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 POST-HEARING REPLY

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# CLAIMANT'S POST-HEARING REPLY

## I. INTRODUCTION

1. In accordance with the Tribunal's letter dated 22 March 2013, Claimant hereby submits its Post-Hearing Reply.[1] This Post-Hearing Reply addresses the arguments proffered by Respondent in its Post-Hearing Brief dated 10 June 2013, as modified by the Tribunal's letter dated 27 June 2013, granting Claimant's motion to strike certain portions thereof.[2] Claimant continues to rely upon all of its previous submissions, both written and oral.

2. As Claimant demonstrated in its Post-Hearing Brief, this case arises out of Guatemala's arbitrary and unjustified decision to decrease, for purely political purposes, EEGSA's 2008-2013 electricity tariffs by drastically reducing its VAD, as well as the arbitrary and unjustified actions that Guatemala took to achieve that objective. As Claimant further demonstrated, these actions culminated in the CNEE disregarding the entire 2008-2013 tariff review process—including the Expert Commission's decisions and EEGSA's 28 July 2008 revised VAD study—and imposing its own unjustifiably low VAD on EEGSA, in breach of the specific representations that Guatemala had made during EEGSA's privatization and in complete disregard of the legal and regulatory framework that Guatemala had adopted to attract and to induce foreign investment in its electricity sector. In so doing, Guatemala deliberately disregarded the key principles set forth in the LGE and RLGE upon which Claimant's investment in EEGSA was premised, as well as the specific representations that it made and confirmed and upon which Claimant justifiably relied, and breached its obligation under Article 10.5 of the DR-CAFTA to accord fair and equitable treatment ("FET") to Claimant's investment.

3. In its Post-Hearing Brief, Respondent continues to attempt to obscure these issues and to recast this case as a purely domestic regulatory dispute over the proper interpretation of Guatemalan law, which already has been decided by the Guatemalan courts. Respondent also attempts to portray Claimant and the TECO group of companies as a mere passive investor in EEGSA, which, at the time of its investment, performed no due diligence, and thus had no

[1] Abbreviations and terms used in Claimant's Post-Hearing Reply have the same meaning as in Claimant's Post-Hearing Brief, Rejoinder on Jurisdiction, Reply, and Memorial.

[2] Respondent's Post-Hearing Brief dated 10 June 2013 ("Respondent's Post-Hearing Brief"); Letter from the Tribunal to the Parties dated 10 June 2013.

expectations as to the operation of the applicable legal and regulatory framework.

4. As Claimant has shown, and as further demonstrated below, this dispute does not arise out of a mere regulatory disagreement over the proper interpretation of certain provisions of Guatemalan law, but rather arises out of Guatemala's deliberate actions designed to prevent EEGSA from calculating its VAD based upon the new replacement value of its network, and thus to ensure a substantial decrease in EEGSA's 2008-2013 VAD and tariffs. The evidence further demonstrates that, contrary to Respondent's *ipse dixit* statements, before deciding to invest in EEGSA, the TECO group of companies performed substantial due diligence, and that its understanding of the applicable legal and regulatory framework—including how and on what basis EEGSA's VAD would be recalculated every five years, and how disputes between the CNEE and EEGSA that arose during that process would be resolved—was based directly upon the specific representations that Guatemala made at the time to induce and to attract foreign investment in EEGSA.

5. Unable to support its arguments with any contemporaneous evidence, Respondent resorts to casting aspersions on Claimant, misconstruing the oral testimony at the Hearing, and relying upon *post-hoc* arguments. Respondent's assertion in its Post-Hearing Brief that Claimant and EEGSA "are the parties who have acted arbitrarily, in bad faith and who have abused their political influence,"[3] however, is not supported by the evidence, and Respondent notably does not advance any legal defense on this basis. Respondent's transparent attempts to quote the Hearing testimony out of context likewise are to no avail, as demonstrated below, and its manifold *post-hoc* arguments are without factual basis and cannot serve as a legal defense to Claimant's claim in this arbitration.

## II. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT'S CLAIM ARISING UNDER ARTICLE 10.5 OF THE DR-CAFTA

6. In its Post-Hearing Brief, Respondent continues to erroneously assert that Claimant has submitted to arbitration a so-called mere regulatory dispute under Guatemalan law, over which this Tribunal does not have jurisdiction.[4] Respondent thus contends that the essence

[3] Respondent's Post-Hearing Brief ¶ 31.

[4] *See id*. ¶¶ 33-67.

of this dispute "relates to disagreements between EEGSA and TGH, on one side, and the CNEE, on the other, regarding the interpretation and application of the regulatory framework, including questions of procedure and technical and financial questions concerning EEGSA's 2008 tariff review,"[5] and that such regulatory disagreements cannot "constitute a violation by the Guatemalan State of the international minimum standard under the Treaty."[6] According to Respondent, the CNEE's interpretation of the regulatory framework, moreover, "is not ridiculous, absurd, or unreasonable to the point that would justify an argument that there has been a fundamental change in the regulatory framework, arbitrariness, or abuse of power," but rather "has a legal and/or technical and economic basis that is concrete and justified."[7] Respondent also continues to assert that the issues raised by Claimant already have been decided by the Guatemalan courts, and thus that "the only valid claim in this case would have been for denial of justice."[8] As set forth below, Respondent's jurisdictional arguments continue to misconstrue the applicable legal standard, deliberately distort and mischaracterize the content of Claimant's claims, and are fundamentally at odds with the documentary record. Respondent's jurisdictional arguments also continue to conflate FET with denial of justice, and are inconsistent with numerous investment treaty cases finding an FET violation based upon a State's legislative, administrative, or regulatory actions, irrespective of whether there has been a denial of justice by the host State's courts.

### A. Respondent Misconstrues The Applicable Legal Standard

7. Relying upon the tribunal's decision in *Iberdrola v. Guatemala,* Respondent continues to argue that, in order to determine whether it has jurisdiction *ratione materiae* over this dispute, the Tribunal must analyze the substance of Claimant's claims.[9] Respondent thus asserts that, "[a]s part of its jurisdictional analysis, the Tribunal must determine whether the dispute submitted by TGH to this arbitration is a dispute over matters regulated by the Treaty," and that this determination necessarily "includes an assessment undertaken by the *Iberdrola*

[5] *Id*. ¶ 80.

[6] *Id*. ¶ 60.

[7] *Id*. ¶ 59.

[8] *Id*. ¶ 71.

[9] *See id*.¶¶ 77-79.

tribunal, of the essence or substance of the dispute at issue to determine whether there is a 'real claim' of violation of the international minimum standard, 'or that there was a real international dispute.'"[10] With respect to Claimant's claim regarding Guatemala's fundamental changes to the regulatory framework, Respondent asserts that the Tribunal thus must examine "the existence and significance of a change," as "only certain types of reforms to the regulatory framework alter the basic premises of that framework to such an extent as to result in a violation of international law," and that the goal of such analysis is to determine "whether such a change is manifestly arbitrary, disproportionate or unreasonable."[11] Respondent's continued attempt to insert an inquiry of international claim validity into the *prima facie* standard must be rejected.[12]

8. As Claimant has explained, in assessing its jurisdiction *ratione materiae* under the DR-CAFTA, the Tribunal must determine whether the facts, as alleged by Claimant, "fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to."[13] In making that determination, the Tribunal applies "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."[14] The Tribunal thus "must not address the merits of the claims, but it must satisfy itself that it has jurisdiction over the dispute, as presented."[15] As the tribunal in *Siemens v. Argentina* confirmed, "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

[10] *Id*. ¶ 77 (quoting *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award of 17 Aug. 2012 ("*Iberdrola v. Guatemala*") ¶ 368 **(RL-32)**).

