. The Tribunal thus concluded that an assessment of "what the tariffs should have been had the CNEE complied with the regulatory framework . . . is properly made on the basis of the Bates White's July 28, 2008 [revised VAD] study."⁸³

C. Guatemala's Arbitrary And Unjustified Conduct Violated Its Obligation To Accord TECO's Investment In EEGSA Fair And Equitable Treatment Under Article 10.5 Of The DR-CAFTA

28. As TECO explained in its Memorial on Partial Annulment, the Tribunal held in its Award that the actions taken by Guatemala during EEGSA's 2008-2013 tariff review, culminating in its decision to reject without any valid reasons both the Expert Commission's decisions and EEGSA's revised VAD study, and to impose its own VAD study on EEGSA, reflected a willful disregard of the regulatory framework and constituted arbitrary treatment in breach of "elementary standards of due process in administrative matters," in violation of its obligation to grant fair and equitable treatment under Article 10.5 of the DR-CAFTA.⁸⁴ In so

⁸⁰ *Id.* ¶ 706. Not only did TECO demonstrate that the Bates White report was "linked," "auditable," and "traceable," but TECO also demonstrated that the CNEE's own allegedly independent study, prepared by Sigla, contained the same alleged defects relating to linkage and traceability that Guatemala, in the arbitration, complained about with respect to the Bates White report. *See* TECO's Reply ¶ 177; TECO's Post-Hearing Brief ¶ 157.

⁸¹ Award ¶ 705.

⁸² *Id.* ¶ 731; *see also* TECO's Memorial on Partial Annulment ¶¶ 40-41, 65.

⁸³ Award ¶ 742.

⁸⁴ *Id.* ¶ 711.

holding, the Tribunal rejected Guatemala's objection that the Tribunal lacked jurisdiction *ratione materiae* over TECO's claim, because TECO's claim allegedly related only to a mere domestic regulatory dispute regarding the proper interpretation of Guatemalan law, which already had been decided by the Guatemalan courts.⁸⁵ As the Tribunal concluded, "this dispute is about whether the Respondent breached its obligations under the minimum standard of treatment," and thus "is an international dispute in which the Arbitral Tribunal will be called to apply international law."⁸⁶ The Tribunal further found that Guatemala's breach had "caused damages to the Claimant, in respect of which the Claimant is entitled to compensation,"⁸⁷ and awarded TECO historical damages for the period from 1 August 2008, when the CNEE arbitrarily imposed the Sigla VAD on EEGSA, until 21 October 2010, when TECO sold its investment as a result of Guatemala's breach, in the full amount claimed.⁸⁸ The Tribunal also awarded TECO 75 percent of its costs.

29. In its Memorial on Annulment, Guatemala asserts that, contrary to the Tribunal's conclusions, TECO's claim under Article 10.5 of the DR-CAFTA concerned nothing more than a mere domestic regulatory dispute regarding the proper interpretation of Guatemalan law,⁸⁹ and that the Tribunal's finding on liability "was based exclusively on CNEE Resolution 144-2008," which "was based on the premise that the Expert Commission's report was advisory, and that the report had confirmed that the Bates White study had deviated from the terms of reference."⁹⁰ Guatemala also asserts that the Tribunal improperly awarded damages to TECO for harm caused by acts other than the allegedly limited violation of the Treaty by Guatemala, and that, in assessing damages, the Tribunal improperly ignored an alternative VAD study presented by Guatemala's industry expert, Mr. Damonte.⁹¹ Finally, Guatemala asserts that the amount of TECO's costs was unreasonable and that the Tribunal's 75 percent cost award to TECO is

⁸⁵ *Id.* ¶¶ 437-484.

⁸⁶ *Id.* ¶ 467.

⁸⁷ *Id.* ¶ 711.

⁸⁸ *Id.* ¶ 742.

⁸⁹ Guatemala's Memorial on Annulment ¶ 53.

⁹⁰ *Id.* ¶ 63.

⁹¹ *Id.* ¶¶ 213-224, 238-241.

contradictory in that Guatemala, not TECO, allegedly prevailed in the arbitration, and, under the principle that costs follow the event, TECO should not have been awarded costs.⁹² Guatemala's assertions are erroneous, and mischaracterize the content of the Tribunal's Award.

30. First, as TECO has explained, its claim for breach of the fair and equitable treatment standard was not based upon a mere regulatory dispute over the proper interpretation of Guatemalan law, as Guatemala contends; to the contrary, TECO's claims arose out of Guatemala's deliberate and calculated actions taken in contravention of its prior representations;⁹³ its fundamental changes to the regulatory framework, which was adopted specifically to induce foreign investment in its failing electricity sector;⁹⁴ and its arbitrary and bad faith conduct taken in connection with EEGSA's 2008-2013 tariff review to decrease EEGSA's VAD.⁹⁵ In addition, as the record confirms, TECO expressly asked the Tribunal in the arbitration 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 TECO's investment in EEGSA fair and equitable treatment.⁹⁶ This is confirmed by the Tribunal in its Award.

31. Observing that TECO's "case is based in large part on the assertion that the CNEE willfully and without reasons disregarded the regulatory framework applicable to the setting of electricity tariffs in Guatemala, as established by the LGE and the RLGE,"⁹⁷ the Tribunal found that "[t]he present dispute essentially rests on an allegation of *abuse of power by the regulator and disregard of the regulatory framework* in the context of an administrative tariff review process."⁹⁸ The Tribunal further found that TECO "alleges that, by failing to abide by the conclusions of the Expert Commission and by unilaterally imposing a tariff based on its own

⁹² *Id.* ¶¶ 225-230.

⁹³ TECO's Memorial ¶¶ 259-280; Award ¶¶ 321-328.

⁹⁴ TECO's Memorial ¶¶ 259-280; Award ¶ 266.

⁹⁵ TECO's Memorial ¶¶ 259-280; Award ¶¶ 299-320.

⁹⁶ *See, e.g.*, TECO's Post-Hearing Brief ¶¶ 100, 164; TECO's Rejoinder on Jurisdiction and Admissibility dated 9 Nov. 2012 ("TECO's Rejoinder") ¶¶ 14-24; TECO's Reply ¶¶ 228-282.

⁹⁷ Award ¶ 497.

⁹⁸ *Id.* ¶ 489 (emphasis added).

consultant’s study, Guatemala repudiated the fundamental principles upon which the regulatory framework was based and upon which it relied when making the investment,”⁹⁹ and “that the CNEE failed to act in good faith in the process of establishing the tariff for 2008-2013, and acted in manifest breach of the law in disbanding the Expert Commission in July 2008.”¹⁰⁰ As the Tribunal thus confirms, TECO’s case was based “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 process,”¹⁰¹ and not on a mere difference of opinion regarding the proper interpretation of Guatemalan law, as Guatemala erroneously asserts.¹⁰²

32. Second, the Tribunal’s finding of liability was not based “exclusively on CNEE Resolution 144-2008,” as Guatemala argues.¹⁰³ To the contrary, as the Tribunal’s Award reflects, 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 EEGSA’s revised VAD study.¹⁰⁴ 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.”¹⁰⁵ 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,”¹⁰⁶ and that, based on the contemporaneous evidence, 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 [the CNEE’s] behavior.”¹⁰⁷

⁹⁹ *Id.* ¶ 460.

¹⁰⁰ *Id.* ¶ 461.

¹⁰¹ *Id.* ¶ 473 (emphasis added).

¹⁰² *See, e.g.*, Guatemala’s Memorial on Annulment ¶ 53.

¹⁰³ *Id.* ¶ 63.

¹⁰⁴ Award ¶¶ 690-711.

¹⁰⁵ *Id.* ¶¶ 690-691 (emphasis added).

¹⁰⁶ *Id.* ¶ 690.

¹⁰⁷ *Id.* ¶ 690.

33. The Tribunal further found 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.”¹⁰⁸ Contrary to Guatemala’s contentions, these findings do not relate to the content of Resolution No. 144-2008, but rather to the CNEE’s conduct and failure to accord due process to EEGSA during its 2008-2013 tariff review.

34. As to damages, the Tribunal properly found that TECO suffered historical damages in the full amount claimed.¹⁰⁹ Contrary to Guatemala’s contentions, the Tribunal’s reasoning regarding historical damages is internally consistent, and the Tribunal’s treatment of Mr. Damonte’s testimony was not improper. Finally, as regards costs, contrary to Guatemala’s contentions, the amount of TECO’s costs was not unreasonable, and, as is evident from the Award, the Tribunal’s allocation of costs is fully consistent with the Tribunal’s assessment of the Parties’ relative success in the case.¹¹⁰

III. LEGAL STANDARDS APPLICABLE TO ANNULMENT

35. It is well established that the annulment procedure under Article 52 of the ICSID Convention is not an appeal;¹¹¹ to the contrary, it is a limited remedy, and is confined to the five grounds listed in Article 52(1), each of which concerns the integrity of the arbitral process.¹¹² As

¹⁰⁸ *Id.* ¶ 688.

¹⁰⁹ *Id.* ¶ 742. As noted above, the Tribunal’s denial of TECO’s damages for loss upon the sale of TECO’s shares is the subject of TECO’s application for partial annulment of the Award. *See* TECO’s Memorial on Partial Annulment § IV.

¹¹⁰ Award ¶¶ 769-779.

¹¹¹ *See* 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); *see also* Guatemala’s Memorial on Annulment ¶ 69 (stating that the “annulment recourse is not an appeal mechanism and the role of annulment committees is not to review the merits of an award, in order to correct its findings of fact or law”).

¹¹² *See, e.g., Soufraki v. UAE*, Decision on Annulment, ¶ 23 (CL-N-132); *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment of 10 July 2014 (“*Alapli v. Turkey*, Decision on Annulment”), ¶ 32 (RL-51); *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment dated 13 Jan. 2015 (“*Iberdrola v. Guatemala*, Decision on Annulment”), ¶ 74 (CL-N-153).

the *ad hoc* committee in *Wena v. Egypt* confirmed, “the remedy of Article 52 is in no sense an appeal;” an *ad hoc* committee’s “power for review” thus “is limited to the grounds of annulment as defined in this provision... [which] are to be interpreted neither narrowly nor extensively.”¹¹³

36. It also is well established that an *ad hoc* committee thus 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.¹¹⁴ In this regard, the *ad hoc* committee in *MINE v. Guinea* correctly observed that “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.”¹¹⁵ Similarly, the *ad hoc* committee in *MTD v. Chile* noted that an annulment committee “cannot substitute its determination on the merits for that of the tribunal. . . . All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one.”¹¹⁶ These principles recently were confirmed by the *ad hoc* committees in *Alapli v. Turkey* and in *Iberdrola v. Guatemala*. As the *ad hoc* committee in *Alapli v. Turkey* remarked, it is not within the power of the *ad hoc* committee “to review the substantive correctness of the Award, both in fact and in law;” instead, the *ad hoc* committee “may only examine whether the standards of procedural integrity of the underlying proceeding were adhered to.”¹¹⁷ In *Iberdrola v. Guatemala*, the *ad hoc* committee similarly affirmed that “a ruling on the substantive correctness of the award is out of place in a decision on annulment,”¹¹⁸ and that “annulment deals only with the legitimacy of the decision-making process, not its merits.”¹¹⁹

¹¹³ *Wena v. Egypt*, Decision on Annulment, ¶ 18 (CL-N-144).

¹¹⁴ See 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).

¹¹⁵ *MINE v. Guinea*, Decision on Annulment, ¶ 4.04 (CL-N-137).

¹¹⁶ *MTD v. Chile*, Decision on Annulment, ¶ 54 (CL-N-138).

¹¹⁷ *Alapli v. Turkey*, Decision on Annulment, ¶ 33 (RL-51).

¹¹⁸ *Iberdrola v. Guatemala*, Decision on Annulment, ¶ 74 (CL-N-153).

¹¹⁹ *Id.* ¶ 74 (CL-N-153).

37. There is no dispute between the parties with regards to the legal standards of failure to state reasons and serious departure from a fundamental rule of procedure.¹²⁰

38. As noted by TECO in its Memorial on Partial Annulment, Article 52(1)(e) of the ICSID Convention provides that an award may be annulled when it has failed to state the reasons on which it is based.¹²¹ As TECO explained, *ad hoc* committees consistently have held that an award is subject to annulment when it does not allow the reader (and, specifically, the parties) to follow the tribunal’s reasoning, including where the award omits to provide any reasons or provides reasons that are insufficient, inadequate, or contradictory.¹²² TECO also explained that the requirement to provide reasons extends to the tribunal’s duty to consider or otherwise respond to the arguments and evidence presented by the parties, and that, as the *ad hoc* committee in *Wena Hotels v. Egypt* ruled, where the tribunal omitted to decide a question submitted to it, to the extent that such omission may affect the reasoning supporting the award, the award is subject to annulment.¹²³

39. As also noted by TECO in its Memorial on Partial Annulment, Article 52(1)(d) of the ICSID Convention provides that an award may be annulled when the tribunal seriously departed from a fundamental rule of procedure.¹²⁴ As TECO explained, among those

¹²⁰ See Guatemala’s Memorial on Annulment ¶ 180 (stating that “the total absence of reasons, as well as insufficient, inadequate or contradictory reasoning, may constitute a ground for annulment” and that “[a]n award must allow the reader to understand how the Tribunal went from the initial facts to its conclusions”) (internal citations omitted); *id.* ¶¶ 236-237 (stating that fundamental rules of procedure include the parties’ rights to be heard and to have an equal opportunity to present their cases and, like TECO, citing *Wena v. Egypt*, Decision on Annulment, ¶ 58 (CL-N-144/RL-64)).

¹²¹ ICSID Convention, Art. 52(1)(e) (“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: . . . (e) that the award has failed to state the reasons on which it is based”).

¹²² See TECO’s Memorial on Partial Annulment ¶¶ 85-87 (citing SCHREUER COMMENTARY ART. 52, p. 1003 ¶ 363 (CL-N-146), *Rumeli v. Kazakhstan*, Decision on Annulment, ¶ 104 (CL-40), *MINE v. Guinea*, Decision on Annulment, ¶ 5.09 (CL-N-137), *Soufraki v. UAE*, Decision on Annulment, ¶¶ 122-123 (CL-N-132), *Caratube v. Kazakhstan*, Decision on Annulment, ¶ 102 (CL-N-127)).

¹²³ See TECO’s Memorial on Partial Annulment ¶ 88 (citing *Wena v. Egypt*, Decision on Annulment, ¶ 101 (CL-N-144)).