[11] *Id*. ¶ 78.

[12] Rejoinder on Jurisdiction ¶¶ 8-13; Reply ¶¶ 283-287.

[13] *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*") ¶ 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 ¶ 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)**.

[14] *Bayindir v. Pakistan* ¶ 197 **(CL-84)**.

[15] *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 **(CL-67)**.

jurisdiction to consider them."[16]

9. Respondent thus is wrong to assert that the Tribunal must examine "the essence or substance of the dispute" in order to determine whether there is a "real claim" or a "real international dispute" over which it has jurisdiction.[17] In applying the *prima facie* standard, the Tribunal instead must evaluate whether the facts, as alleged by Claimant, namely the CNEE's decision to disregard the Expert Commission's rulings and to impose its own artificially reduced VAD on EEGSA in violation of Guatemala's prior specific representations and the legal and regulatory framework it established to attract and to induce foreign investment in EEGSA, as well as Guatemala's fundamental changes to that regulatory framework and its arbitrary and bad faith conduct in conducting EEGSA's 2008-2013 tariff review, could possibly give rise to a breach of Article 10.5 of the DR-CAFTA, over which this Tribunal has jurisdiction. As Claimant has demonstrated and as shown further below, the facts as alleged by Claimant not only are capable, if proved, of constituting a breach of Article 10.5 of the DR-CAFTA, but also have been proven and do constitute such a breach.

10. Similarly, Respondent is wrong to assert that, in assessing its jurisdiction *ratione materiae* over Claimant's claim regarding Guatemala's fundamental changes to the regulatory framework, the Tribunal must examine the "existence and significance" of the change in order to determine "whether such a change is manifestly arbitrary, disproportionate or unreasonable," or whether it alters the "basic premises" of the regulatory "framework to such an extent as to result in a violation of international law."[18] As Claimant explained in its Post-Hearing Brief, whether any State action—regulatory or otherwise—constitutes a violation of the minimum standard of treatment is a merits decision, and not a jurisdictional decision.[19] The Tribunal's analysis as to whether Guatemala's fundamental changes to critical elements of the regulatory framework are

[16] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 Aug. 2004 ¶ 180 **(CL-94)**.

[17] Respondent's Post-Hearing Brief ¶ 77.

[18] *Id.* ¶ 78.

[19] Claimant's Post-Hearing Brief dated 10 June 2013 ("Claimant's Post-Hearing Brief") ¶ 54; *see also* Tr. (22 Jan. 2013) 413:19-414:1 (Tribunal Question) (questioning whether, "if it's a very minor regulatory change in the opinion of one of the parties, if that is a matter, maybe, decided on the jurisdictional phase or if it's a matter that necessarily has to be decided on the [merits]?").

manifestly arbitrary, disproportionate, or unreasonable, or whether they altered the basic premises of that framework to such an extent as to result in a violation of the minimum standard is decidedly factual in nature, requiring an assessment of the documentary and testimonial evidence, and thus necessarily is a question for the merits, and not jurisdiction.[20] Respondent's argument that "the Tribunal must decide at the jurisdictional level" whether Claimant's claim concerns a "real regulatory change" thus must be rejected.[21]

### B. This Dispute Does Not Arise Out Of A Mere Regulatory Disagreement

11. In its Post-Hearing Brief, Respondent continues to argue that Claimant has not "submitted a real dispute under the Treaty,"[22] and that the "true issues in dispute" in this arbitration relate "to disagreements over the interpretation and application of certain provisions of Guatemalan law,"[23] including (1) whether the Terms of Reference ("ToR") as drafted by the CNEE are mandatory, or whether EEGSA and its consultant, Bates White, were permitted deviate from the ToR, where they considered the ToR to be inconsistent with the LGE and RLGE;[24] (2) whether the Expert Commission's decisions are binding upon the CNEE, and, if so, whether the Expert Commission was to review EEGSA's revised VAD study in order to determine whether that study properly incorporated all of the Expert Commission's decisions;[25] (3) whether the CNEE is required under the LGE to rely solely and exclusively upon the distributor's VAD study to set the distributor's VAD and tariffs, or whether the CNEE is permitted under the LGE to rely upon its own VAD study;[26] (4) whether the design of the construction units in the Bates White VAD study or the Sigla VAD study was correct; and (5) whether depreciation is included in the calculation of the distributor's VAD.[27] According to Respondent, "[i]n all of these matters, the CNEE's position has a legal and/or technical and

[20] Claimant's Post-Hearing Brief ¶ 54.

[21] Respondent's Post-Hearing Brief ¶ 79.

[22] *Id*. ¶ 39.

[23] *Id*. ¶ 40.

[24] *Id*. ¶¶ 41-42.

[25] *Id*. ¶¶ 43-47.

[26] *Id*. ¶¶ 48-55.

[27] *Id*. ¶¶ 56-58.

economic basis that is concrete and justified,"[28] and Claimant's alleged mere disagreement with the CNEE cannot amount to a violation of the international minimum standard.[29] Respondent's continued attempt to avoid scrutiny of its actions under international law by recasting this case as a "mere" regulatory dispute over the interpretation of the LGE and RLGE must be rejected.

12. As Claimant repeatedly has explained, the facts underlying Claimant's claim do not concern a mere disagreement over the proper interpretation of Guatemalan law, but rather concern Guatemala's deliberate actions designed to prevent EEGSA from calculating its 2008-2013 VAD based upon the new replacement value of its network, and thus to ensure a substantial decrease in EEGSA's 2008-2013 VAD and tariffs.[30] Claimant's complaint thus is not that the "regulator incorrectly applied the domestic regulatory framework," as Respondent erroneously asserts.[31] Rather, as Claimant's submissions reflect, Claimant's complaint is that the CNEE's arbitrary actions in decreasing in EEGSA's 2008-2013 VAD directly contravened Guatemala's prior specific representations regarding the VAD calculation process, which had been made for the express purpose of attracting and inducing foreign investment in EEGSA; that Guatemala's amendments to the RLGE, as well as the manner in which the CNEE used those amendments to defend its actions before the Guatemalan courts, fundamentally changed critical elements of the regulatory framework upon which Claimant's investment in EEGSA was premised; and that the actions that the CNEE took to ensure a decrease in EEGSA's VAD, despite the significant increase in the costs of materials involved in electricity distribution and the Expert Commission's express rulings on the discrepancies, reflect arbitrary, bad faith conduct by the regulator in the exercise of its functions.[32]

13. Moreover, the various matters that Respondent raises as allegedly forming the basis of this dispute do not concern mere "regulatory disagreements" over the interpretation of Guatemalan law, but rather involve disputed issues of fact over which this Tribunal necessarily

[28] *Id*. ¶ 59.

[29] *Id*. ¶ 60.

[30] Claimant's Post-Hearing Brief ¶¶ 47-48; Rejoinder on Jurisdiction ¶¶ 14-24; Reply ¶¶ 228-230, 283-287.

[31] Respondent's Post-Hearing Brief ¶ 73.

[32] Claimant's Post-Hearing Brief ¶¶ 47-48; Rejoinder on Jurisdiction ¶¶ 14-24; Reply ¶¶ 228-230, 283-287.

has jurisdiction.[33] Thus, for example, while Respondent asserts that Claimant's claim relates to a disagreement over the nature and impact of EEGSA's 2008-2013 ToR, whether the ToR were mandatory, or whether the parties expressly agreed in Article 1.10 to allow EEGSA's consultant to deviate from the ToR, where it provided a reasoned justification for doing so, is a disputed factual issue over which this Tribunal has jurisdiction.[34] Similarly, whether Guatemala represented to potential investors in EEGSA that the Expert Commission's rulings would be binding, and whether the CNEE and EEGSA agreed in Rule 12 to have the Expert Commission determine if EEGSA's revised VAD study properly incorporated all of its rulings, also are disputed factual issues over which this Tribunal has jurisdiction.[35] Respondent's attempt to recast these issues as mere "regulatory disagreements" over which this Tribunal does not have jurisdiction thus fails.

14. In addition, and as discussed further below, the CNEE's purported position on each of these issues does not have "a legal and/or technical and economic basis that is concrete and justified," as Respondent contends.[36] To the contrary, the CNEE's purported positions are *post-hoc* justifications that Respondent simply has manufactured in its effort to defend the CNEE's actions before the Guatemalan courts and before this Tribunal.[37] There notably is *no* contemporaneous evidentiary support for any of the CNEE's interpretations, and, indeed, Respondent points to none in its Post-Hearing Brief.[38] What the contemporaneous evidence does show is that the CNEE simply was unwilling to accept the final result of the tariff review process—which would have increased EEGSA's 2008-2013 VAD and tariffs—and, after analyzing the Expert Commission's rulings, thus decided to abandon that process and to adopt its own VAD study, which did not comply with the Expert Commission's rulings, on the pretense that RLGE Article 99 required the CNEE to set new tariffs for EEGSA by 1 August 2008, an argument that the CNEE itself later abandoned before its own courts.[39] Indeed, as Mr. Colom

[33] Respondent's Post-Hearing Brief ¶¶ 41-60.

[34] *Id*. ¶¶ 41-42.

[35] *Id*. ¶¶ 43-47.

[36] *Id*. ¶ 59.

[37] Claimant's Post-Hearing Brief ¶¶ 105, 159-163; Reply ¶¶ 6, 184-190, 247-253.

[38] Respondent's Post-Hearing Brief ¶¶ 40-58.

[39] Claimant's Post-Hearing Brief ¶¶ 159-160; Reply ¶¶ 85-89, 188-190.

himself stated in an April 2010 presentation to the *Asociación Iberoamericana de Entidades Reguladoras de la Energía*, by adopting its own VAD study, the CNEE was able to eliminate "[h]istorical distortions from the VAD (*the user pays what it should pay*)."[40] As the contemporaneous evidence thus confirms, this dispute never concerned a mere difference of opinion between EEGSA and the CNEE with respect to the interpretation of the LGE and RLGE, as Respondent would like this Tribunal to believe; rather, this dispute concerns the CNEE's deliberate actions in decreasing EEGSA's 2008-2013 VAD—when it objectively should have increased—so that users would pay what the CNEE for political reasons wanted them to pay.

### C. Claimant's Claim Is Not Limited To A Claim For Denial Of Justice

15. In its Post-Hearing Brief, Respondent continues to argue that the Guatemalan courts already have decided this dispute, and thus that the only valid claim in this case could be for denial of justice, which Claimant has not asserted.[41] Relying upon the tribunal's observation in *Azinian v. Mexico* that "[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level,"[42] Respondent argues that, where regulatory disputes have been analyzed and decided by the host State's courts, the only valid international claim is a claim for denial of justice, because "[i]t is the courts that must resolve any dispute over the interpretation and application of domestic law."[43] According to Respondent, the State's only obligation in such circumstances is "to make sure that its courts were available and made a decision that could not give rise to any accusation of denial of justice."[44] Respondent's arguments are manifestly incorrect.

16. First, Respondent's argument that the Guatemalan courts already have decided this dispute is premised upon its erroneous assumption that this dispute concerns the proper

[40] Colom Bickford, Carlos E., Presidente CNEE, *Evolucion de la Methodología del Calculo Tarifario en Guatemala* dated Apr. 2010, at 47 (emphasis added) **(C-348)**.

[41] Respondent's Post-Hearing Brief ¶¶ 61-67, 71-73.

[42] *Id*. ¶ 72 (quoting *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of 1 Nov. 1999 ("*Azinian v. Mexico*") (emphasis omitted) ¶ 97 **(RL-2)**).

[43] *Id*. ¶ 73.

[44] *Id*.

interpretation of the LGE and RLGE.[45] Contrary to Respondent's contentions, EEGSA *did not* litigate these same claims in the Guatemalan courts, and thus the Guatemalan courts have not already decided this dispute.[46] As Claimant has explained, EEGSA's *amparo* petitions challenged the CNEE's Resolutions under Guatemalan law.[47] The Guatemalan courts ultimately ruled that the CNEE had the authority, under amended RLGE Article 98, to establish EEGSA's tariffs in accordance with the VAD study prepared by the CNEE's own consultant, Sigla.[48] Those courts did not consider whether, in doing so, Guatemala acted contrary to its prior specific representations, whether the amendment to RLGE Article 98 fundamentally altered the pre-existing regulatory framework that had been adopted to attract private investment in EEGSA, or whether the CNEE conducted EEGSA's tariff review in an arbitrary and unfair manner.[49]

17. Moreover, not only did the cases before the Guatemalan courts present different causes of action than those presented to this Tribunal, but the parties to those proceedings were different as well; Claimant was not a party to any of the Guatemalan court cases brought by EEGSA, and, thus, the Guatemalan court decisions can have no *res judicata* effect *vis-à-vis* Claimant in this arbitration.[50] In its Post-Hearing Brief, Respondent agrees with Claimant that it would not have had standing to challenge the CNEE's Resolutions in Guatemalan court.[51] Respondent nevertheless asserts that, because treaties are self-executing in Guatemala, Claimant

[45] *See, e.g.*, *id*. (arguing that "[w]hen the claimant's complaint is, as here, that a regulator incorrectly applied the domestic regulatory framework, the conduct of the courts examining the regulator's actions cannot be ignored").

[46] *Id*. ¶¶ 61-67.

[47] Claimant's Post-Hearing Brief ¶ 53; Rejoinder on Jurisdiction ¶ 49; Reply ¶¶ 208-216, 283-287.

[48] Claimant's Post-Hearing Brief ¶¶ 105, 111-116; Resolution of the Constitutional Court regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 13-15 **(C-331)**; Resolution of the Constitutional Court regarding Amparo 37-2008 dated 24 Feb. 2010, at 17 **(C-345)**. Respondent's continued argument that the Guatemalan Constitutional Court did not rely upon amended RLGE Article 98 in validating the actions of the CNEE under Guatemalan law, moreover, is wrong. *See* Respondent's Post-Hearing Brief ¶¶ 62-65. As Claimant demonstrated in its Post-Hearing Brief, the Guatemalan Constitutional Court expressly relied upon the 2007 amendment to RLGE Article 98, which allowed the CNEE for the very first time to rely upon its own VAD study in certain limited circumstances to calculate the distributor's VAD. *See* Claimant's Post-Hearing Brief ¶¶ 105; 111-116; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 14 **(C-331)**; Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 17 **(C-345)**.