¹²⁴ See ICSID Convention, Art. 52(1)(d) (“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: . . . (d) that there has been a serious departure from a fundamental rule of procedure”).

fundamental rules of procedure is the right to be heard,¹²⁵ and the treatment of evidence and burden of proof.¹²⁶ As TECO also explained, *ad hoc* committees have considered a departure from a fundamental rule of procedure to be “serious” when the departure is substantial and deprived the party of the benefit or protection which the rule was intended to provide.¹²⁷ TECO further explained that the departure is serious when it caused the tribunal to reach a substantially different result from the one it would have otherwise reached; however, the applicant is not required to prove that the tribunal necessarily would have changed its conclusion had the fundamental rule in question been observed.¹²⁸

40. While the parties thus are in agreement with respect to the legal standards governing the grounds for annulment for failure to state reasons and serious departure from a fundamental rule of procedure, TECO disputes Guatemala’s description of the manifest excess of powers legal standard.¹²⁹ There does not appear to be any dispute between the parties that, as TECO explained, this ground for annulment encompasses situations where a tribunal exceeds or fails to exercise its jurisdiction, or fails to apply the law agreed upon by the parties.¹³⁰ As TECO also explained, 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.¹³¹

41. Relying upon secondary sources, Guatemala asserts that the “control function of annulment is particularly important in cases of deficient decisions of jurisdiction”¹³² and that *ad*

¹²⁵ See TECO’s Memorial on Partial Annulment ¶¶ 81-82.

¹²⁶ See *id.* ¶ 83.

¹²⁷ See *id.* ¶ 84 (citing *MINE v. Guinea*, Decision on Annulment, ¶ 5.05 (CL-N-137)).

¹²⁸ See *id.* ¶ 84 (citing *Wena v. Egypt*, Decision on Annulment, ¶ 58 (CL-N-144) and *Pey Casado v. Chile*, Decision on Annulment, ¶ 80 (CL-N-143)).

¹²⁹ 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”).

¹³⁰ See TECO’s Memorial on Partial Annulment ¶¶ 75-78; Guatemala’s Memorial on Annulment ¶ 77 (stating that a “manifest excess of powers exists when an arbitral tribunal exceeds the limits of the jurisdiction it has been granted, or when it fails to apply the law applicable to the dispute”) (internal citations omitted).

¹³¹ See TECO’s Memorial on Partial Annulment ¶¶ 79-80.

¹³² Guatemala’s Memorial on Annulment ¶ 70; see also *id.* ¶ 71 (similar).

hoc committees “can and shall conduct a thorough review of jurisdictional issues.”¹³³ To the extent that Guatemala suggests 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, or that the requirement that the excess of powers be “manifest” does not extend to jurisdictional issues, Guatemala is mistaken, for the following reasons.

42. First, the plain language of Article 52(1)(b) of the ICSID Convention does not provide for a heightened level of scrutiny or a wider latitude to annul awards in respect of matters of jurisdiction, and neither does it dispense with the requirement that an excess of powers as regards jurisdiction be “manifest.”¹³⁴

43. Second, as the Centre explained in its Background Paper on Annulment, “*ad hoc* Committees have acknowledged the principle specifically provided by the Convention that the Tribunal is the judge of its own competence,” and, “[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.’”¹³⁵

44. Indeed, as the following examples demonstrate, *ad hoc* committees have rejected the notion that decisions on jurisdiction require greater scrutiny than other decisions:

- In *Azurix v. Argentina*, the *ad hoc* committee remarked that “in cases where there is any uncertainty or doubt as to whether or not a tribunal has jurisdiction, that question falls to be settled by the tribunal itself in exercise of its competence-competence under that provision,”¹³⁶ and, for that reason, “Article 52(1)(b) does not provide a mechanism for *de novo* consideration of, or an appeal against, a decision of a tribunal under Article 41(1) after the tribunal has given its final

¹³³ See *Id.* ¶ 81.

¹³⁴ 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”).

¹³⁵ INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, BACKGROUND PAPER ON ANNULMENT FOR THE ADMINISTRATIVE COUNCIL OF ICSID, 10 Aug. 2012, ¶ 89 (CL-N-147).

¹³⁶ *Azurix v. Argentina*, Decision on Annulment, ¶ 67 (CL-N-124).

award.”¹³⁷ The committee concluded that it is “only where the tribunal has *manifestly* acted without jurisdiction that an ad hoc committee can intervene under Article 52(1)(b).”¹³⁸

- In *SGS v. Paraguay*, the *ad hoc* committee observed that “[u]nder Article 41 of the ICSID Convention, the Tribunal shall be the judge of its own competence, and thus its decision on the scope of its jurisdiction cannot be reviewed *de novo* by an Annulment Committee.”¹³⁹ Thus, the committee held that “there is no difference in the standard of review applicable to a claim of manifest excess of powers on the basis of jurisdiction or on the merits.”¹⁴⁰
- In *Lucchetti v. Peru*, the *ad hoc* committee stated similarly that “the wording of Article 52(1)(b) is general and makes no exception for issues of jurisdiction,” and “a request for annulment is not an appeal, which means that there should not be a full review of the tribunal’s award.”¹⁴¹ The committee also concluded that “[o]ne general purpose of Article 52, including its sub-paragraph (1)(b), must be that an annulment should not occur easily,” and, “[f]rom this perspective, the Committee considers that the word ‘manifest’ should be given considerable weight also when matters of jurisdiction are concerned.”¹⁴²
- In *MCI v. Ecuador*, the *ad hoc* committee concluded that “[i]t makes no difference that the issue in this case is about the Tribunal’s jurisdiction, since jurisdiction does not give the ad hoc Committee a wider competence to assess the validity of the award under Article 52 but must be dealt with as any other issue.”¹⁴³ The committee also remarked that the “standards for reviewing the Tribunal’s decision about competence are . . . the same as those which *ad hoc* committees should apply when they review any other matters.”¹⁴⁴
- In *Soufraki v. UAE*, the *ad hoc* committee stated that “the requirement that an excess of power must be ‘manifest’ applies equally if the question is one of jurisdiction,” and “[o]nly if an ICSID tribunal commits a manifest excess of

¹³⁷ *Id.* ¶ 68 (CL-N-124).

¹³⁸ *Id.* ¶ 68 (CL-N-124) (emphasis in original).

¹³⁹ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment of 19 May 2014 (“*SGS v. Paraguay*, Decision on Annulment”), ¶ 114 (CL-N-156).

¹⁴⁰ *Id.* ¶ 114 (CL-N-156).

¹⁴¹ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment of 5 Sept. 2007 (“*Lucchetti v. Peru*, Decision on Annulment”), ¶ 101 (RL-60).

¹⁴² *Id.* ¶ 101 (RL-60).

¹⁴³ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment of 19 Oct. 2009 (“*MCI v. Ecuador*, Decision on Annulment”), ¶ 55 (RL-62).

¹⁴⁴ *Id.* ¶ 55 (RL-62).

power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment.”¹⁴⁵

- In *Alapli v. Turkey*, the *ad hoc* committee stated that “[w]ith respect to the failure to exercise a jurisdiction which a tribunal did possess, the standards to be employed are identical,” that the “excess of powers must be manifest, meaning evident, obvious and clear on its face,” and that “the ICSID Convention does not draw any distinction between jurisdictional excesses and other types of excesses that a tribunal may commit.”¹⁴⁶

45. For the above reasons, the notions that the Committee should apply a heightened 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, or that the Committee has a wider latitude to annul the Tribunal’s decision on jurisdiction than its decisions regarding other matters, are without basis.

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

46. As set forth above, the Tribunal rejected Guatemala’s jurisdictional objections, and held that it had jurisdiction *ratione materiae* over the dispute.¹⁴⁷ In its Memorial on Annulment, Guatemala contends that, in so holding, “the Tribunal exceeded its powers by exercising jurisdiction over a merely regulatory dispute under local law, ignoring the fundamental basis of the claim, applying no test *prima facie*, and merely accepting [TECO]’s characterization of such claim.”¹⁴⁸ Guatemala further contends that, in rejecting its jurisdictional objection that TECO “had submitted a merely regulatory dispute without examining either the Treaty that conferred jurisdiction on the Arbitral Tribunal or the fundamental basis of [TECO]’s claims,” the Tribunal “failed to give reasons as to how it reached those conclusions, in breach of the ICSID Convention.”¹⁴⁹

¹⁴⁵ *Soufraki v. UAE*, Decision on Annulment, ¶ 119 (CL-N-132).

¹⁴⁶ *Alapli v. Turkey*, Decision on Annulment, ¶ 238 (RL-51).

¹⁴⁷ *See supra* ¶ 28; Award ¶¶ 437-488.

¹⁴⁸ Guatemala’s Memorial on Annulment ¶ 111.

¹⁴⁹ *Id.* ¶ 196.

47. According to Guatemala, the Tribunal “effectively skipped the entire analysis on the matter of its jurisdiction,” and “omitted examining the Treaty and presenting an examination of the facts and circumstances specific to the case enabling the Tribunal to claim jurisdiction over [TECO]’s dispute as an international – as opposed to a domestic – claim.”¹⁵⁰ Guatemala further asserts that “[t]he Tribunal did not discuss at all the distinction between a claim under domestic law and one under international law,”¹⁵¹ and failed to apply the *prima facie* test properly, by failing to analyze whether TECO’s “allegations and characterizations have a real basis,” in view of the specific facts of the case.¹⁵² Guatemala also asserts that the Tribunal rejected Guatemala’s jurisdictional arguments “without giving substantive reasons other than plain refusal,” and without providing any explanation as to how it reached its conclusion.¹⁵³ Guatemala’s assertions are baseless, and its request that the Committee annul the Tribunal’s decision on jurisdiction thus should be denied, as set forth below.

48. First, as the Tribunal’s Award plainly reflects, the Tribunal did not “effectively skip[] the entire analysis on the matter of its jurisdiction,” and “omit[] examining the Treaty.”¹⁵⁴ Nor did the Tribunal fail to “discuss at all the distinction between a claim under domestic law and one under international law,” as Guatemala contends.¹⁵⁵ To the contrary, in determining whether it had jurisdiction under the DR-CAFTA and the ICSID Convention, the Tribunal first observed that there was no dispute that TECO’s “30 percent shareholding in EEGSA qualifie[d] as an investment pursuant to Article 10.28 of CAFTA-DR,” which, as the Tribunal noted, includes “as an investment any asset that an investor owns or control[s], including shares in an enterprise.”¹⁵⁶ The Tribunal further observed that there similarly was no dispute that TECO’s 30

¹⁵⁰ *Id.* ¶ 95.

¹⁵¹ *Id.* ¶ 96.

¹⁵² *Id.* ¶ 106.

¹⁵³ *Id.* ¶¶ 195, 196.

¹⁵⁴ *Id.* ¶ 95.

¹⁵⁵ *Id.* ¶ 96.

¹⁵⁶ Award ¶ 438.

percent “shareholding in EEGSA qualifie[d] as an investment under Article 25.1 of the ICSID Convention,” or that TECO itself qualified as an investor under the DR-CAFTA.¹⁵⁷

49. Having established that TECO and its shareholding in EEGSA thus were entitled to protection under the DR-CAFTA and the ICSID Convention, the Tribunal proceeded to examine whether it had jurisdiction *ratione materiae* over the dispute.¹⁵⁸ Guatemala complains, however, that, in so doing, the Tribunal failed to examine Article 10.16.1(a)(i)(A) of the DR-CAFTA,¹⁵⁹ and failed to recognize that Guatemala’s consent to arbitration as reflected in this provision “did not refer to just any type of claim, but only to those claims concerning a violation by the Guatemalan State of investment protections established by the Treaty,”¹⁶⁰ and that Guatemala’s consent thus did not extend to TECO’s claim, which allegedly was “based merely on local law.”¹⁶¹ Guatemala’s complaints are incorrect.

50. Article 10.16.1(a)(i)(A) of the DR-CAFTA provides that, “[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: the claimant, on its own behalf, may submit to arbitration under this Section a claim that the respondent has breached an obligation under Section A” of the Treaty, which includes the obligation to accord fair and equitable treatment.¹⁶² As Guatemala’s own pleadings reflect, 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.¹⁶³ There thus was no need for the Tribunal to analyze Article 10.16.1(a)(i)(A) in detail in its Award, nor was there any need for the Tribunal to refer to or quote this provision, as Guatemala erroneously asserts.¹⁶⁴

¹⁵⁷ *Id.* ¶¶ 439, 440.

¹⁵⁸ *Id.* ¶¶ 444-465.

¹⁵⁹ Guatemala’s Memorial on Annulment ¶ 94; *see also id.* ¶ 183.

¹⁶⁰ *Id.* ¶ 91.

¹⁶¹ *Id.* ¶ 91.

¹⁶² DR-CAFTA, Art. 10.16.1(a)(i)(A).

¹⁶³ Guatemala’s Rejoinder ¶ 31.

¹⁶⁴ Guatemala’s Memorial ¶ 94.

51. Moreover, as Guatemala’s pleadings reflect, Guatemala argued in the arbitration that, pursuant to Article 10.16.1(a)(i)(A), TECO could “only submit to arbitration a claim in which it is alleged that the Guatemalan state violated one of the investment protection standards established by the Treaty;” “[i]n other words, Guatemala’s consent to arbitration, and therefore the jurisdiction *ratione materiae* of this Tribunal, does not extend to just any type of claim; rather, it encompasses only those claims that genuinely involve violations of the substantive provisions of the Treaty.”¹⁶⁵ As the Award reflects, the Tribunal addressed this objection in full.

52. In its Award, the Tribunal expressly disagreed with Guatemala’s argument that TECO’s claim was no more than a “domestic dispute on the interpretation of Guatemalan law.”¹⁶⁶ The Tribunal correctly endorsed TECO’s view that the dispute was about 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.”¹⁶⁷ As the Tribunal remarked, the fact that the Tribunal would “have to decide certain points of interpretation of the regulatory framework by applying Guatemalan law, does not and cannot deprive the Arbitral Tribunal of its jurisdiction.”¹⁶⁸ The Tribunal further observed that “Article 42(1) of the ICSID Convention is very clear in that international tribunals can and must apply the laws of the host State to the questions in dispute that are submitted to such law,”¹⁶⁹ and that, although the Tribunal would “have to apply Guatemalan law to some of the questions in dispute, 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.”¹⁷⁰ The Tribunal thus duly considered

¹⁶⁵ Guatemala’s Rejoinder ¶ 32.

¹⁶⁶ Award ¶ 466.

¹⁶⁷ *Id.* ¶ 467.

¹⁶⁸ *Id.* ¶ 468.

¹⁶⁹ *Id.* ¶ 469.