[49] *See, e.g.*, Rejoinder on Jurisdiction ¶ 49.

[50] Claimant's Post-Hearing Brief ¶ 53; Rejoinder on Jurisdiction ¶ 49; Reply ¶¶ 208-216, 283-287.

[51] Respondent's Post-Hearing Brief ¶ 70; *see also* Claimant's Post-Hearing Brief ¶ 53 (stating same).

could have brought an *international law* claim alleging a violation of the *DR-CAFTA* before the Guatemalan courts.[52] This is immaterial, and what Respondent neglects to disclose is that, if Claimant had brought such a claim before the Guatemalan courts, it would have waived its right to bring this claim in international arbitration.[53] The DR-CAFTA, like the NAFTA, ensures that foreign investors have only one opportunity to bring a claim for breach of the Treaty: they may bring that claim in international arbitration or before national courts, if such claims are judiciable before the national courts.[54] It thus is not surprising that "no foreign investor has ever invoked an investment protection treaty in Guatemalan courts,"[55] as the investor would be waiving its right to have its case heard by an impartial international tribunal in exchange for having its claim heard by the political, non-independent courts of Guatemala.[56] Unlike a claim for a breach of the Treaty, however, investors not only are permitted, but are encouraged, to attempt to resolve their disputes in national courts, under domestic law causes of actions, to prevent the internationalization of the dispute.[57] In its Post-Hearing Brief, Respondent fails to acknowledge or respond to Claimant's observation that, in this regard, its jurisdictional arguments contravene the object and purpose of the "no u-turn" provision in Article 10.18(2) of the DR-CAFTA.[58]

18. Second, in its Post-Hearing Brief, Respondent fails to address the numerous

[52] Respondent's Post-Hearing Brief ¶ 68.

[53] *Id*.

[54] DR-CAFTA, Annex 10-E (providing that "an investor of the United States may not submit to arbitration . . . a claim that a Central American Party . . . has breached an obligation under Section A . . . if the investor . . . has alleged *that breach of an obligation under Section A* in proceedings before a court or administrative tribunal of a Central American Party") (emphasis added) **(CL-1)**; NAFTA Annex 1120.1 (providing that "an investor of another Party may not allege that Mexico has breached an obligation" under NAFTA Chapter Eleven "both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal") **(CL-116)**. Mexico is the only one of the three NAFTA States in which international treaties are self-executing.

[55] Respondent's Post-Hearing Brief ¶ 68.

[56] *See* Rule of Law Index, The World Justice Project (2012) **(C-614)**; Freedom in the World, FreedomHouse (2012) **(C-613)**; Roberto Molina Barreto, Imperative Constitutional Reform (2011) **(C-609)**.

[57] Claimant's Post-Hearing Brief ¶ 52; Rejoinder on Jurisdiction ¶ 56-57.

[58] DR-CAFTA, Art. 10.18(2) **(CL-1)**; Claimant's Post-Hearing Brief ¶ 52; Tr. (21 Jan. 2013) 154:11-16 (Claimant's Opening); Rejoinder on Jurisdiction ¶¶ 56-57; *see also Azinian v. Mexico* ¶ 86 (stating that the fact that the claimants in that case had taken "the initiative before the Mexican courts" did not deprive the tribunal of jurisdiction over the claim, and that "it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration under NAFTA.") **(RL-2)**.

investment treaty cases that have found an FET violation based upon a State's legislative, administrative, or regulatory actions, irrespective of whether there had been a denial of justice by the host State's courts, including, among others, *EDF v. Argentina*,[59] *ATA Construction v. Jordan*,[60] and *CME v. Czech Republic*.[61] As these cases demonstrate, even where the host State's courts are implicated, investment treaty tribunals have recognized that a breach of the FET standard can occur separate from any treatment accorded by the host State's courts.[62] As the tribunal's decision in *Vivendi II* confirms,[63] this is so, because denial of justice is but a subset of the international minimum standard and only one way in which a State may violate its obligation to accord an investment FET.[64] As the *Vivendi II* tribunal found, if it "were to restrict the claims of unfair and inequitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard."[65] Respondent does not address this authority in any way.

19. Moreover, it is well established that a State cannot use its own judicial system to insulate itself from a violation of an international law obligation.[66] 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

[59] *EDF Int'l S.A., Saur Int'l S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012 ¶¶ 905-907, 1095-1097 ("*EDF v. Argentina*") **(CL-86)**.

[60] *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*") ¶¶ 121-128 **(CL-58)**.

[61] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 Sept. 2001 ¶¶ 603, 611, 614 **(CL-16)**.

[62] Claimant's Post-Hearing Brief ¶¶ 47-54; Rejoinder on Jurisdiction ¶¶ 29, 51-54; Reply ¶¶ 272-282.

[63] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 ("*Vivendi II*") ¶ 7.4.10 **(CL-18)** (rejecting the very same argument that Respondent advances here, 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").

[64] Claimant's Post-Hearing Brief ¶ 49; Rejoinder on Jurisdiction ¶ 51; Reply ¶ 272; 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).

[65] *Vivendi II* ¶ 7.4.11 **(CL-18)**.

[66] Reply ¶ 282.

relevant conduct of public officials."[67] 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 divest the tribunal of jurisdiction, or limit the claimants' claims to a claim for denial of justice.[68] Rather, as the tribunal observed, "the legality of Respondent's acts under national law does not determine their lawfulness under international legal principles," and thus "[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."[69] Respondent also does not address this authority.

20. Third, the tribunal's decision in *Iberdrola* that the claimant's claims were purely regulatory and thus outside the jurisdiction of the tribunal, with the exception of its denial of justice claim, is inapposite.[70] As Claimant has explained, the *Iberdrola* tribunal's decision was grounded on the fact that, "beyond labeling the behavior of [the] CNEE as violating the Treaty, the Claimant did not raise a dispute under the Treaty and international law, but a technical, financial and legal discussion on provisions of the law of the Respondent State," and 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."[71] As the tribunal observed, "*according to the claim filed by the Claimant*, [the tribunal] would have to act as regulatory authority, as administrative entity and as

[67] *Azinian v. Mexico* ¶ 98 **(RL-2)**; *see also ATA Construction v. Jordan* ¶ 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)**; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 Jul. 2007 ("*Kardassopoulos v. Georgia*") ¶ 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)**.

[68] *EDF v. Argentina* ¶ 1095 **(CL-86)**.

[69] *Id*. ¶ 907; *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 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").

[70] Respondent's Post-Hearing Brief ¶¶ 33-39, 74-76.

[71] Claimant's Post-Hearing Brief ¶ 48; Rejoinder on Jurisdiction ¶¶ 25-30; *Iberdrola v. Guatemala* ¶¶ 353, 354 **(RL-32)**.

trial court, to decide" various issues of Guatemalan law.[72] The tribunal further found that there was only marginally a "debate about violations of the Treaty, or international law, or which actions of the Republic of Guatemala, in exercise of State power, had violated certain standards contained in the Treaty,"[73] and that "[b]y the way the debate, the hearing, and the issues raised had developed, this process was more like an international commercial arbitration than an investment one."[74] Indeed, Guatemala emphasized in that case that Iberdrola had not made *any reference* to international law during its hearing.[75] No such findings could be made based upon the record in this case.