¹⁷⁰ *Id.* ¶ 470.

the distinction between a claim under domestic law and one under international law, and concluded (correctly) that TECO had submitted a claim under international law.¹⁷¹

53. Second, in determining whether it had jurisdiction *ratione materiae* over the dispute, the Tribunal did not improperly apply the *prima facie* test to TECO's allegations.¹⁷² To the contrary, as TECO demonstrated in the arbitration, in assessing its jurisdiction *ratione materiae*, a tribunal must determine whether the facts, as alleged by the claimant, "fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to."¹⁷³ As the tribunal in *Bayindir v. Pakistan* explained, "[i]n performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment [of] whether the facts alleged may constitute breaches."¹⁷⁴ The tribunal in *Telefónica v. Argentina* articulated the standard as follows:

As to the *legal foundation* of the case, in accordance with accepted judicial practice, the Tribunal must evaluate whether those facts, when established, namely the unilateral changes of the legal regime just mentioned and their alleged negative impact on Telefónica's investment, could possibly give rise to the Treaty breaches that the Claimant alleges, and which the Tribunal is competent to pass judgment upon. In other words, those facts, if proved to be true, must be 'capable' of falling within the provision of the BIT and of having caused or constituting treaty breaches as alleged by the Claimant. It is of course a question of the merits as to whether the alleged facts do constitute breaches of the BIT for which the Respondent must be held liable.¹⁷⁵

¹⁷¹ *Id.* ¶ 466.

¹⁷² *See id.* ¶¶ 444-465.

¹⁷³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 Nov. 2005 ("*Bayindir v. Pakistan*, Decision on Jurisdiction"), ¶ 197 (CL-84); *see also Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 Apr. 2005 ("*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).

¹⁷⁴ *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶ 197 (CL-84).

¹⁷⁵ *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006, ¶ 56 (internal citations omitted) (emphasis in original) (CL-96).

54. TECO further demonstrated that, in applying the *prima facie* test, a tribunal “must not address the merits of the claims, but it must satisfy itself that it has jurisdiction over the dispute, as presented.”¹⁷⁶ As the tribunal in *Siemens v. Argentina* observed, “the Tribunal 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.”¹⁷⁷

55. Consistent with this jurisprudence, the Tribunal noted in its Award that, “[i]n order to assess whether it has jurisdiction to decide the present dispute, the Arbitral Tribunal must determine whether the facts alleged by the Claimant are capable, if proven, of constituting breaches of the Respondent’s international obligations under CAFTA-DR,” and that, “[a]s found by many arbitral tribunals, in performing this task, the Arbitral Tribunal applies a *prima facie* test.”¹⁷⁸ Analyzing TECO’s submissions, the Tribunal found that TECO “alleges 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 its investment,”¹⁷⁹ and “that the CNEE failed to act in good faith in the process of establishing the tariff for 2008-2013, and acted in manifest breach of the law in disbanding the Expert Commission in July 2008.”¹⁸⁰

56. Applying the *prima facie* test to the allegations advanced by TECO, the Tribunal properly held that TECO had “made such allegations that are such, if proved, as to establish a

¹⁷⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 31 Jan. 2006, ¶ 137 (observing that this principle “has been recognized both by the International Court of Justice and by Arbitral Tribunals in many cases”) (CL-67); see TECO’s Reply ¶¶ 283-287; TECO’s Post-Hearing Reply ¶¶ 7-10.

¹⁷⁷ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 Aug. 2004, ¶ 180 (CL-94); see also *Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. Republic of Ecuador* [II], PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility of 27 Feb. 2012, ¶ 4.8 (rejecting Ecuador’s submission that the claimants “must already have established their case with a 51% chance of success, i.e. on a balance of probabilities,” preferring instead the claimants’ submission that “their case should be ‘decently arguable’ or that it has ‘a reasonable possibility as pleaded’”) (CL-85); see TECO’s Reply ¶¶ 283-287; TECO’s Post-Hearing Reply ¶¶ 7-10.

¹⁷⁸ Award ¶¶ 444, 445.

¹⁷⁹ *Id.* ¶ 460.

¹⁸⁰ *Id.* ¶ 461.

breach of Guatemala’s obligations under the minimum standard.”¹⁸¹ As the Tribunal further remarked, 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 behavior would constitute a breach of the minimum standard.”¹⁸²

57. While Guatemala itself recognizes in its Memorial that, “[o]f course if [TECO]’s allegations were proven right in light of its characterization of the claim, then the Tribunal would have jurisdiction,”¹⁸³ it nonetheless argues that, “in this case, the Treaty dispute could not be distinguished from the domestic dispute,” and that the Tribunal should have looked beyond TECO’s characterization of its claim, as other tribunals have done in cases involving purely contractual claims.¹⁸⁴ Guatemala’s argument is meritless. Not only did the Tribunal expressly reject Guatemala’s characterization of TECO’s claim as involving no more than a mere domestic regulatory dispute over the proper interpretation of Guatemalan law,¹⁸⁵ but there is *no* legal authority that supports Guatemala’s suggestion that claims arising from so-called domestic regulatory disputes are analogous to claims arising from mere contractual breaches.¹⁸⁶

58. As Claimant explained in the arbitration, although investment treaty tribunals, as a general rule, do not have jurisdiction over purely contractual claims,¹⁸⁷ this is based upon the distinction between action taken by the State in its sovereign capacity and action taken by the State in its capacity as an ordinary contracting party. As the tribunal in *Impregilo v. Pakistan*

¹⁸¹ *Id.* ¶ 464.

¹⁸² *Id.* ¶ 465.

¹⁸³ Guatemala’s Memorial on Annulment ¶ 106.

¹⁸⁴ *Id.* ¶¶ 107, 108.

¹⁸⁵ Award ¶ 466.

¹⁸⁶ Guatemala’s Memorial on Annulment ¶ 107.

¹⁸⁷ *See, e.g., El Paso Energy Int’l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 Apr. 2006, ¶ 65 (observing that an investment treaty tribunal “has jurisdiction over treaty claims and cannot entertain purely contractual claims which do not amount to claims for violations of the BIT”) (CL-118); *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction dated 6 Aug. 2003, ¶ 162 (finding that the tribunal did not have jurisdiction over contract claims “which do not also constitute or amount to breaches of the substantive standards of the BIT”) (CL-117).

explained, “[o]nly the State in the exercise of its sovereign authority (*‘puissance publique’*), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.”¹⁸⁸ The *Azinian* tribunal similarly found that NAFTA Chapter Eleven does not “allow investors to seek international arbitration for mere contractual breaches,”¹⁸⁹ as this would elevate “a multitude of *ordinary* transactions with public authorities into potential international disputes.”¹⁹⁰ There is no such distinction for so-called domestic regulatory disputes, which, by definition, involve the State acting in its sovereign capacity; as the Tribunal correctly found, whether a State’s regulatory actions constitute a treaty breach thus is a merits decision, and not a jurisdictional one.¹⁹¹ Indeed, as TECO noted in the arbitration, 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.¹⁹²

59. Notably, although Guatemala relied extensively in the arbitration upon the tribunal’s decision on jurisdiction in *Iberdrola* for the principle that mere domestic regulatory disputes fall outside the jurisdiction of an ICSID tribunal, the tribunal’s decision in that case was grounded not on any legal conclusion to that effect, but rather on its finding that the claimant had asked the tribunal 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.”¹⁹³ As the *Iberdrola* tribunal observed, “*according to the claim of the Claimant*, [the tribunal] would have to act as regulator, as administrative entity and court of

¹⁸⁸ *Impregilo v. Pakistan*, Decision on Jurisdiction, ¶ 260 (CL-63).

¹⁸⁹ *Robert Azinian and others. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award of 1 Nov. 1999 (“*Azinian v. Mexico*, Award”), ¶ 87 (RL-2).

¹⁹⁰ *Id.* (emphasis added).

¹⁹¹ See Award ¶ 470.

¹⁹² See TECO’s Reply ¶¶ 285-287.

¹⁹³ Claimant’s Post-Hearing Brief ¶ 48; Rejoinder on Jurisdiction ¶¶ 25-30; *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award of 17 Aug. 2012 (“*Iberdrola v. Guatemala*, Award”) ¶¶ 353-354 (CL-N-154).

instance, to define” various issues of Guatemalan law.¹⁹⁴ 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,”¹⁹⁵ and that “[f]rom the way the debate and hearing developed and from the issues raised, this process was more like an international trade arbitration than one of investment.”¹⁹⁶ Indeed, Guatemala emphasized in that case that Iberdrola had not made *any reference* to international law during its hearing.¹⁹⁷ As TECO demonstrated in the arbitration, no such findings could be made in this case.¹⁹⁸

60. This was confirmed by the Tribunal in its Award. As the Tribunal observed, “[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.”¹⁹⁹ The Tribunal properly remarked that its “task is to resolve the present dispute on the basis of the legal arguments and the evidence presented before it,” and concluded that, “[a]s a consequence, the Arbitral Tribunal, in making its findings on jurisdiction, cannot and will not rely on the findings of the Iberdrola tribunal.”²⁰⁰

61. In its Decision on Annulment, the *ad hoc* committee in *Iberdrola* confirmed that the tribunal had “declined its jurisdiction based on the view that the Claimant had failed to present clear and concrete reasoning as to which of Guatemala’s acts of authority could amount to Treaty violations under international law.”²⁰¹ Interpreting the award in the *Iberdrola* case, the *ad hoc* committee remarked that, “[a]ccording to the Award, even though Iberdrola did refer to Treaty provisions and standards, its allegations consisted exclusively of differences as to the

¹⁹⁴ *Iberdrola v. Guatemala*, Award, ¶ 354 (emphasis added) (CL-N-154).

¹⁹⁵ *Id.* ¶ 352.

¹⁹⁶ *Id.* ¶ 353.

¹⁹⁷ *Id.* ¶ 261.

¹⁹⁸ See TECO’s Post-Hearing Reply ¶¶ 20-21.

¹⁹⁹ Award ¶ 486.

²⁰⁰ *Id.* ¶ 487.

²⁰¹ *Iberdrola v. Guatemala*, Decision on Annulment, ¶ 88 (CL-N-153).

interpretation of Guatemalan domestic law.”²⁰² While criticizing the “particularly high” pleading requirements imposed by the tribunal,²⁰³ the *ad hoc* committee thus concluded that “it was the Tribunal’s view that ICSID lacked jurisdiction and the Tribunal lacked competence because Iberdrola’s application could only be framed under domestic law, and the Treaty only vests the Tribunal with jurisdiction over violations of international law.”²⁰⁴ The *ad hoc* committee thus rejected the argument advanced by Guatemala in TECO’s arbitration that the *Iberdrola* tribunal’s decision on jurisdiction was premised on any principle regarding mere domestic regulatory disputes; 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,”²⁰⁵ and that “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.”²⁰⁶ 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,²⁰⁷ and 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-law one.”²⁰⁸ As a result, the committee concluded that “Iberdrola’s application for annulment challenges a general thesis posed in the

²⁰² *Id.* ¶ 88 (CL-N-153).

²⁰³ *Id.* ¶¶ 93-94 (CL-N-153). Notably, the *ad hoc* committee remarked that “[i]t is perfectly conceivable for another tribunal dealing with this very same case to have found that, at least *prima facie*, the case involved disputes concerning the BIT protection standards.” *Id.* ¶¶ 113, 133.

²⁰⁴ *Id.* ¶ 88 (CL-N-153).

²⁰⁵ *Id.* ¶ 86 (CL-N-153).

²⁰⁶ *Id.* ¶ 86 (CL-N-153).

²⁰⁷ *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).

²⁰⁸ *Id.* ¶ 82 (CL-N-153).

abstract to decline jurisdiction, namely the Tribunal’s assumption that domestic-law issues preclude international ones, a thesis not put forth in the Award.”²⁰⁹

62. Finally, the Tribunal did not “wrongly affirm[] jurisdiction on a mere domestic law claim, already resolved by the local courts,”²¹⁰ as Guatemala contends, nor is Guatemala correct in arguing that, where “the dispute concerns a mere disagreement between an investor with the actions of an administrative body that has already been the subject of a final decision by the local judicial authorities, the only available claim that may be brought forward is a claim for denial of justice.”²¹¹ As TECO demonstrated in the arbitration, denial of justice is but a subset of the international minimum standard, and one way in which a State may violate its obligation to accord fair and equitable treatment.²¹² TECO further demonstrated that, even in cases where the State’s domestic courts are implicated, investment treaty tribunals have recognized that a breach of the fair and equitable treatment standard can occur separate and apart from any treatment accorded by the domestic courts.²¹³

63. In *Vivendi II*, for example, the tribunal 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.”²¹⁴ As the tribunal observed, if it “were to restrict the claims of unfair and [in]equitable treatment to circumstances in which Claimants

²⁰⁹ *Id.* ¶ 89 (CL-N-153).

²¹⁰ Guatemala’s Memorial on Annulment ¶ 113.

²¹¹ *Id.* ¶ 109.

²¹² TECO’s Reply ¶ 272; TECO’s Post-Hearing Brief ¶ 49; TECO’s Post-Hearing Reply ¶ 18; DR-CAFTA, Art. 10.5(1) (“Each Party shall accord to covered investments treatment in accordance with customary international law, *including* fair and equitable treatment and full protection and security”) (emphasis added) (CL-1); *compare id.*, Art. 10.5(2)(a) (“‘fair and equitable treatment’ *includes* the obligation not to deny justice”) (emphasis added), *with id.*, Art. 10.5(2)(b) (“‘full protection and security’ *requires* each Party to”) (emphasis added); *see also ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award of 18 May 2010 (“*ATA Construction v. Jordan*, Award”), ¶¶ 121-128 (CL-58).

²¹³ *See* TECO’s Reply ¶ 275; TECO’s Post-Hearing Reply ¶ 18.

²¹⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 (“*Vivendi II*”), ¶ 7.4.10 (CL-18).

have also established a denial of justice, it would eviscerate the fair and equitable treatment standard.”²¹⁵

64. Similarly, in *ATA Construction v. Jordan*, the tribunal found that Jordan had violated the fair and equitable treatment standard by retroactively applying a new law that had extinguished the investor’s right to arbitrate, which the tribunal deemed to be an “integral part” of the claimant’s investment contract, even though the Jordanian Court of Cassation had rendered a decision confirming the annulment of the claimant’s arbitration award and extinguishing the arbitration agreement under Jordanian law.²¹⁶ As the tribunal observed, the “operation of Jordanian law opened the door to the adjudication of the parties’ dispute before the Jordanian State courts, depriving the Claimant of its legitimate reliance on the Arbitration Agreement in the Contract of 2 May 1998.”²¹⁷ In so ruling, the tribunal recalled “the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law,” as well as “the unanimous award rendered in the *Desert Line Co. v. Yemen* case,” which emphasized that “State authorities are estopped from undertaking any act that contradicts what they previously accepted as obligations incumbent upon them in a given context.”²¹⁸ While the tribunal found that the extinguishing of the claimant’s arbitration agreement by the Jordanian courts had violated the fair and equitable treatment standard, the tribunal rejected the claimant’s denial of justice claim, finding that the Court’s “actions could hardly be said to have constituted abusive misconduct, bad faith or a denial of justice.”²¹⁹

65. As TECO explained, other investment treaty tribunals likewise have confirmed that they are not required to follow domestic court decisions to determine whether applicable treaty provisions have been violated.²²⁰ In *CME v. Czech Republic*, for example, the Czech

²¹⁵ *Id.* ¶ 7.4.11.