21. Unlike in *Iberdrola*, Claimant's discussion of international law has not been lacking; throughout its written and oral submissions, Claimant has demonstrated by reference to investment treaty jurisprudence and to other sources of international law that, if its allegations are proven to be correct, "it would follow that the Respondent violated the treaty or international law."[76] Claimant also has expressly asked this Tribunal to review Guatemala's actions not in light of Guatemalan law, but in light of Guatemala's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA FET.[77] According to the claim filed by Claimant in this arbitration, the Tribunal thus would not "have to act as regulatory authority, as administrative entity and as trial court, to decide" various issues of Guatemalan law, as was found by the *Iberdrola* tribunal to be the case in that arbitration.[78]

22. Moreover, as discussed above, Claimant's FET claim does not depend upon a determination of the proper interpretation of Guatemalan law; nor does it arise from mere regulatory irregularities in EEGSA's ordinary dealings with the CNEE.[79] Unlike what was found

[72] *Iberdrola v. Guatemala* ¶ 354 (emphasis added) **(RL-32)**.

[73] *Id*. ¶ 352.

[74] *Id*. ¶ 353.

[75] *Id.* ¶ 261.

[76] *Id*. ¶ 357.

[77] *See* Claimant's Post-Hearing Brief ¶ 48; Tr. (21 Jan. 2013) 157:21-158:10 (Claimant's Opening); Rejoinder on Jurisdiction ¶¶ 14-24; Reply ¶¶ 228-282.

[78] *Iberdrola v. Guatemala* ¶ 354 **(RL-32)**.

[79] *See supra* Section II.B; Claimant's Post-Hearing Brief ¶¶ 29, 47-48; Rejoinder on Jurisdiction ¶¶ 6, 14-24, 43-48; Reply ¶¶ 228-282.

to be the case in *Iberdrola*, Claimant thus had not submitted to this Tribunal a so-called mere regulatory dispute over the proper interpretation of Guatemalan law, as Respondent erroneously contends.[80] Rather, Claimant has submitted to this Tribunal a claim that Respondent took deliberate action in contravention of its prior specific representations; that it fundamentally changed critical elements of its regulatory framework, which was established specifically to attract and to induce foreign investment in EEGSA; and that it engaged in arbitrary and bad faith conduct in connection with EEGSA's 2008-2013 tariff review to decrease EEGSA's VAD.[81] In any event, as Claimant has demonstrated, to the extent that the *Iberdrola* tribunal found that it did not have jurisdiction to consider issues of domestic law in assessing the conduct of regulatory authorities under international law, that finding is manifestly incorrect.[82] Not only is it well established that investment treaty tribunals are permitted to determine issues of domestic law in assessing whether there has been a violation of an international law obligation,[83] but numerous investment treaty tribunals have ruled on issues of domestic law in a regulatory context, including where, as here, the claimant's claim was based upon a fundamental change to the legal regime, an abuse of power, or conduct that otherwise is arbitrary.[84] Indeed, as the tribunal in *Chemtura v. Canada* expressly affirmed, the customary international law minimum standard of treatment "seeks to ensure that investors from NAFTA member States benefit from *regulatory fairness*."[85]

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[80] Respondent's Post-Hearing Brief ¶¶ 74-76.

[81] *See infra* Section IV.B; Claimant's Post-Hearing Brief ¶¶ 101-164; Rejoinder on Jurisdiction ¶¶ 14-24; Reply ¶¶ 228-230, 283-287.

[82] Rejoinder on Jurisdiction ¶¶ 31-42; *see also* Tr. (21 Jan. 2013) 158:20-160:10 (Claimant's Opening).

[83] Rejoinder on Jurisdiction ¶¶ 32-34 (citing *Kardassopoulos v. Georgia* ¶ 145 **(CL-88)**; *Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990 ¶ 21 **(CL-82)**; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability of 27 Dec. 2010 ¶ 39 **(CL-70)**; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 Dec. 2003 ¶ 95 **(CL-83)**).

[84] Rejoinder on Jurisdiction ¶¶ 35-41 (citing *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006 ¶ 87 **(CL-96)**; *EDF Int'l v. Argentina* ¶¶ 994-1051 **(CL-86)**; *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 ¶¶ 232-235 **(CL-92)**; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ¶¶ 246-248 **(CL-37)**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003 ¶¶ 164, 166 **(CL-95)**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 Apr. 2004 ("*Waste Management II*") ¶ 98 **(CL-46)**).

[85] *Chemtura Corp. v. Canada*, UNCITRAL, Award of 2 Aug. 2010 ¶ 179 (emphasis added) **(CL-14)**.

23. Respondent's assertion that tribunals frequently reject claims arising from so-called regulatory breaches "at the jurisdictional stage of the arbitration, as was the case for the alleged regulatory breaches present in the *Iberdrola* and *Azinian* cases," also is erroneous.[86] As Claimant has shown, the *Iberdrola* decision is the *only* case in which a claim was dismissed for lack of jurisdiction on these grounds;[87] contrary to Respondent's contention, the tribunal's decision in *Azinian* was not a jurisdictional decision, but rather was a decision on the merits.[88] Indeed, with the exception of *Iberdrola*, none of the cases upon which Respondent relies was dismissed for lack of jurisdiction on the grounds that the claimant's claims arose from a so-called mere regulatory dispute, and that the only claim over which the tribunal had jurisdiction thus was one for denial of justice.[89] Rather, as Claimant has explained, the cases upon which Respondent relies fall into two categories: (i) claims dismissed for lack of jurisdiction, because the claimant's claims were purely contractual in nature; and (ii) claims dismissed on the merits, where the tribunal found that the claimant had not established a violation of the fair and equitable treatment obligation.[90] The first category of cases is inapposite, as Claimant does not base its claims upon a breach of contract, and the second category of cases affirms Claimant's position that the Tribunal has jurisdiction over Claimant's claims and that the type of conduct at issue here, which clearly is distinguishable from that at issue in those cases, rises to the level of an FET breach.

24. In its Post-Hearing Brief, Respondent attempts to link the tribunal's decision in *Iberdrola* to cases involving purely contractual claims;[91] however, there is *no* legal authority for Respondent's suggestion that claims arising from so-called mere regulatory disputes are analogous to claims arising from mere contractual breaches and, indeed, Respondent points to none.[92] While there is no dispute that investment treaty tribunals, as a general rule, do not have

[86] Respondent's Post-Hearing Brief ¶ 38 (internal citations omitted).

[87] Claimant's Post Hearing Brief ¶ 49; Rejoinder on Jurisdiction ¶ 50.

[88] *See Azinian v. Mexico* **(RL-2)**.

[89] *See* Respondent's Post-Hearing Brief ¶ 38 (citing the tribunal's decisions in *Azinian v. Mexico*, *Iberdrola v. Guatemala*, *SGS v. Pakistan*, *Generation Ukraine v. Ukraine*, and *Joy Mining v. Egypt*).

[90] Rejoinder on Jurisdiction ¶ 55; Reply ¶ 277.

[91] Respondent's Post-Hearing Brief ¶ 38.

[92] *Id*.

jurisdiction over purely contractual claims,[93] 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* 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."[94] The *Azinian* tribunal similarly found that NAFTA Chapter Eleven does not "allow investors to seek international arbitration for mere contractual breaches,"[95] as this would elevate "a multitude of *ordinary* transactions with public authorities into potential international disputes."[96] There is no such distinction for so-called "mere regulatory disputes," which, by definition, involve the State acting in its sovereign capacity. Thus, as noted above, whether a State's regulatory actions constitute a treaty breach is a merits decision, and not a jurisdictional one.[97]

## III. RESPONDENT MISCHARACTERIZES THE MINIMUM STANDARD OF TREATMENT UNDER ARTICLE 10.5 OF THE DR-CAFTA

25. In its Post-Hearing Brief, Respondent continues to mischaracterize the minimum standard of treatment under Article 10.5 of the DR-CAFTA, arguing that "the international minimum standard is less demanding on States than the fair and equitable treatment standard, and is violated only when there is particularly egregious and serious conduct."[98] Respondent further asserts that the DR-CAFTA member States "have clarified for the Tribunal what their

[93] *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-102)**; *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)**.

[94] *Impregilo v. Pakistan* ¶ 260 **(CL-63)**.

[95] *Azinian v. Mexico* ¶ 87 **(RL-2)**.

[96] *Id*. (emphasis added).

[97] Claimant's Post-Hearing Brief ¶ 54.

[98] Respondent's Post-Hearing Brief ¶ 268.

common intention and understanding was when they agreed to the international minimum standard,"[99] and "have expressly defined the content of the standard, agreeing to limit it to denial of justice and, at most, manifest arbitrariness."[100] According to Respondent, "[t]he common view of the States regarding the content of the obligations which they agreed to is binding on the parties to this proceeding and the Tribunal."[101] In addition, Respondent asserts that "manifest arbitrariness requires an element of volition in the arbitrary conduct,"[102] and "that the doctrine of legitimate expectations is not applicable in the context of the international minimum standard."[103] Respondent's assertions are incorrect, as set forth below.

26. First, as Claimant demonstrated in its Post-Hearing Brief, numerous investment treaty tribunals—and even Respondent itself—have acknowledged that the minimum standard of treatment has evolved and, in the context of foreign investment protection, has converged in substance with the FET standard, such that the standards essentially are the same.[104] As Respondent itself argued in the *Iberdrola* arbitration, "the international minimum standard and fair and equitable treatment are *hardly distinguishable*."[105] The tribunal in *Deutsche Bank v. Sri Lanka* similarly concluded that "the actual content of the Treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law,"[106] while the tribunal in *SAUR v. Argentina* found that it is "irrelevant whether the concept of FET is interpreted in accordance with its 'ordinary meaning,' as required by the Vienna Convention, or in accordance with customary international law; *in both cases, the level of conduct required from the State is the same, and it does not require an*

[99] *Id*. ¶ 262.

[100] *Id*. ¶ 273.

[101] *Id*. ¶ 262.

[102] *Id*. ¶ 273.

[103] *Id*. ¶ 284.

[104] Claimant's Post-Hearing Brief ¶¶ 13-20; *see also* Reply ¶ 231; Memorial ¶¶ 229-244.

[105] Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 25 July 2011 at 170:12-14 (Respondent's Opening) ("*[E]l estándar mínimo internacional y el trato justo y equitativo son difícilmente distinguibles*.") (emphasis added) **(C-628)**.

[106] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 Oct. 2012 ("*Deutsche Bank v. Sri Lanka*") ¶ 419 **(CL-100)**.

*enhanced volitional element*."[107] Indeed, it is telling that neither Respondent nor tribunals nor respected commentators have pointed to a single FET claim brought under the NAFTA or the DR-CAFTA which failed, and have contended that this same claim would have prevailed, if it had been subject to a so-called "autonomous" FET standard; likewise, arbitral awards and the literature are devoid of any commentary suggesting that any particular FET claim which succeeded under a treaty with a so-called autonomous FET standard would have failed, if it had been brought under the NAFTA or the DR-CAFTA. This is because both the NAFTA and the DR-CAFTA offer the highest protection for foreign investment, and it is in this regard that the distinction between the minimum standard of treatment and the so-called autonomous FET standard is "more theoretical than real."[108]

27. Thus, numerous investment treaty tribunals—and even Respondent itself—have confirmed that the standard articulated by the *Waste Management II* tribunal accurately reflects both the customary international law minimum standard of treatment and the so-called autonomous FET standard.[109] In *RDC v. Guatemala*, the first DR-CAFTA case to reach the merits, the tribunal thus not only adopted the *Waste Management II* standard in its Award, finding that the standard "persuasively integrates the accumulated analysis of prior NAFTA

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[107] *SAUR Int'l S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012 ("*SAUR v. Argentina*") ¶ 494 ("*Par conséquent, il est devenu indifférent que le concept de TJE soit interprété conformément à son « sens courant », comme l'exige la Convention de Vienne, ou conformément au droit international coutumier; dans les deux cas, le niveau de conduite exigible de l'État est le même et il ne requiert pas d'élément volitif renforcé*.") (emphasis added) **(CL-107)**.

[108] *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 ¶ 611 **(CL-39)**.

[109] Claimant's Post-Hearing Brief ¶¶ 18-20 (citing *Waste Management II* ¶ 98 **(CL-46)**; *RDC v. Guatemala* ¶¶ 162, 219 **(CL-92)**; *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award of 15 Nov. 2004 ¶ 95 **(RL-7)**; *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award of 18 Sept. 2009 ¶¶ 283-285 **(CL-12)**; *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits of 3 Aug. 2005, Part IV, Chapter D, ¶ 8 **(CL-105)**; *Deutsche Bank v. Sri Lanka* **(CL-100)**; *Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award of 6 Nov. 2008 ¶ 187 **(RL-11)**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 ¶¶ 597, 601-602 **(CL-10)**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 Feb. 2007 ¶ 297 **(CL-44)**; *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 Oct. 2006 ¶ 128 **(CL-27)**; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 ¶ 370 **(CL-8)**; *BG Group v. The Argentine Republic*, UNCITRAL, Final Award of 24 Dec. 2007 (set aside on other grounds) ¶¶ 292, 294 **(CL-9)**; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of 17 Mar. 2006 ¶ 302 **(CL-42)**).

Tribunals and reflects a balanced description of the minimum standard of treatment,[110] but Respondent itself expressly endorsed and approved this standard.[111] In *Deutsche Bank*, the tribunal, in applying an autonomous FET standard, similarly found "that the standard has been rightly – although not exhaustively – defined in the *Waste Management II* case," and that its components include the "protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment; good faith conduct although bad faith on the part of the State is not required for its violation; conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary; [and] conduct that does not offend judicial propriety, that complies with due process and the right to be heard."[112]

28. In its Post-Hearing Brief, Respondent conveniently ignores this authority and, in clear contradiction with its prior statement in the *Iberdrola* arbitration that "the international minimum standard and fair and equitable treatment are *hardly distinguishable*,"[113] argues that "there is no doubt that the international minimum standard imposes fewer restrictions on State conduct, and therefore provides a lower level of protection than the fair and equitable treatment standard."[114] As Claimant noted in its Post-Hearing Brief, Respondent cannot be permitted to endorse contradictory interpretations for purely strategic advantage, and thus should be estopped from arguing, as it does here, that the minimum standard of treatment is a higher standard.[115]

29. Respondent further argues that "the Treaty clearly indicates the source to which reference must be made to establish the content of the standard, namely, international custom, i.e. the general and consistent practice followed by States from a sense of legal obligation,"[116] and that Claimant "did not make any reference in it submissions and during the Hearing to the

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[110] *RDC v. Guatemala* ¶ 219 **(CL-92)**.