²¹⁶ *ATA Construction v. Jordan*, Award, ¶¶ 121-128 (CL-58).

²¹⁷ *Id.* ¶ 124.

²¹⁸ *Id.* ¶ 122 (internal citations omitted).

²¹⁹ *Id.* ¶ 123.

²²⁰ TECO’s Rejoinder on Jurisdiction ¶ 53.

Republic argued that ongoing civil litigation in the Czech courts should determine whether the host-State's Media Council had made an appropriate decision not to allow the investor use the license to operate a television station.²²¹ The tribunal rejected the Czech Republic's argument, finding that the claimant was not required to wait for the Czech Supreme Court's decision before initiating arbitration proceedings, because "[t]he outcome of the civil court proceedings is irrelevant to the decision on the alleged breach of the Treaty by the Media Council acting in concert with the Respondent."²²²

66. Similarly, in *EDF v. Argentina*, the fact that the Supreme Court of Mendoza had rejected all claims brought by the claimants' distribution company in the Argentine courts did not render the *EDF* tribunal without jurisdiction to consider the claimants' fair and equitable treatment claim, nor did it limit the claimants' fair and equitable treatment claim to a claim for denial of justice.²²³ In so ruling, the tribunal observed that "the legality of Respondent's acts under national law does not determine their lawfulness under international legal principles," and that "[t]he fact that the Argentine Supreme Court has vested Respondent with robust authority during national economic crises does not change the Tribunal's analysis."²²⁴ The tribunal also noted that Article 27 of the 1969 Vienna Convention precludes a host-State from "invok[ing] the provisions of its internal law as justification for its failure to perform,"²²⁵ and that Article 3 of the ILC Articles provides that the characterization of an act of a State as internationally wrongful "is not affected by the characterization of the same act as lawful by internal law."²²⁶

²²¹ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 Sept. 2001, ¶ 415 (CL-16).

²²² *Id.* ¶ 415.

²²³ *EDF Int'l S.A., Saur Int'l S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012 ("*EDF v. Argentina*, Award"), ¶ 1095 (CL-86).

²²⁴ *Id.* ¶ 907.

²²⁵ *Id.* ¶ 905.

²²⁶ *Id.* ¶ 906; see also *Ioannis Kardossopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction ("*Kardossopoulos v. Georgia*, Decision on Jurisdiction"), ¶ 146 (holding that "whatever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law") (CL-88).

67. TECO further demonstrated that it is well established that a State cannot use its own judicial system to insulate itself from a violation of an international law obligation.²²⁷ As the tribunal in *Azinian* noted, “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.”²²⁸

68. In its Award, the Tribunal rejected Guatemala’s jurisdictional arguments, 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,”²²⁹ 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 process.”²³⁰ 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.”²³¹

69. The Tribunal further noted that, while “[i]t is indeed true that the Guatemalan courts have decided some of the questions in dispute concerning the interpretation of the Guatemalan regulatory framework and the regularity of some of the CNEE’s decisions under such law,” “[i]t is also true that this Arbitral Tribunal will have to apply Guatemalan law to some of the regulatory aspects of the dispute, and that, in so doing, it may have to defer to the

²²⁷ TECO’s Reply ¶ 282; TECO’s Post-Hearing Reply ¶ 19.

²²⁸ *Azinian v. Mexico*, Award, ¶ 98 (RL-2); see also *ATA Construction v. Jordan*, Award, ¶ 122 (“[T]he Tribunal recalls the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law.”) (CL-58); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 Dec. 2002, ¶ 140 (“As the Respondent concedes, this Tribunal could find a [Treaty] violation even if Mexican courts uphold Mexican law...; this Tribunal is not bound by a decision of a local court if that decision violates international law.”) (RL-5); *Kardossopoulos v. Georgia*, Decision on Jurisdiction, ¶ 146 (holding that “whatever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law”) (internal citations omitted) (CL-88).

²²⁹ Award ¶ 472.

²³⁰ *Id.* ¶ 473.

²³¹ *Id.* ¶ 484.

decisions made by the Guatemalan courts when such aspects of the dispute are subject to Guatemalan law.”²³² The Tribunal emphasized, however, that its “task is fundamentally to assess the legal relevance of the facts under customary international law,” and that, “[a]s a consequence, although the decisions made by the Constitutional Court of Guatemala will have consequences on the findings that the Arbitral Tribunal will have to make under Guatemalan law, such circumstance cannot deprive the Arbitral Tribunal of its jurisdiction to decide the case under international law.”²³³

70. The Tribunal, moreover, expressly disagreed with Guatemala’s argument that TECO had “ask[ed] it ‘to act as an appellate court of third or fourth instance in matters governed by Guatemalan law.’”²³⁴ As the Tribunal noted, its “task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law,” but rather is “to apply international law to the facts in dispute, including the content of Guatemalan law as interpreted by the Constitutional Court.”²³⁵ The Tribunal further noted that “the disputes resolved by the Guatemalan judiciary are not the same as the one which this Arbitral Tribunal now has to decide;” that the Tribunal “may of course give deference to what was decided as a matter of Guatemalan law by the Guatemalan Constitutional Court;” but that “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.”²³⁶

71. In asserting jurisdiction *ratione materiae* over the dispute, the Tribunal thus did not manifestly exceed its powers over a domestic regulatory dispute under local law, nor did the Tribunal ignore the fundamental basis of TECO’s claim; fail to apply the *prima facie* case; or fail to recognize that TECO’s “only claim . . . before an international tribunal would have been a claim for denial of justice,” as Guatemala erroneously contends.²³⁷ The Tribunal similarly did

²³² *Id.* ¶ 474.

²³³ *Id.* ¶ 475.

²³⁴ *Id.* ¶ 476.

²³⁵ *Id.* ¶ 477.

²³⁶ *Id.* ¶ 483.

²³⁷ Guatemala’s Memorial on Annulment ¶ 111.

not ignore the arbitration agreement, or fail to give reasons for how it had reached its conclusions on jurisdiction.²³⁸ To the contrary, as the Award reflects, the Tribunal properly applied the *prima facie* test to the allegations advanced by TECO in its pleadings, 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. There thus are no grounds to annul the Tribunal's decision to exercise jurisdiction over TECO's claim.

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

72. As set forth above, the Tribunal held that the actions taken by Guatemala during EEGSA's 2008-2013 tariff review, culminating in the decision to reject both the Expert Commission's decisions and EEGSA's revised VAD study, and to impose a punitively low VAD on EEGSA derived from the CNEE's own VAD study, which admittedly did not incorporate the Expert Commission's decisions and which EEGSA was not even permitted to review, reflected a willful disregard of the legal and regulatory framework, and constituted arbitrary treatment and a failure to accord due process in violation of Article 10.5 of the DR-CAFTA.²³⁹

73. In its Memorial on Annulment, Guatemala asserts that, in so holding, the Tribunal manifestly exceeded its powers, by allegedly failing to apply international law to the facts of the case,²⁴⁰ and reviewing and reversing the decisions of the Constitutional Court of Guatemala.²⁴¹ Guatemala further asserts that, in holding Guatemala liable, the Tribunal not only failed to state reasons with respect to the "test of applicable international law,"²⁴² but adopted contradictory reasoning, which amounted "to a lack of reasoning, and failure to state reasons."²⁴³ Guatemala's arguments are erroneous, and its request that the Committee annul the Tribunal's decision on the merits thus should be denied, as set forth below.

²³⁸ *Id.* ¶¶ 183, 196.

²³⁹ *See supra* ¶ 28; Award ¶¶ 707-711.

²⁴⁰ Guatemala's Memorial on Annulment ¶¶ 145-174, 178.

²⁴¹ *Id.* ¶¶ 114-144, 177.

²⁴² *Id.* ¶ 203.

²⁴³ *Id.* ¶ 212.

A. The Tribunal Applied International Law To The Facts Presented

74. In its Memorial, Guatemala contends that, in finding Guatemala liable under Article 10.5 of the DR-CAFTA, the Tribunal did not engage in any “international law analysis of the concepts of arbitrary conduct or due process, or of how a State measure can constitute either of them, in light of the facts of this case,” but instead “focused almost entirely on Guatemalan law.”²⁴⁴ According to Guatemala, “[i]nternational law was the primary applicable law in the case [as TECO] brought the claim under an international treaty seeking to hold Guatemala responsible internationally for the acts of its electricity regulator,” but “the Tribunal did not explain how it applied such international law.”²⁴⁵ Guatemala further argues that the “[f]ailure to apply the applicable law is a classic instance of manifest excess of powers,” as well as “a serious failure to state reasons, because there is an obvious lack of motivation for the finding of a breach of the Treaty (as opposed to a breach of domestic law),”²⁴⁶ and that the Tribunal “failed to provide any reasoning as to why a purely domestic law finding could equate to a Treaty breach—it simply made a leap in logic by equating a breach of the Regulatory Framework (characterized as a ‘wilful disregard’) with a breach of the Treaty—without more.”²⁴⁷ Guatemala further contends that the Tribunal did not “define the test of applicable international law,” or explain “how that test applie[d] to the facts of the case,” and that “nowhere in the Award is there an examination of the terms ‘arbitrariness’ or ‘due process’ under international law.”²⁴⁸ Guatemala’s arguments are erroneous, and belied by the plain language of the Tribunal’s Award.

75. First, 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.”²⁴⁹ In defining the applicable standard under Article 10.5, the Tribunal observed that “Article 10.5(2) provides that FET under

²⁴⁴ *Id.* ¶ 13.

²⁴⁵ *Id.* ¶ 14.

²⁴⁶ *Id.* ¶ 15.

²⁴⁷ *Id.* ¶ 15.

²⁴⁸ *Id.* ¶¶ 199, 203.

²⁴⁹ Award ¶ 447 (emphasis added).

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.’”²⁵⁰

76. Summarizing each Party’s arguments with respect to the content of the minimum standard of treatment,²⁵¹ the Tribunal found 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.”²⁵² Citing arbitral awards and commentaries discussing the content of the minimum standard, the Tribunal 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.”²⁵³ The Tribunal further noted 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.”²⁵⁴

77. The Tribunal also observed that, “pursuant to Article 10.5 of CAFTA-DR, 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 has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to

²⁵⁰ *Id.* ¶ 448 (emphasis omitted).

²⁵¹ *Id.* ¶¶ 449-453.

²⁵² *Id.* ¶ 454.

²⁵³ *Id.* ¶ 455.

²⁵⁴ *Id.* ¶ 456.

provide reasons for its decisions or disregarded its own rules.”²⁵⁵ The Tribunal further observed that, based upon such principles, “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.”²⁵⁶ 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.”²⁵⁷ 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,”²⁵⁸ 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.”²⁵⁹

78. Guatemala’s assertions that the Tribunal “did not define the test of applicable international law,” and that its “analysis of the content of the minimum standard of fair and equitable treatment is limited to” one brief statement, thus are baseless.²⁶⁰ The Tribunal not only defined the applicable legal standard under customary international law, but examined specifically how that standard would apply in the context of administrative proceedings, such as the tariff review process at issue in this case.²⁶¹

79. Guatemala’s complaint that the Tribunal failed to examine the terms “arbitrariness” or “due process,” and did not “even refer to the now classic definition of arbitrariness by the International Court of Justice in the *ELSI* case,” likewise is meritless.²⁶² As reflected in the Parties’ pleadings, both Parties referred to the *ELSI* case as setting forth the

²⁵⁵ *Id.* ¶ 457.

²⁵⁶ *Id.* ¶ 458.

²⁵⁷ *Id.* ¶ 587.

²⁵⁸ *Id.* ¶ 587.

²⁵⁹ *Id.* ¶ 587.

²⁶⁰ Guatemala’s Memorial on Annulment ¶¶ 197, 203.

²⁶¹ Award ¶¶ 457-458.

²⁶² Guatemala’s Memorial on Annulment ¶ 200.

applicable definition of arbitrariness under international law;²⁶³ there thus was no need for the Tribunal to discuss or to examine the *ELSI* case in its Award, which was not in dispute between the Parties. As elaborated above, moreover, in defining the applicable 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,”²⁶⁴ and that, “[i]n assessing whether there 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.”²⁶⁵ The Tribunal thus did examine the terms “arbitrariness,” and “due process,” and considered what actions would run afoul of those obligations in the context of the facts of the case, contrary to Guatemala’s assertions.

80. The same is true with respect to the case law cited by the Parties, and the submissions of the non-disputing State parties on the content of the minimum standard of treatment. In its Memorial, Guatemala complains that “[t]here is no analysis of the extensive case law cited by the Parties and no examination of the difference between the international minimum standard and the rule of fair and equitable treatment,” and that “the submissions of the non-disputing parties deserved no mention in the merits sections of the Award, except to just one reference to one of those submissions in a footnote.”²⁶⁶ These complaints are incorrect and irrelevant.

²⁶³ 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; Guatemala’s Rejoinder ¶¶ 165-166; Guatemala’s Post-Hearing Brief ¶¶ 274-278; Guatemala’s Post-Hearing Reply ¶ 147.

²⁶⁴ Award ¶ 587.

²⁶⁵ *Id.* ¶ 457. The Tribunal similarly did not need to analyze in depth the meaning of “abuse of power” in its Award, as Guatemala contends. Guatemala’s Memorial on Annulment ¶ 167. In its Award, the Tribunal observed that the dispute “essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process.” Award ¶ 489. As elaborated below, the Tribunal’s decision on liability rested upon its finding that the CNEE had repudiated “the two fundamental regulatory principles applying to the tariff review process” through its actions, and that such repudiation was “arbitrary and breache[d] elementary standards of due process in administrative matters.” *See infra* ¶ 83; *id.* ¶ 711. In other words, as is clear from the Tribunal’s Award, TECO alleged and the Tribunal found that the regulator had abused its power by acting arbitrarily, specifically by repudiating the fundamental principles underlying the tariff review process, and by breaching standards of due process.

²⁶⁶ Guatemala’s Memorial on Annulment ¶ 162.

81. As set forth above, the Tribunal not only relied directly upon relevant case law and commentary in defining the content of the minimum standard of treatment under Article 10.5, noting specifically that it agreed with the standard as articulated by “many arbitral tribunals and authorities,”²⁶⁷ but both Parties relied upon the very same case law regarding the minimum standard of treatment;²⁶⁸ there thus was no need for the Tribunal to engage in any further analysis of the case law presented by the Parties in their pleadings, as Guatemala erroneously contends.²⁶⁹ 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;²⁷⁰ there thus also was no need for the Tribunal to examine or to cite those submissions in its Award.

82. Second, applying the applicable standard to the facts of the case, the Tribunal held that, “in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission’s report, and in unilaterally imposing a tariff based on its own consultant’s VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.”²⁷¹ The Tribunal further 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 principles on the tariff review process in Guatemalan law.”²⁷² As the Tribunal observed, 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

²⁶⁷ Award ¶ 455.

²⁶⁸ 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.

²⁶⁹ Guatemala’s Memorial on Annulment ¶ 162.

²⁷⁰ 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.

²⁷¹ Award ¶ 664.

²⁷² *Id.* ¶ 682.

to provide valid reasons to that effect;” no such reasons, however, were provided.²⁷³ Thus, the Tribunal explained, “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 that “[t]he ‘preliminary review’ that the CNEE performed in less than one day was clearly insufficient to discharge that obligation.”²⁷⁴ As the Tribunal observed, 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.”²⁷⁵

83. In setting EEGSA’s 2008-2013 VAD and tariffs unilaterally, the Tribunal thus found that “the regulator ha[d] repudiated the two fundamental principles upon 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.”²⁷⁶ The Tribunal held 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.”²⁷⁷

84. As the Award reflects, in holding Guatemala liable, the Tribunal did not commit “serious omissions and shortcomings in reasoning,”²⁷⁸ nor did it simply “equate the breach of domestic law it had identified with a breach of international law without further discussion,”²⁷⁹ as Guatemala contends. To the contrary, the Tribunal examined the content of the minimum

²⁷³ *Id.* ¶ 683.

²⁷⁴ *Id.* ¶ 690.

²⁷⁵ *Id.* ¶ 690.

²⁷⁶ *Id.* ¶ 710.

²⁷⁷ *Id.* ¶ 711.

²⁷⁸ Guatemala’s Memorial on Annulment ¶ 203.

²⁷⁹ *Id.* ¶ 172.

standard of treatment obligation under Article 10.5 by reference to arbitral decisions, upon which both Parties had relied, and commentary; 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 providing any reasons the Expert Commission's Report, and unilaterally imposing a tariff based upon its own consultant's VAD calculation.²⁸⁰ In so finding, the Tribunal did not apply Guatemalan law, but rather international law to the facts presented.

85. The Tribunal, moreover, did not conflate "the concepts of a domestic and an international breach," nor did it fail to show how Guatemala's breach of the regulatory framework resulted in a breach of international law, as Guatemala asserts.²⁸¹ As elaborated above, the Tribunal found not only that there were no justifications or reasons for the CNEE's actions in adopting Resolution No. 144-2008; in disregarding the Expert Commission's Report; and in unilaterally imposing a tariff based upon its own consultant's VAD calculation, but that, in doing so, the CNEE had repudiated the two fundamental regulatory principles underlying the tariff review process.²⁸² 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."²⁸³ 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.

²⁸⁰ Award ¶ 664.

²⁸¹ Guatemala's Memorial on Annulment ¶¶ 169, 170.

²⁸² See *supra* ¶ 83; Award ¶¶ 664-665.

²⁸³ Award ¶ 587.

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

86. In its Memorial, Guatemala contends that international law “precludes *de facto* review of domestic decisions on questions of local law,”²⁸⁴ and that, because “an arbitral tribunal may not review decisions by national courts on local law matters,”²⁸⁵ it follows that a public authority cannot be found to “be in breach of international law for implementing a decision supported by its local courts unless the local courts’ decision itself is challenged under international law.”²⁸⁶ Guatemala further contends that, although the Tribunal recognized in its Award that it could not review the decisions of the Constitutional Court, it “did exactly the opposite in the Award,”²⁸⁷ and thus failed to respect “local judicial decisions on questions of local law.”²⁸⁸ Guatemala also contends that the Tribunal’s Award is “plainly contradictory,” because, “[o]n the one hand it states that decisions of the Constitutional Court cannot be reviewed, but then it condemns Guatemala because of a CNEE Resolution (Resolution 144-2008) that the Court expressly stated was in accordance with the Regulatory Framework.”²⁸⁹

87. Specifically, Guatemala argues that the Constitutional Court, in ruling on EEGSA’s *amparo* petitions under Guatemalan law, held that the CNEE had “acted within the scope of its powers and that it ‘followed the process regulated by law,’” finding that the Expert Commission’s report was non-binding; that the Expert Commission had been lawfully dissolved by the CNEE after it had issued that report; and that the CNEE could decide, in light of the report, to accept either EEGSA’s VAD study or its own consultant’s VAD study.²⁹⁰ According to Guatemala, the Tribunal thus “should not have resolved issues already settled by” the Constitutional Court, including whether the CNEE had willfully disregarded the fundamental principles of the regulatory framework, or whether the regulatory framework permitted the

²⁸⁴ Guatemala’s Memorial on Annulment ¶ 114.

²⁸⁵ *Id.* ¶ 115.

²⁸⁶ *Id.* ¶ 116.

²⁸⁷ *Id.* ¶¶ 118-119.

²⁸⁸ *Id.* ¶ 142.

²⁸⁹ *Id.* ¶ 212.

²⁹⁰ *Id.* ¶¶ 120-121, 123.

CNEE, in the circumstances of the case, to disregard EEGSA's VAD study and to approve its own consultant's VAD study.²⁹¹ Guatemala further asserts that "[t]he Tribunal's decision that Guatemala breached the international minimum standard of the Treaty was based solely on Resolution 144-2008," even though "Resolution 144-2008 and its compatibility with the Regulatory Framework had been precisely the object of the decision of the Constitutional Court,"²⁹² and that the Tribunal's decision on liability thus "necessarily implies a revision of the decisions of the Constitutional Court."²⁹³ Guatemala's arguments are erroneous, and mischaracterize the scope of both the Constitutional Court's decisions and the Tribunal's findings.

88. First, Guatemala's contention that a public authority cannot be found to "be in breach of international law for implementing a decision supported by its local courts unless the local courts' decision itself is challenged under international law,"²⁹⁴ is incorrect and was expressly rejected by the Tribunal in its Award.²⁹⁵ As set forth above, it is well established that a State cannot use its own judicial system to insulate itself from a violation of an international law obligation by validating its actions under national law,²⁹⁶ and that, as the tribunal in *EDF v. Argentina* observed, the legality of a State's "acts under national law does not determine their lawfulness under international legal principles."²⁹⁷

89. Applying these principles to this case, the Tribunal expressly disagreed with Guatemala's contention that, "in case of disagreement on the actions or decisions taken by the regulator 'the State cannot be held responsible [. . .] since another branch of the Government, the

²⁹¹ *Id.* ¶ 125.

²⁹² *Id.* ¶¶ 127-128.

²⁹³ *Id.* ¶ 137.

²⁹⁴ *Id.* ¶ 116.

²⁹⁵ *See supra* ¶¶ 62-66.

²⁹⁶ *See supra* ¶ 67; TECO's Post-Hearing Reply ¶ 19; TECO's Reply ¶ 282.

²⁹⁷ *EDF v. Argentina*, Award, ¶ 907 (CL-86); *see also id.* ¶¶ 905-906 (noting that Article 27 of the 1969 Vienna Convention precludes a host-State from "invok[ing] the provisions of its internal law as justification for its failure to perform," and that Article 3 of the ILC Articles "provides that the characterization of an act of a State as internationally wrongful is not affected by the characterization of the same act as lawful by internal law").

judiciary, has been called to intervene and has issued a decision on the matter.”²⁹⁸ The Tribunal correctly observed that “the disputes resolved by the Guatemalan judiciary are not the same as the one which this Arbitral Tribunal now has to decide,” and that, 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.”²⁹⁹

90. The Tribunal also expressly disagreed with Guatemala’s argument that the decisions of the Constitutional Court already had disposed of the dispute submitted by TECO to arbitration, finding 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.”³⁰⁰ As the Tribunal 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.”³⁰¹ The Tribunal thus found that it was “not bound by the Constitutional Court’s decisions,”³⁰² 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.”³⁰³

²⁹⁸ Award ¶ 482.

²⁹⁹ *Id.* ¶ 483.

³⁰⁰ *Id.* ¶ 516.

³⁰¹ *Id.* ¶ 517.

³⁰² *Id.* ¶ 518.

³⁰³ *Id.* ¶ 519.

91. Second, the Tribunal’s holding that Guatemala breached the minimum standard of treatment did not “reverse” the Constitutional Court’s rulings in EEGSA’s *amparo* proceedings, nor is the Tribunal’s reasoning contradictory, or based solely upon Resolution No. 144-2008, as Guatemala contends.³⁰⁴ As the Award reflects, the Tribunal found that the Constitutional Court had made two specific rulings.³⁰⁵ First, the Court ruled that “the CNEE was entitled to disband the Expert Commission on July 28, 2008,” that is, after the Expert Commission had issued its report on the discrepancies between the parties.³⁰⁶ 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 independent study.”³⁰⁷ With respect to this ruling, the Tribunal explained that, while the Court had decided that the CNEE was entitled to apply a tariff calculated on the basis of its own VAD study, “it only did so on the basis that, in Guatemalan law, an expert report cannot be binding and that the law reserves for the regulator the exclusive power to set tariffs.”³⁰⁸

92. Notably, the Tribunal found that 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.³⁰⁹ 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,”³¹⁰ 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.”³¹¹ The Tribunal further expressly noted that this

³⁰⁴ Guatemala’s Memorial on Annulment ¶¶ 128-129.

³⁰⁵ Award ¶ 512.

³⁰⁶ *Id.* ¶ 514.

³⁰⁷ *Id.* ¶ 513.

³⁰⁸ *Id.* ¶ 542.

³⁰⁹ *Id.* ¶ 540.

³¹⁰ *Id.* ¶¶ 543-544 (quoting Guatemala’s Post-Hearing Brief ¶ 62).

³¹¹ *Id.* ¶ 541.

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.”³¹²

93. Analyzing RLGE Article 98, 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.”³¹³ Indeed, the Tribunal agreed with TECO that a contrary reading of RLGE Article 98 would be nonsensical.³¹⁴ The Tribunal accordingly held 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 [to incorporate observations made by the CNEE into its VAD study] would arise.”³¹⁵

94. In its Award, the Tribunal also 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.”³¹⁶ 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 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.”³¹⁷ The Tribunal further observed that such a conclusion would be “manifestly at odds with the regulatory framework,”³¹⁸ as the entire regulatory framework is

³¹² *Id.* ¶¶ 543-544 (quoting Guatemala’s Post-Hearing Brief ¶ 62).

³¹³ *Id.* ¶ 589.

³¹⁴ *Id.* ¶¶ 579-580.

³¹⁵ *Id.* ¶ 589.

³¹⁶ *Id.* ¶ 545.

³¹⁷ *Id.* ¶ 562.

³¹⁸ *Id.* ¶ 562.

based upon the premise that “the regulator did not enjoy unlimited discretion in fixing the tariff.”³¹⁹

95. The Tribunal further noted 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.”³²⁰ 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.”³²¹ 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,”³²² 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.”³²³

96. Analyzing the evidence presented by the Parties, the Tribunal thus 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 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

³¹⁹ *Id.* ¶ 563.

³²⁰ *Id.* ¶ 563 (emphasis in original).

³²¹ *Id.* ¶ 564.

³²² *Id.* ¶ 564.

³²³ *Id.* ¶ 583 (emphasis added).

and in breach of the administrative process established for the tariff review.”³²⁴ As the Tribunal noted, “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.”³²⁵ In establishing EEGSA’s tariffs, the CNEE thus “failed without any reasons to take the Expert Commission’s pronouncements into account.”³²⁶

97. 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.”³²⁷ 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.”³²⁸ No such reasons, however, were provided in the CNEE’s Resolution No. 144-2008 or otherwise.³²⁹

98. In addition, separate and apart from Resolution No. 144-2008, the Tribunal 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

³²⁴ *Id.* ¶ 681 (emphasis in original).

³²⁵ *Id.* ¶ 678.

³²⁶ *Id.* ¶ 678.

³²⁷ *Id.* ¶¶ 679-680.

³²⁸ *Id.* ¶ 683.

³²⁹ *Id.* ¶ 683.

behavior.”³³⁰ As noted above, the Tribunal explained 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.”³³¹ As the Tribunal remarked, based on the contemporaneous evidence, 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 [the CNEE’s] behavior.”³³² Indeed, 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, as TECO had explained, 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.”³³³

99. 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 Commission’s conclusions and implement them in the VAD study.”³³⁴ 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.”³³⁵

100. Contrary to Guatemala’s contentions, none of these issues was decided by the Constitutional Court, nor was the evidence of the CNEE’s “preliminary review” of the Expert

³³⁰ *Id.* ¶¶ 690-691.

³³¹ *See supra* ¶ 32; Award ¶ 690.

³³² Award ¶ 690.

³³³ *Id.* ¶¶ 684-685; *see also* TECO’s Reply ¶¶ 87-88, 142, 160, 190; TECO’s Post-Hearing Brief ¶¶ 113.

³³⁴ Award ¶ 686.

³³⁵ *Id.* ¶ 688.

Commission’s report even submitted to the Court for its consideration.³³⁶ As set forth above, the Constitutional Court simply found that, under the laws and regulations, the CNEE had sole authority to set EEGSA’s new tariffs, and that it had not delegated that authority to the Expert Commission, whose report was not binding.³³⁷ It was on that basis that the Constitutional Court considered that the CNEE had acted “in accordance with the [] Law and Regulations.”³³⁸ 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.³³⁹

101. Moreover, in holding Guatemala liable under Article 10.5 of the DR-CAFTA, the Tribunal did not reverse or revise the Constitutional Court’s rulings; to the contrary, as the Award confirms, the Tribunal accepted and incorporated those rulings into its decision.³⁴⁰ Applying the applicable standard under customary international law to the facts presented, the Tribunal nonetheless held that the *process* by which EEGSA’s tariff had been established breached the minimum standard of treatment.³⁴¹ This issue was not even considered, much less decided by the Constitutional Court.³⁴² Contrary to Guatemala’s contentions, 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.³⁴³ As the Award confirms, the Tribunal did not reverse or revise the Constitutional Court’s

³³⁶ 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).

³³⁷ Award ¶ 542.

³³⁸ Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 13 (C-331).

³³⁹ Award ¶¶ 561, 564.

³⁴⁰ *Id.* ¶¶ 477, 483, 519.

³⁴¹ *Id.* ¶¶ 707-711.

³⁴² *See supra* ¶¶ 70, 94-95; Award ¶ 563.