[111] *Id*. ¶ 162 ("Respondent refers with approval to how the minimum standard of treatment was described by the arbitral tribunals in *Waste Management II*, *GAMI*, *Thunderbird* and *Genin*") (internal citations omitted).

[112] *Deutsche Bank v. Sri Lanka* ¶ 420 **(CL-100)**.

[113] Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 25 July 2011 at 170:12-14 (Respondent's Opening) ("*[E]l estándar mínimo internacional y el trato justo y equitativo son difícilmente distinguibles*.") (emphasis added) **(C-628)**.

[114] Respondent's Post-Hearing Brief ¶ 266.

[115] Claimant's Post-Hearing Brief ¶ 16.

[116] Respondent's Post-Hearing Brief ¶ 250.

general practice of States, followed as a legal obligation, as the source of the protection standard."[117] This too is incorrect. As Claimant has demonstrated, and as the tribunal affirmed in *Cargill v. Mexico*, "the writings of scholars and the decisions of tribunals may serve as evidence of custom," particularly in light of the fact that "surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as 'fair and equitable treatment' where developed examples of State practice may not be many or readily accessible."[118] As Claimant noted in its Post-Hearing Brief, the tribunal in *Merrill & Ring v. Canada* thus considered and rejected the very same argument that Respondent advances here.[119] Noting Canada's argument "that the existence of the rule must be proven," the tribunal concluded that, "against the backdrop of the evolution of the minimum standard of treatment," it was "satisfied that fair and equitable treatment has become a part of customary law."[120] As the tribunal noted, "[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*."[121]

30. Second, Respondent is wrong to assert that the interpretations of the minimum standard of treatment advocated by the non-disputing parties in this case must prevail,[122] because "[t]he common view of the States regarding the content of the obligations which they agreed to is binding on the parties to this proceeding and the Tribunal."[123] As Articles 10.22.3 and 19.1.3(c) of the DR-CAFTA make clear, only the Free Trade Commission may "issue interpretations of the provisions of" the DR-CAFTA, which would bind this Tribunal.[124] The submissions made

[117] *Id*. ¶ 251.

[118] *Cargill v. Mexico* ¶¶ 277, 274 **(CL-12)**; *see also* Claimant's Post-Hearing Brief ¶ 21; Reply ¶¶ 232-233.

[119] Claimant's Post-Hearing Brief ¶ 24.

[120] *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award of 31 Mar. 2010 ("*Merrill & Ring v. Canada*") ¶ 211 **(CL-29)**.

[121] *Id*. ¶ 210.

[122] Respondent's Post-Hearing Brief ¶ 252.

[123] *Id*. ¶ 262.

[124] The Dominican Republic – Central America – United States Free Trade Agreement dated 5 Aug. 2004 ("DR-CAFTA"), Chapter Ten, Art. 10.22.3 ("A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 19.1.3(c) (The Free Trade Commission) shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent

by certain of the non-disputing State parties under Article 10.20 in this case do not constitute such a decision and thus are not binding upon this Tribunal.[125] Moreover, because not all of the non-disputing parties made submissions in this case, there is no agreement on the interpretation of the Treaty that should be taken into account by this Tribunal.[126] Respondent's cursory attempt to construe Costa Rica's and Nicaragua's silence as approving the submissions that have been made also must be rejected.[127] The notion that a State, through its silence, could be deemed to express its agreement with legal submissions made by another State contravenes the most basic principles of international law, and evidences Respondent's willingness to disregard even fundamental notions of law in an attempt to gain a strategic advantage in this case. Indeed, it is telling that each of the non-disputing State parties which made an Article 10.20 submission in this case expressly stated that its failure to comment upon any particular issue must *not* be construed as agreement or disagreement with any party's position on that issue;[128] this makes Guatemala's assertion all the more surprising.

31. Respondent's attempt to construct the alleged "common view of the States" regarding the content of Article 10.5 of the DR-CAFTA by picking and choosing the most restrictive language from each non-disputing party submission also fails.[129] As the non-disputing

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with that decision.") **(CL-1)**; *id*., Art. 19.1.3(c) ("The Commission may: . . . issue interpretations of the provisions of this Agreement").

[125] *Id*., Art. 10.20.

[126] *See* Vienna Convention on the Law of Treaties, Art. 31(3)(a) (providing that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be taken into account); *id.* Art. 31(3)(b) (providing that a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account) **(CL-2)**.

[127] Respondent's Post-Hearing Brief ¶ 252 n.366.

[128] United States Art. 10.20.2 Submission dated 23 Nov. 2012 ¶ 1 ("[N]o inference should be drawn from the absence of comment on any issue not addressed below."); Dominican Republic Art. 10.20.2 Submission dated 5 Oct. 2012 ¶ 2 ("[T]he fact that a legal issue arisen during the procedure is not addressed in this submission does not mean or should not be considered to mean that the Dominican Republic agrees or disagrees with the position taken by the contending parties."); El Salvador Art. 10.20.2 Submission dated 5 Oct. 2012 ¶ 2 ("[T]he absence of comments in this submission about any other questions of Treaty interpretation does not give rise to any inferences regarding El Salvador's interpretation of any provisions of the Treaty not specifically addressed in this submission."); Honduras Art. 10.20.2 Submission dated 15 Nov. 2012 ¶ 2 ("*[E]l hecho que está es una cuestión jurídica que haya surgido durante el procedimiento no se aborde esta comunicacíon no deberá considerarse como que Honduras esta de acuerdo o en desacuerdo con la posición adoptadas por las partes contendientes*.").

[129] Respondent's Post-Hearing Brief ¶¶ 252-262.

party submissions themselves reflect, there is no "common view of the States" regarding the content of the standard.[130] Nor has the United States agreed that "the standard only protects against denial of justice and manifest arbitrariness," as Respondent asserts.[131] Rather, as Claimant noted in its Post-Hearing Brief, the United States never has addressed the issue of whether a State incurs responsibility for a violation of the minimum standard of treatment when it acts contrary to specific representations made to induce that investor's investment; instead, its submissions in this and other cases focus exclusively on the principle that liability does not arise under the minimum standard of treatment simply because the investor's "subjective" or "mere" expectations allegedly are dashed.[132] Claimant has never argued otherwise.

32. Furthermore, the views expressed by the non-disputing parties in this case are not only defensively-oriented, as is to be expected given the parties' role as current and future potential respondents in DR-CAFTA arbitrations, but also are no different than submissions made by them in other cases. Thus, for instance, three of the same DR-CAFTA parties made submissions in the *RDC v. Guatemala* arbitration, which essentially are identical in substance to the submissions made here.[133] As Claimant has explained, the tribunal in *RDC* concluded that "the manner in which and the grounds on which [Guatemala had] applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in Article 10.5 of CAFTA by being, in the words of *Waste Management II*, 'arbitrary, grossly unfair, [and] unjust'. . . . including by evidencing that *lesivo* was in breach of representations

[130] *Cf.* Honduras Art. 10.20.2 Submission dated 15 Nov. 2012 ¶¶ 6, 10 (stating that a breach of DR-CAFTA's Article 10.5 amounts to a "grave denegation of justice, a manifest arbitrariness, … a complete lack of due process, a manifest discrimination, or the manifest absence of the reasons for a decision" which are minimum levels of treatment in accordance with customary international law); Dominican Republic Art. 10.20.2 Submission dated 5 Oct. 2012 ¶ 8 (recognizing that "manifestly arbitrary behavior, blatant unfairness and very egregious actions" each constitute a breach of the DR-CAFTA's Article 10.5 as violations of customary international law); El Salvador Art. 10.20.2 Submission dated 5 Oct. 2012 ¶¶ 16-17 (stating that the only clear violation of "fair and equitable treatment" is a "denial of justice" and that arbitrary measures are not established violations of customary international law and would have to be proven as such to amount to a violation of the DR-CAFTA's Article 10.5).