³⁴³ Guatemala’s Memorial on Annulment ¶¶ 207, 208-209.

findings, or otherwise “ignore local judicial decisions on questions of local law;”³⁴⁴ rather, it found that Guatemala had violated its international law obligations under the Treaty.

102. In any event, 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. As the Tribunal correctly found, the decisions could not “have the effect of a precedent or have any *res judicata* effect in this arbitration,” and the Tribunal thus was “not bound by the Constitutional Court’s decisions.”³⁴⁵ 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.³⁴⁶ In addition, to the extent that the Tribunal’s interpretation of the Constitutional Court’s decisions were wrong—which it is not—this, as set forth above, would not provide a valid basis for annulment under ICSID Convention Article 52(1).³⁴⁷

103. Finally, Guatemala’s complaint that, in holding Guatemala liable under Article 10.5 of the DR-CAFTA, the Tribunal made several findings with respect to the regulatory framework, which “conform with the reasons of Judge Chacón’s dissenting opinion” in one of the Constitutional Court’s decisions, is irrelevant.³⁴⁸ As the Constitutional Court’s 18 November 2009 decision reflects, although the majority opinion does not address whether the CNEE’s application of amended RLGE Article 98 was proper, the dissenting opinion does address this issue, finding that the CNEE was not entitled under amended RLGE Article 98 to approve its own VAD study;³⁴⁹ because this issue, however, was not decided by the Constitutional Court in its majority opinion, the Tribunal’s holding does not contradict the Court’s decisions. The mere fact that some of the Tribunal’s analysis with respect to the regulatory framework is consistent with the opinion of the dissenting Constitutional Court judge does not mean that the Tribunal

³⁴⁴ *Id.* ¶ 142.

³⁴⁵ Award ¶ 518.

³⁴⁶ *See supra* ¶¶ 67, 88; TECO’s Post-Hearing Reply ¶ 19; TECO’s Reply ¶ 282.

³⁴⁷ *See supra* ¶ 36.

³⁴⁸ Guatemala’s Memorial on Annulment ¶ 130.

³⁴⁹ Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 22-23, 27-29 (C-331).

reversed or revised the Court's decisions. To the contrary, as the Award confirms, the Tribunal granted deference to the Constitutional Court's decisions in its Award.³⁵⁰

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

104. As explained in TECO's Memorial on Partial Annulment, the Tribunal properly found that, as a consequence of Guatemala's breach of the Treaty, TECO suffered losses, and awarded TECO historical damages 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, in the full amount claimed, *i.e.*, US\$ 21,100,552.³⁵¹

105. In determining the amount of damages, the Tribunal applied the methodology agreed by the Parties, *i.e.*, that damages should be calculated as the difference between the actual value of EEGSA reflecting Guatemala's unlawful conduct and a but-for scenario assessing EEGSA's value while assuming that Guatemala had not violated the Treaty.³⁵² The Parties essentially did not dispute valuation in the actual scenario,³⁵³ as that amount was reflected in the tariffs that EEGSA was actually collecting. The Tribunal thus focused on the Parties' valuations in the but-for scenario. Claimant presented its but-for valuation of EEGSA based on the

³⁵⁰ Award ¶¶ 477, 483, 519.

³⁵¹ See TECO's Memorial on Partial Annulment ¶¶ 64-66. The Tribunal's denial of TECO's damages for loss upon the sale of its shares in EEGSA is the subject of TECO's application for partial annulment of the Award. See TECO's Memorial on Partial Annulment § IV.

³⁵² See Award ¶¶ 719, 742; see also TECO's Memorial on Partial Annulment ¶¶ 35-41, 64-66; Kaczmarek I ¶¶ 126-129 (CER-2); Kaczmarek II ¶ 6 (CER-5); Abdala I ¶ 25 (RER-1). TECO's ultimate percentage ownership of EEGSA would then be taken into account to arrive at a damages amount.

³⁵³ See Award ¶ 750; TECO's Memorial on Partial Annulment ¶ 51; Abdala II ¶ 2 ("There [were] no major differences with [Mr. Kaczmarek] in the valuation of EEGSA in the actual scenario.") (RER-4); Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 13; TECO's Post-Hearing Brief ¶ 165; TECO's Post-Hearing Reply ¶ 153 ("At bottom, the only disagreement that Respondent's expert has with Claimant's damages analysis concerns the calculation of EEGSA's capital expenditures *in the but-for scenario.*") (emphasis added); Guatemala's Post-Hearing Brief ¶ 334 ("As explained during the Hearing, given that *the parties are essentially in agreement regarding EEGSA's value in the actual scenario*, the principal focus of their disagreement is the but for scenario.") (emphasis added); Guatemala's Post-Hearing Reply ¶ 161 (stating that the "truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM").

testimony of its quantum expert, Mr. Kaczmarek, who, in turn, relied upon Bates White’s 28 July 2008 VAD study, which Claimant had argued would have been used to set the tariffs had Guatemala not breached its Treaty obligations.³⁵⁴ Respondent, by contrast, relied upon its quantum expert, Dr. Abdala, whose valuation, in turn, was based on a VAD study prepared for the purposes of the arbitration by Guatemala’s industry expert, Mr. Damonte.³⁵⁵

106. The Tribunal properly held that because the study prepared by Mr. Damonte did not incorporate all of the Expert Commission’s rulings, it could not “usefully [be] refer[red] to . . . as a basis for assessing the but for scenario.”³⁵⁶ The Tribunal also held that “[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission’s pronouncements or that there is any reason to depart from such pronouncements.”³⁵⁷ The Tribunal thus proceeded to use Bates White’s 28 July 2008 VAD study and Mr. Kaczmarek’s analysis as the basis upon which to calculate EEGSA’s value in the but-for scenario and to award damages.³⁵⁸

107. Respondent’s stated two grounds for annulment of the Tribunal’s decision on quantum are meritless.

108. First, according to Respondent, a proper quantification of damages would have required a “review [by the Tribunal] of each of the Expert Commission’s findings and whether a regulator could reasonably have rejected such conclusion in exercise of its discretion.”³⁵⁹ Respondent asserts that the Tribunal allegedly held that the Treaty was violated solely by the CNEE’s failure to “provide sufficient motivation for its decision” to adopt the Sigla VAD study,

³⁵⁴ Guatemala asserts that “THG assumed in this future loss calculation that the 2008 tariffs would remain in place unaltered until the expiration of the concession which wholly ignores the Regulatory Framework and is irrelevant in light of its disposal of its interest to a buyer who knew that the tariffs would only apply until 2013.” Guatemala’s Memorial on Annulment ¶ 56. This is incorrect, as TECO explained in the arbitration and in its Memorial on Partial Annulment. *See* TECO’s Memorial on Partial Annulment ¶¶ 43-46, 101.

³⁵⁵ *See* Award ¶¶ 716-742; *see also* TECO’s Memorial on Partial Annulment ¶¶ 35-41, 64-66.

³⁵⁶ Award ¶ 727; *see also* TECO’s Memorial on Partial Annulment ¶¶ 40-41, 64.

³⁵⁷ Award ¶ 731; *see also* TECO’s Memorial on Partial Annulment ¶¶ 40-41, 65.

³⁵⁸ Award ¶¶ 728, 742; *see also* TECO’s Memorial on Partial Annulment ¶ 66.

³⁵⁹ Guatemala’s Memorial on Annulment ¶ 18.

rather than by the decision itself,³⁶⁰ and that the Tribunal confirmed that the Expert Commission's rulings were not binding on the CNEE, meaning that the CNEE had "discretion as to whether or not to incorporate each conclusion from the Expert Commission report and company study."³⁶¹ Respondent then concludes that the Tribunal should have determined whether the CNEE, in theory, could have rejected any of the Expert Commission's decisions consistent with the regulatory framework, rather than adopting the Expert Commission's rulings in their entirety for purposes of calculating EEGSA's valuation in the but-for scenario.³⁶² Respondent asserts that, as a consequence, the Tribunal ordered Guatemala to compensate TECO for damages caused by acts other than the allegedly limited violation of the Treaty by Guatemala.³⁶³ According to Respondent, this renders the Tribunal's reasoning concerning damages contradictory, requiring annulment of the section of the Award awarding TECO historical damages.³⁶⁴

109. Contrary to Respondent's argument, it is clear from the Award that the Tribunal considered that, although the Expert Commission's rulings were not binding *per se*, in the sense that the CNEE was not required to automatically implement them, the CNEE had the duty to give the Expert Commission's rulings "serious consideration" and could depart from them only if it had "*valid reasons*" to do so.³⁶⁵ Indeed, the Award states expressly that the Tribunal concluded that "[i]t is clear that the regulator did not enjoy unlimited discretion in fixing the tariff,"³⁶⁶ that the Constitutional Court's decision (addressed further above) "does not mean . . . that the CNEE had unlimited discretion to depart from [the Expert Commission's report] without

³⁶⁰ *Id.* ¶ 17 (emphasis omitted); *see also id.* ¶¶ 64, 214-217 (same).

³⁶¹ *See id.* ¶ 18; *see also id.* ¶¶ 216-218 (same).

³⁶² *Id.* ¶ 18; *see also id.* ¶ 219 (same).

³⁶³ *See id.* ¶¶ 19-20; *see also id.* ¶¶ 219-222, 234 (same).

³⁶⁴ *Id.* ¶¶ 19-20; *see also id.* ¶¶ 219-222, 234 (same).

³⁶⁵ Award ¶ 565 (emphasis added); *see also id.* ¶ 683 (stating that, once the CNEE "had received the Expert Commission's report, [the CNEE] 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") (emphasis added).

³⁶⁶ *Id.* ¶ 563.

valid reasons,”³⁶⁷ and that, “[a]s to Guatemala’s view that the regulator was at liberty to fix the tariff based on a VAD study that did not reflect the Expert Commission’s pronouncements, it is also incorrect.”³⁶⁸

110. In the circumstances of the case, the Tribunal held that Guatemala violated the Treaty when the CNEE “repudiated the two fundamental principles upon which the tariff review process regulatory framework is premised,” namely, that, save in limited circumstances, “the tariff would be based on a VAD calculation made by a prequalified consultant appointed by the distributor,” and that, “in case of a disagreement between the regulator and the distributor, such disagreement would be resolved having regard to the conclusions of a neutral Expert Commission.”³⁶⁹

111. In assessing the damages arising from Guatemala’s breach, the Tribunal stated that Guatemala did not “establish that the regulator would have had *any valid reasons* to disregard the pronouncements of the Expert Commission regarding the asset base”³⁷⁰ and that “[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission’s pronouncements *or that there is any reason to depart from such pronouncements.*”³⁷¹

112. In summary, the Tribunal concluded that (i) the CNEE had an obligation to give serious consideration to the Expert Commission’s rulings; (ii) the CNEE could depart from the Expert Commission’s rulings only if it had valid reasons to do so; (iii) the CNEE failed to consider the Expert Commission’s rulings; (iv) the Bates White’s 28 July 2008 VAD study implemented the Expert Commissions pronouncements; (v) there were no valid reasons to depart from Bates White’s 28 July 2008 VAD study; and (vi) damages therefore should be calculated based on the difference between EEGSA’s actual value derived from the actual Sigla VAD and

³⁶⁷ *Id.* ¶ 564.

³⁶⁸ *Id.* ¶ 698.

³⁶⁹ *Id.* ¶ 665; *see also* TECO’s Memorial on Partial Annulment ¶ 55.

³⁷⁰ Award ¶ 731 (emphasis added).

³⁷¹ *Id.* ¶ 731 (emphasis added); *see also id.* ¶ 735 (holding that the “decision of the Expert Commission on the FRC is reasonable and consistent with the regulatory framework” and that “the regulator would have had no valid reason to disregard such decision.”).

its but-for value derived from Bates White's 28 July 2008 VAD study. There is nothing contradictory about the Tribunal's foregoing reasoning, and Respondent's argument to the contrary should be rejected.³⁷²

113. Second, Respondent asserts that the Tribunal rejected Mr. Damonte's VAD study as a basis to value EEGSA in the but-for scenario on the ground that the study failed to implement the Expert Commission's ruling on the capital recovery factor (FRC), while ignoring an alternative version of Mr. Damonte's study in which he purportedly did implement the Expert Commission's ruling on the FRC.³⁷³ According to Respondent, the Tribunal thereby denied Guatemala due process, seriously departing from a fundamental rule of procedure.³⁷⁴

114. Guatemala, once again, misconstrues the Tribunal's Award. As set forth in the Award, the Tribunal had valid grounds for refusing to use Mr. Damonte's original or alternative version of his study as a basis for calculating EEGSA's but-for value and Claimant's damages. Indeed, Mr. Damonte's FRC calculation was not the only reason why the Tribunal concluded that Mr. Damonte's VAD study could not be used as a basis to value EEGSA. Specifically, prior to addressing the FRC, the Tribunal discussed EEGSA's VNR (*i.e.*, the new replacement value of the assets of the model efficient company, to which the FRC is applied in order to obtain cash flow payments to the distributor).³⁷⁵ The Tribunal noted that the VNR calculated in Bates White's 28 July 2008 study amounted to US\$ 1,102 million, whereas the VNR calculated by Mr. Damonte amounted to a "lower figure" of US\$ 629 million.³⁷⁶ The Tribunal then remarked that, "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates

³⁷² Respondent's assertion that the "situation [in this case] is similar to that in *Pey Casado v. Chile*, where the committee annulled the award for contradictory reasoning and failure to state reasons," is wrong. See Guatemala's Memorial on Annulment ¶ 221. The *Pey Casado ad hoc* committee annulled the award on the ground that the tribunal, on the one hand, held that the expropriation claim was outside of the temporal scope of the applicable investment treaty, and, on the other hand, awarded the claimants damages based on a contemporaneous assessment of expropriation compensation conducted by the Chilean Government. See *Pey Casado v. Chile*, Decision on Annulment, ¶¶ 281-285 (CL-N-143). As explained above, there is no such contradiction in the Tribunal's decision to award TECO historical damages.

³⁷³ Guatemala's Memorial on Annulment ¶¶ 22-23, 236-241.

³⁷⁴ *Id.* ¶¶ 22-23, 236-241.

³⁷⁵ See Award ¶¶ 729-732.

³⁷⁶ *Id.* ¶ 729.

White 28 July study failed to incorporate the Expert Commission’s pronouncements or that there [was] any reason to depart from such pronouncements,” and that Guatemala “did not establish . . . that Bates White failed to properly incorporate the Expert Commission’s pronouncements in its 28 July study.”³⁷⁷ The Tribunal concluded that, “[a]s a consequence, the Arbitral Tribunal will accept the VNR proposed by Mr. Kaczmarek,”³⁷⁸ rather than the VNR presented by Mr. Damonte. Thus, even if Guatemala’s speculation that the Tribunal neglected to consider Mr. Damonte’s alternative FRC calculation were correct, such omission was not “serious,” because the Tribunal separately decided that Mr. Damonte’s VAD study could not be used as a basis to value EEGSA due to Mr. Damonte’s use of an understated VNR.

115. Indeed, as also set forth in the Award, Mr. Damonte testified that, “to apply *many* of the pronouncements of the Expert Commission, additional information and optimizations impossible to achieve in the time available are required.”³⁷⁹ As an example, Mr. Damonte failed to implement the Expert Commission’s ruling relating to reference prices, which impacted Mr. Damonte’s recalculated VNR, in both his original and alternative study.³⁸⁰ Moreover, Guatemala’s quantum expert, Dr. Abdala, did not even present an alternative quantification of damages based on Mr. Damonte’s alternative VAD study.³⁸¹ In light of these circumstances, it is not surprising, and certainly not a violation of due process, for the Tribunal to have determined

³⁷⁷ *Id.* ¶ 731; *see also* TECO’s Memorial on Partial Annulment ¶¶ 64-65.

³⁷⁸ Award ¶ 732.

³⁷⁹ *Id.* ¶ 417 n.403 (emphasis added).

³⁸⁰ *See* TECO’s Post-Hearing Brief ¶ 179; *see also* TECO’s Memorial on Partial Annulment ¶ 41; Damonte II ¶ 215, Table 5 (showing that in his purported implementation of the Expert Commission’s rulings, Mr. Damonte replaced the reference prices used by Bates White with reference prices used for the companies DEORSA and DEOCSA, and stating that the “most important” changes he implemented in Stages B to E of the tariff study “has been the change in prices and the change in the CRF formula”) (RER-5).

³⁸¹ *See generally* Abdala I (RER-1); Abdala II (RER-4); *see also* Abdala II ¶ 92 (stating that Dr. Abdala corrected an alleged fundamental problem in Mr. Kaczmarek’s valuation by “[r]eplacing the CRF formula with the one corrected by Damonte”); TECO’s Post-Hearing Brief ¶¶ 175-178 (explaining that although Dr. Abdala recognized in his report that a proper but-for valuation required calculating the value that EEGSA would have had, assuming that its VAD had been set on the basis of all of the Expert Commission’s rulings, Dr. Abdala admitted on cross-examination that he ignored the Expert Commission’s ruling on the FRC and, instead, used Mr. Damonte’s FRC formula to calculate EEGSA’s but-for value).

that, “[a]fter careful review of the evidence,”³⁸² the Bates White’s 28 July 2008 VAD study was the proper basis for calculating damages.

116. In any event, to the extent that Respondent asserts that the Tribunal erred in concluding that Mr. Damonte failed to implement the Expert Commission’s rulings in their entirety, this would not constitute a basis for annulment. It is well established, and not disputed between the Parties, that the annulment procedure under the ICSID Convention is not an appeal, and that errors of the tribunal in the application of the law (as long as the tribunal purported to apply the proper governing law) and mistakes of fact generally are not grounds for annulment.³⁸³ In this case, the purported ground for annulment presented by Respondent amounts to an attempt by Respondent to have the Committee revisit and reverse the Tribunal’s assessment of Mr. Damonte’s testimony, which is impermissible.

117. Finally, citing to its Counter-Memorial on the Merits, Respondent asserts that “[f]ollowing Mr. Damonte’s calculations, the resulting alleged damage for historical losses would have been reduced” to US\$5.3 million.³⁸⁴ Respondent’s submission, however, identifies the foregoing amount as global damages representing the sum of historical losses and loss of value,³⁸⁵ and not as Mr. Damonte’s revised calculation for historical damages. Furthermore, in its Counter-Memorial on the Merits, Respondent expressly states that the foregoing figure is based on Mr. Damonte’s use of his *own* FRC calculation, and not the one set forth in the Expert

³⁸² Award ¶ 731; *see also* TECO’s Memorial on Partial Annulment ¶¶ 40-41, 65.

³⁸³ *See* 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); *see also* Guatemala’s Memorial on Annulment ¶ 69 (stating that the “annulment recourse is not an appeal mechanism and the role of annulment committees is not to review the merits of an award, in order to correct its findings of fact or law”).

³⁸⁴ Guatemala’s Memorial on Annulment ¶ 240 (citing Guatemala’s Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits dated 24 Jan. 2012 ¶ 618).

³⁸⁵ Guatemala’s Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits dated 24 Jan. 2012 ¶ 618 (table presenting the US\$5.3 million as total damages).

Commission's ruling.³⁸⁶ Thus, as Claimant argued and the Tribunal expressly found, it would have been inappropriate to calculate Claimant's damages using that figure.

118. For all of the reasons set forth above, there is no basis to annul the Tribunal's decision awarding TECO historical damages in the amount of US\$ 21,100,552.

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

119. As explained in TECO's Memorial on Partial Annulment, 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\$ 7,520,695.39.³⁸⁷ As TECO also explained, 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.³⁸⁸

120. Respondent's request that the Committee annul the Tribunal's decision on costs should be denied. An ICSID tribunal's decision awarding costs falls well within its discretion and there are no grounds for an ICSID tribunal to annul a tribunal's decision on costs. As the *ad hoc* committee in *MINE v. Guinea* explained, Article 61(2) of the ICSID Convention, which provides that the tribunal shall assess the expenses incurred by the parties and decide how and by whom these expenses (as well as the fees and expenses of the tribunal and the charges by the Centre) shall be paid,³⁸⁹ "confers a discretionary power on the Tribunal which was in particular under no obligation to state reasons for awarding costs against the losing party."³⁹⁰ Similarly, the *ad hoc* committee in *CDC v. Seychelles* remarked in the context of an application to annul the

³⁸⁶ *See id.* ¶ 617 (stating that, in calculating damages, Guatemala's quantum experts, "[i]nstead of using the FRC proposed by the Expert Commission, . . . used the FRC calculated by Mr. Damonte based on the Constant Annuity method").

³⁸⁷ *See* TECO's Memorial on Partial Annulment ¶ 74; *see also* Award ¶ 779.

³⁸⁸ *See* TECO's Memorial on Partial Annulment ¶ 74; *see also* TECO's Submission on Costs dated 24 July 2013; TECO's Reply on Costs dated 7 Aug. 2013.

³⁸⁹ ICSID Convention, Art. 61(2) ("In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.").

³⁹⁰ *MINE v. Guinea*, Decision on Annulment, ¶ 6.111 (CL-N-137).

tribunal's decision on costs for alleged failure to state reasons under Article 52(1)(e) of the ICSID Convention, that "it must be said that quite commonly reasoned awards do not extend their reasoning to the area of costs" and that "[i]t therefore may be doubted whether Article 52(1)(e) was intended to embrace such an issue;" and, even assuming *arguendo* that it did, "we reject the idea that annulment is either permissible or appropriate on this point."³⁹¹ Likewise, although the *ad hoc* committee in the *Iberdrola* case criticized the tribunal's decision on jurisdiction and, hence, its decision to award Guatemala costs as "excessive," it nevertheless declined to annul that portion of the tribunal's award in light of the "discretionary nature of the costs decision and the restricted review scope of annulment," concluding that "this Committee is absolutely precluded from reviewing the Tribunal's decision on costs."³⁹² It is notable in this connection that Guatemala, having obtained the foregoing ruling from the *ad hoc* committee in *Iberdrola*, and having been represented by the same counsel in both the *Iberdrola* and the *TECO* annulment proceedings, now argues in this annulment proceeding that this *ad hoc* Committee should revisit and annul the decision on costs rendered by the *TECO* tribunal.

121. In fact, however, in no instance has an *ad hoc* committee annulled a tribunal's determination with respect to cost allocation (other than as a direct consequence of annulling the award or other portions thereof).³⁹³

122. Notwithstanding this *jurisprudence constante*, Respondent argues that the Tribunal's decision on costs should be annulled for a failure to state reasons and because it allegedly is inconsistent with the Tribunal's decision to apply the principle that costs follow the event.³⁹⁴ Not only are Respondent's arguments legally unsound, as explained above,³⁹⁵ but Respondent's arguments are factually incorrect as well.

³⁹¹ *CDC v. Seychelles*, Decision on Annulment, ¶ 87 (CL-N-128).

³⁹² *Iberdrola v. Guatemala*, Decision on Annulment, ¶ 94 n.53 (CL-N-153); *see also id.* ¶ 145 (determining that it is not within the *ad hoc* committee's competence to review the tribunal's decision on costs, because the tribunal enjoys greater discretion in awarding costs and reviewing that decision would entail improperly reviewing the tribunal's judgment on the merits).

³⁹³ *See MINE v. Guinea*, Decision on Annulment, ¶¶ 6.111-6.112 (annulling the tribunal's award of damages and, as a consequence of the claimant no longer being the prevailing party, annulling the award of costs as well) (CL-N-137).

³⁹⁴ Guatemala's Memorial on Annulment ¶ 2(c); *see also id.* ¶¶ 24-27, 225-230, 235.

123. First, even assuming *arguendo* that the requirement to provide reasons extends to an award of costs, the Award provides more than sufficient reasons in support of the Tribunal’s decision, as it lays out the Tribunal’s reasoning regarding costs in a clear and internally consistent manner.³⁹⁶ Specifically, the Award (i) discusses the legal basis for the Tribunal’s decision on costs;³⁹⁷ (ii) summarizes the Parties’ positions on costs;³⁹⁸ (iii) indicates that, upon analyzing the Parties’ submissions, the amounts of their claimed “costs are justified and appropriate in view of the complexity of this case;”³⁹⁹ (iv) states that the Tribunal decided to adopt the Parties’ shared position that costs should follow the event;⁴⁰⁰ (v) concludes that “[t]he Claimant has been successful in its arguments regarding jurisdiction, as well as in establishing the Respondent’s responsibility,” whereas Respondent “has been partially successful on quantum;”⁴⁰¹ and (vi) allocates costs on that basis.⁴⁰² Thus, Respondent’s assertion that “it is impossible to understand the reasoning of the Tribunal on costs”⁴⁰³ is meritless. Indeed, other

³⁹⁵ See *MINE v. Guinea*, Decision on Annulment, ¶ 6.111 (CL-N-137) (stating that Article 61(2) of the ICSID Convention “confers a discretionary power on the Tribunal which was in particular under no obligation to state reasons for awarding costs against the losing party”); *CDC v. Seychelles*, Decision on Annulment, ¶ 87 (CL-N-128) (stating that “it must be said that quite commonly reasoned awards do not extend their reasoning to the area of costs” and that “[i]t therefore may be doubted whether Article 52(1)(e) was intended to embrace such an issue”) (CL-N-128); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 Feb. 2008 (“*Desert Line v. Yemen*, Award”), ¶ 303 (stating that the tribunal “has broad powers of discretion in matters of arbitration costs and expenses incurred by the Parties under Article 61(2) of the ICSID Convention”) (CL-61); CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2d ed., Cambridge University Press, 2009) Art. 61, p. 1235 ¶ 42 (“The Convention and the attendant Rules and Regulations give tribunals broad discretion in awarding costs and offer little guidance on how this discretion is to be exercised.”) (CL-N-159).

³⁹⁶ See Award ¶¶ 769-779.

³⁹⁷ See *id.* ¶¶ 769-771.

³⁹⁸ See *id.* ¶¶ 772-774, 776.

³⁹⁹ *Id.* ¶ 775.

⁴⁰⁰ *Id.* ¶¶ 776-777.

⁴⁰¹ *Id.* ¶ 778.

⁴⁰² *Id.* ¶ 779.

⁴⁰³ Guatemala’s Memorial on Annulment ¶ 226.

investment treaty tribunals have provided a similar level of detail concerning the reasons underlying their decisions on costs.⁴⁰⁴

124. Second, Respondent asserts that Guatemala was the successful party in the arbitration, because it “prevailed in most of the merits issues as well as in 90 per cent of the damages claim.”⁴⁰⁵ According to Respondent, in light of Guatemala’s alleged victory, the Tribunal’s decision that Guatemala pay 75 percent of TECO’s costs is inconsistent with the Tribunal’s decision to apply the principle that costs should follow the event.⁴⁰⁶ Contrary to Respondent’s argument, the Tribunal assessed the Parties’ relative success in the case as follows: “[t]he *Claimant has been successful* in its arguments regarding jurisdiction, as well as in establishing the Respondent’s responsibility,” whereas Respondent “has been *partially successful* on quantum.”⁴⁰⁷ As is evident from the quoted language and the context in which it is used in the Award, the Tribunal correctly concluded that the Party that had substantially prevailed in the

⁴⁰⁴ See, e.g., *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, ¶ 819 (setting forth the tribunal’s reasoning on costs in a single paragraph, as follows: “Finally, the Tribunal turns to costs. To obtain justice, Claimants had no option but to bring this arbitration forward and to incur the related costs. Although they have prevailed on the substance of the dispute, they have failed on a number of their allegations and the amount of damages awarded is less than the one claimed. On this basis, the Tribunal considers fair that each party bear 50% of the costs of the arbitration proceeding (advances to ICSID) and that Respondent be condemned to pay 50% of Claimants’ legal costs and fees as detailed in Claimants’ letter of January 25, 2008 (with appendices under tab 1 to 5), with the exception of the costs of the arbitration (lodging fee and advances to ICSID).”) (CL-39); *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award of 3 Nov. 2008, ¶ 295 (stating that “[t]aking into account all circumstances of the instant case and the fact that the Claimant prevailed in the jurisdiction phase of the proceedings, but neither party has fully prevailed in the merits, the Tribunal decides that each party shall bear its own legal costs and that the Respondent and the Claimant shall be responsible for 75% and 25%, respectively, of fees and expenses of the Tribunal and the costs of administration of the ICSID Secretariat”) (CL-33); *Desert Line v. Yemen*, Award, ¶¶ 299-304 (providing a concise analysis of costs) (CL-61); *Asian Agricultural Prods. Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, ¶ 116 (same) (CL-82).

⁴⁰⁵ Guatemala’s Memorial on Annulment ¶ 26; see also *id.* ¶ 228.

⁴⁰⁶ See *id.* ¶¶ 26-27, 228-229.

⁴⁰⁷ Award ¶ 778 (emphasis added).

arbitration was Claimant, not Respondent.⁴⁰⁸ The Tribunal’s allocation of costs is fully consistent with that conclusion.⁴⁰⁹

125. Third, Respondent asserts that the Tribunal failed to provide “any analysis or demonstration . . . that TGH’s declared costs . . . were ‘reasonable,’”⁴¹⁰ or to assess the reasonableness of Claimant’s costs by reference to the alleged “obvious benchmark” of Guatemala’s costs, which amounted to “approximately 50 per cent” of Claimant’s costs, “even though Guatemala had constituted a similar legal team of international and local legal counsel.”⁴¹¹

126. Contrary to Respondent’s argument, as noted above, 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 this case.*”⁴¹² Indeed, there is nothing unreasonable or surprising about the difference in the Parties’ costs, for several reasons:

- In *TECO*, Guatemala used the same counsel, the same witnesses, and the majority of the same experts as in the earlier *Iberdrola* arbitration, which concerned the same factual circumstances as the *TECO* arbitration. In fact, Guatemala’s experts conducted essentially the same exercise in the *TECO* arbitration as they had previously conducted in the *Iberdrola* arbitration.⁴¹³ Guatemala’s counsel and experts thus piggybacked on the

⁴⁰⁸ See *id.* ¶¶ 778-779.

⁴⁰⁹ See *id.* ¶ 779. Respondent’s assertion that Claimant’s partial annulment application evidences that Claimant itself “clearly believed it had ‘lost’ the arbitration” (Guatemala’s Memorial on Annulment ¶ 26) is not only irrelevant to the analysis provided by the Tribunal in the Award but also incorrect. See TECO Energy 2013 Annual Report (excerpt) at 48 (stating that the “ICSID Tribunal unanimously found in favor of TGH”) (C-N-638). Claimant notes that, similar to the press article submitted as new Exhibit C-N-637 (see TECO’s Memorial on Partial Annulment at n.438), this new exhibit is proffered as evidence of events that have occurred since the Award, and the new exhibit thus could not have been introduced into evidence in the underlying arbitration.

⁴¹⁰ Guatemala’s Memorial on Annulment ¶ 25; see also *id.* ¶ 226 (same).

⁴¹¹ *Id.* ¶ 226.

⁴¹² Award ¶ 775 (emphasis added).

⁴¹³ Specifically, in both arbitrations, Guatemala’s industry expert, Mr. Damonte, purported to incorporate the rulings of the Expert Commission into the 5 May 2008 version of Bates White’s VAD study, and Guatemala’s quantum expert, Dr. Abdala, purported to use the results of Mr. Damonte’s analysis as the basis for his assessment of damages. Compare Expert Report of Mario C. Damonte dated July 2010 submitted by Guatemala in the *Iberdrola* arbitration, ¶ 1 of the Spanish original (indicating that Mr. Damonte task in the

work they did for the *Iberdrola* arbitration and consequently expended less time and expense in preparing Guatemala's defense in the *TECO* arbitration than they otherwise would have expended. Claimant's counsel and experts, by contrast, did not have the benefit of prior familiarity with the issues in dispute.⁴¹⁴

- *TECO*'s costs were exacerbated by Guatemala's misconduct in the arbitration, including, among other things, the fact that Guatemala (i) submitted a Reply on Jurisdiction despite the Parties' express agreement and Tribunal's order prohibiting it from doing so, thus compelling *TECO* to expend more resources to prepare an unanticipated Rejoinder; (ii) repeatedly submitted evidence and testimony from the earlier *Iberdrola* ICSID arbitration, in violation of the Tribunal's orders, thus requiring Claimant to expend considerable resources to make repeated applications to strike the objectionable material from the record; (iii) objected to the production of the same category of documents that Guatemala itself had earlier requested, thus unnecessarily complicating the document production phase by compelling Claimant to make applications for production to the Tribunal; (iv) withheld responsive documents from production to *TECO* in defiance of the Tribunal's orders; (v) misrepresented the record, requiring Claimant to spend considerable effort correcting those misrepresentations; and (v) failed to provide required

arbitration was to recalculate Bates White's 5 May 2008 VAD study per the rulings of the Expert Commission) (C-572) with Expert Report of Mario C. Damonte dated Jan. 2012 submitted by Guatemala in the *TECO* arbitration, ¶ 2 (same) (RER-2); Expert Opinion of Manuel A. Abdala and Marcelo A. Schoeters dated 25 July 2010 submitted by Guatemala in the *Iberdrola* arbitration, ¶ 14 of the Spanish original (stating that Mr. Abdala calculated damages based on Mr. Damonte's purported implementation of the Expert Commission's rulings) (C-523) with Abdala I ¶¶ 92-95 (same) (RER-1). Compare also, e.g., Expert Report of Mario C. Damonte dated July 2010 submitted by Guatemala in the *Iberdrola* arbitration, ¶¶ 426, 434, 436, 438, 440, 442 (stating that Mr. Damonte did not evaluate certain rulings of the Expert Commission due to alleged time constraints and lack of information) (C-572) with Expert Report of Mario C. Damonte dated Jan. 2012 submitted by Guatemala in the *TECO* arbitration, ¶¶ 163, 176 (same) (RER-2); Expert Opinion of Manuel A. Abdala and Marcelo A. Schoeters dated 25 July 2010 submitted by Guatemala in the *Iberdrola* arbitration, ¶¶ 42-53, 160, 177-178 in the Spanish original (describing the model company regulatory framework, the FRC calculation under the ToR, and EEGSA's investment expenses) (C-523) with Abdala I ¶¶ 115-126, 61, 53-55 (same) (RER-1). In addition, the witness statements of Guatemala's witnesses in the *TECO* arbitration were identical in certain material respects to the witness statements of these same witnesses that Guatemala submitted in the *Iberdrola* arbitration. Compare, e.g., Witness Statement of Carlos Eduardo Colom Bickford dated 24 July 2010 submitted by Guatemala in the *Iberdrola* arbitration, ¶¶ 28-56, 57-61, 80-98, 117-126 in the Spanish original (discussing electricity distribution in Guatemala and EEGSA's tariff review for the 2008-2013 tariff period) (C-524) with Witness Statement of Carlos Eduardo Colom Bickford dated Jan. 2012 submitted by Guatemala in the *TECO* arbitration, ¶¶ 28-52, 53-61, 75-94, 111-122 (discussing same in nearly identical terms) (RWS-1); Witness Statement of Enrique Moller Hernandez dated 16 June 2010 submitted by Guatemala in the *Iberdrola* arbitration, ¶¶ 6-24, 26-31, 33-34, 54-55, 57-63 in the Spanish original (discussing the 1998 electricity law and EEGSA's tariff review for the 2008-2013 tariff period) (C-525) with Witness Statement of Enrique Moller Hernandez dated Jan. 2012 submitted by Guatemala in the *TECO* arbitration, ¶¶ 6-24, 25-30, 31-34, 42-48 (discussing same in nearly identical terms) (RWS-2); and Witness Statement of Mercados Energéticos dated 22 Feb. 2011 submitted by Guatemala in the *Iberdrola* arbitration, ¶¶ 22-28 in the Spanish original (analyzing Bates White's 28 July 2008 VAD study) (C-553) with Witness Statement of Mercados Energéticos dated Jan. 2012 submitted by Guatemala in the *TECO* arbitration, ¶¶ 22-28 (discussing same in identical terms) (RWS-3).

⁴¹⁴ See *TECO*'s Reply on Costs dated 7 Aug. 2013 ¶ 8.

translations, placing the burden upon Claimant to acquire those translations or make applications to the Tribunal.⁴¹⁵

- As other arbitral tribunals have observed, in the context of investment treaty arbitration, there is nothing surprising about the claimant incurring significantly higher costs than the respondent, because, among other reasons, claimants carry the burden of proof, and respondents generally are subject to budgetary constraints.⁴¹⁶

127. Finally, Respondent raises various other assertions, including that, in the context of investment treaty arbitration, it is “unusual for one party to be ordered to pay the other party’s costs” absent exceptional circumstances such as party misconduct;⁴¹⁷ that Guatemala did not engage in any misconduct in the arbitration;⁴¹⁸ that the costs awarded to TECO constitute more than 35 percent of the total compensation awarded to TECO;⁴¹⁹ and that the Award is “one of the highest costs awards ever made against a respondent state in ICSID history.”⁴²⁰ Respondent, however, fails to demonstrate that these alleged circumstances constitute a basis for annulment under the ICSID Convention.⁴²¹

⁴¹⁵ See TECO’s Submission on Costs dated 24 July 2013; TECO’s Reply on Costs dated 7 Aug. 2013; see also TECO’s Memorial on Partial Annulment ¶ 74 (noting same).

⁴¹⁶ See, e.g., *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award of 16 June 2010 (“*Gemplus v. Mexico*, Award”), ¶ 17-25 (“[T]he Claimants claim costs in the total sum of US\$ 5,362,973.22. This amount significantly exceeds the Respondent’s claim for costs, being less than 45% of the Claimants’ costs; but the Tribunal does not consider the latter excessive for this case. It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state’s billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty.”) (CL-22); *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 Oct. 2006 (“*ADC v. Hungary*, Award”), ¶ 535 (“The Tribunal rejects the submission that the reasonableness of the quantum of the Claimants’ claim for costs should be judged by the amount expended by the Respondent. It is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.”) (CL-3); see also *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 Oct. 2012 (“*Deutsche v. Sri Lanka*, Award”), ¶ 589 (“The Tribunal further notes that the Respondent’s claim for costs including legal fees and expenses is far less than that of the Claimant. This notwithstanding, the parties’ costs appear to be reasonable in the circumstances.”) (CL-100).

⁴¹⁷ Guatemala’s Memorial on Annulment ¶ 227.

⁴¹⁸ *Id.* ¶ 227.

⁴¹⁹ *Id.* ¶ 229.

⁴²⁰ *Id.* ¶ 24; see also *id.* ¶ 229 (similar).

⁴²¹ See *id.* ¶¶ 26, 227-229.

128. Guatemala agreed in the arbitration that the Tribunal had discretion to allocate costs under the principle that costs follow the event, and did not assert that an order to cover a Party's costs was appropriate only in exceptional circumstances, such as the other Party's misconduct.⁴²² The discretion of a DR-CAFTA tribunal to award costs, including attorney's fees, also is expressly set forth in the DR-CAFTA.⁴²³ Guatemala's newly-invented "exceptional circumstances" test therefore provides no basis to annul the Tribunal's decision on costs.⁴²⁴

129. Further, there is no requirement under the Treaty, the ICSID Convention, or international law that the amount of costs awarded to a party be mathematically proportional to the amount of damages sought or awarded, or to costs awarded in other cases.⁴²⁵ As regards the

⁴²² See Award ¶ 776 (stating that "[b]oth parties . . . agree that, in assessing and apportioning the costs, the Arbitral Tribunal can exercise discretion"); see also Guatemala's Submission on Costs dated 24 July 2013 ¶¶ 2-4 & n.2 (stating that the "ICSID Convention grants the Tribunal authority to determine arbitration costs and how to apportion such costs between the parties," that "[i]t is a generally accepted principle in international arbitration that the term 'expenses' should be construed broadly . . . and that "international arbitration practice has also accepted the principle that 'the successful party should be paid its reasonable legal costs by the unsuccessful party' or, if the outcome is not clear, costs must be apportioned in view of the relative success of each party's claims"); Guatemala's Reply on Costs dated 7 Aug. 2013 ¶ 30 (reiterating Guatemala's request that TECO be ordered to "bear the cost of the proceeding in its entirety" and not indicating that its request was based on any "exceptional circumstances").

⁴²³ See DR-CAFTA, Art. 10.26.1 ("A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules") (CL-1).

⁴²⁴ See, e.g., *Gemplus v. Mexico*, Award, ¶¶ 17-23 to 17-26 (awarding costs to the claimants based on the principle that costs follow the event and notwithstanding that the tribunal found that the respondent had conducted itself in the arbitration with "propriety and professionalism" and rejected the claimants' argument that the respondent had engaged in procedural misconduct constituting "special factors" requiring an award of costs) (CL-22).

⁴²⁵ See generally DR-CAFTA, Art. 10.26.1 ("A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules") (CL-1); ICSID Convention, Article 61(2) ("In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."); see also, e.g., *PSEG Global, Inc., The North American Coal Co., and Konya Ingin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ("*PSEG v. Turkey*, Award"), ¶¶ 352-354 (holding that, in light of the claimant's partial success in the case, the respondent should cover 65 percent of the claimant's costs, i.e., US\$ 13,553,563.80; notably, the damages awarded amounted to US\$ 9,061,479.34, i.e., less than the amount of costs awarded, and a relatively small portion of the total damages sought, which, measured at fair market value, amounted to US\$ 115 million, before interest (see *id.* ¶ 284)) (CL-37); *Gemplus v. Mexico*, Award, ¶¶ 18-1 to 18-11 (awarding costs of US\$ 5,450,000, representing 35% of the damages awarded of US\$ 15,508,381) (CL-22); *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012, ¶ 360 (awarding costs of €350,000, representing 100% of the damages awarded of €350,000) (CL-N-157).

amount of the costs awarded to TECO, there are numerous examples of higher cost awards.⁴²⁶ In determining the amount to award to TECO, the Tribunal expressly examined TECO's costs, determined that they were reasonable, and held that TECO was entitled to 75 percent of its costs in light of its success on jurisdiction and the merits. Respondent's assertions concerning the magnitude of the cost award, therefore, are not a basis to annul the Tribunal's decision on costs.

130. For all of the foregoing reasons, Respondent's request that the Tribunal's decision on costs be annulled should be rejected.

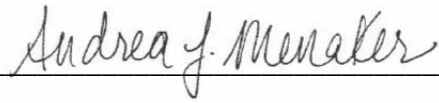
* * *

VIII. CONCLUSION

131. 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.

⁴²⁶ See, e.g., *Československá obchodní banka, a. s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award dated 29 Dec. 2004, ¶ 374(5) (awarding costs to the claimant of US\$ 10 million) (CL-N-157); *PSEG v. Turkey*, Award, ¶¶ 352-253 (awarding costs to the claimant of US\$ 13,553,563.80) (CL-37); *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, UNCITRAL, Final Award of 18 July 2014, ¶¶ 1869, 1887 (awarding costs to the claimant of US\$ 60 million and € 4,240,000) (CL-N-155); *Deutsche v. Sri Lanka*, Award, ¶¶ 576-590 (awarding costs to the claimant of US\$ 7,995,127.36) (CL-100); *Ioannis Kardassopoulos v. The Republic of Georgia*, Award, ¶¶ 687-692 (awarding costs to the claimant of US\$ 7,942,297) (CL-121); *ADC v. Hungary*, Award, ¶¶ 525-542 (awarding costs to the claimant of US\$ 7,623,693) (CL-3); *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award of 2 Sept. 2011, ¶¶ 557-569 (ordering the claimant to pay US \$15,602,500 of respondent's costs) (RL-43).

Respectfully submitted,



Andrea J. Menaker

Petr Polášek

Kristen M. Young

WHITE & CASE LLP

701 Thirteenth Street, N.W.

Washington, D.C. 20005

U.S.A.

Counsel for Claimant

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