[131] Respondent's Post-Hearing Brief ¶ 255.

[132] Claimant's Post-Hearing Brief ¶ 26.

[133] *See RDC v. Guatemala* **(CL-92)**; *RDC v. Guatemala*, Honduras Art. 10.20.2 Submission dated 1 Jan. 2012 **(RL-27)**; *RDC v. Guatemala*, El Salvador Art. 10.20.2 Submission dated 1 Jan. 2012 ¶¶ 6-7 **(RL-28)**; *RDC v. Guatemala*, United States Art. 10.20.2 Submission dated 31 Jan. 2012 ¶ 2 **(RL-29)**.

made by Guatemala upon which Claimant reasonably relied,"[134] thus accepting that arbitrary conduct, as well as conduct that contravenes prior representations, breaches Article 10.5 of the DR-CAFTA, and rejecting the unduly restrictive interpretation which Guatemala proposes and argues that certain non-disputing parties endorse.

33. Respondent's further assertions that Claimant's counsel "did not even once utter the phrase 'non-disputing party' during [its] opening statement," that it "chose not to exercise its right to comment in response [to the oral presentations made by the non-disputing parties], even when the opportunity for rebuttal was expressly built into the Hearing schedule," and that "[t]he only justification that TGH could have had for remaining silent was that it possessed no arguments with which to respond, and therefore preferred to ignore the question" not only are blatantly wrong, but also are entirely disingenuous.[135] As the Hearing transcript reflects, Claimant referred directly to and quoted the Article 10.20 submission made by the Dominican Republic in its Opening Statement.[136] Moreover, while Claimant expressly reserved the right to respond to the oral presentations made by the non-disputing parties at the Hearing,[137] the Tribunal itself noted that its preference was not to spend "much time with discussion on this presentation, because we believe that the issues are in the written submission and we prefer to reserve as much time as possible [] to discuss questions that the Tribunal might have and the organization of further steps of the proceedings."[138] After the Hearing was postponed and its length considerably shortened, the parties, in their 25 February 2013 Agreement on the Hearing Organization, thus encouraged "the Republic of El Salvador to keep its submission short, in light of the restricted hearing time," and noted that, "[d]epending on the length and content of El Salvador's submission, the parties reserve the right to request an opportunity to briefly respond at the hearing (such response not to exceed 15 minutes per party)."[139] The parties reiterated this

[134] *RDC v. Guatemala* ¶ 235 **(CL-92)**; Claimant's Post-Hearing Brief ¶ 27; Rejoinder on Jurisdiction ¶ 38.

[135] Respondent's Post-Hearing Brief ¶¶ 15, 16.

[136] Tr. (21 Jan. 2013) 121:4-6, 123:11-124:1 (Claimant's Opening Statement); Claimant's Opening Slides 126, 130.

[137] Tr. (22 Jan. 2013) 539:14-17 (Claimant).

[138] Tr. (22 Jan. 2013) 540:4-12 (Tribunal).

[139] Email from Respondent to the Tribunal dated 25 Feb. 2013, attaching Agreement on the Hearing Organization, at 2.

agreement in their subsequent emails to the Tribunal dated 2 March 2013 with respect to the submission of the Dominican Republic.[140]

34. In view of the Tribunal's stated preference and the limited hearing time, Claimant thus decided not to respond to the non-disputing party presentations orally, but to use the remainder of its time for its direct and cross-examinations; the parties accordingly both expressly agreed to address these presentations in their post-hearing briefs.[141] Indeed, even without addressing these presentations, the fifth day of the Hearing, when the non-disputing parties made their oral presentations, did not end until 8:40 pm, and Claimant was expressly asked by the Tribunal to limit the length of its cross-examinations on that day, which it agreed to do in the circumstances.[142] In any event, the oral presentations made by the non-disputing parties at the Hearing did not make any observations that were not already contained in their written submissions, with the exception of the United States, which noted that it "reject[ed]" the suggestion made by Guatemala in its Opening Statement that its "written submission in this case somehow reflects a failure by the United States to, 'protect,' a U.S. investor,"[143] an argument which Respondent nevertheless continues to allude to in its Post-Hearing Brief.[144]

35. Third, with respect to arbitrariness, as Claimant noted in its Post-Hearing Brief, there is no dispute between the parties that arbitrariness, as the ICJ stated in the *ELSI* case, "is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful [*sic*] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[145] Respondent's suggestion that "arbitrariness *requires* an element of intentionality," and that "[s]uch intentionality is what makes it possible to characterize a mere

[140] Email from Claimant to the Tribunal dated 2 Mar. 2013; Email from Respondent to the Tribunal dated 2 Mar. 2013.

[141] Tr. (4 Mar. 2013) 824:8-14 (Claimant) ("Claimant doesn't believe it's necessary and is prepared to just respond in the Post-Hearing Submissions."); Tr. (4 Mar. 2013) 824:15-20 (Respondent) ("I think we can also reserve any observations for the Post-Hearing Brief.").

[142] *See* Tr. (4 Mar. 2013) 1154:7-14, 1174:1-5, 1244:14-22, 1252:15-18 (Tribunal).

[143] Tr. (4 Mar. 2013) 822:17-20 (United States).

[144] Respondent's Post-Hearing Brief ¶ 14.

[145] Claimant's Post-Hearing Brief ¶ 41 (quoting *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, reprinted in 1989 I.C.J. REP. 15 ¶ 128 **(RL-1)**); Reply ¶ 237; Counter-Memorial ¶ 528.

illegality as a violation of the basic concept of law and submit public authorities to the rule of law," is incorrect.[146] As Claimant noted in its Post-Hearing Brief, while intentionality, like bad faith, is not required for a finding of arbitrariness, evidence of intentionality—or regulatory action that "grossly subverts a domestic law or policy for an ulterior motive"—violates the international minimum standard.[147] As the tribunal explained in *Cargill v. Mexico*, "arbitrariness may lead to a violation . . . when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point *where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive*."[148] This is consistent with the tribunal's finding in *SAUR v. Argentina* that an element of volition is not required for an FET violation.[149] As the *SAUR* tribunal concluded, when the Treaty "defines the fair and equitable treatment standard 'consistent with the principles of international law,' the Treaty refers to those principles as they are currently understood," and that "*currently, the interpretation according to which the principle does not require an enhanced volitional element in the conduct of the offending State is virtually unanimous*."[150]

36. Moreover, while Respondent asserts that "a mere violation of a legal rule" and "mere illegality" do not constitute arbitrary treatment in violation of the international minimum standard, as discussed above and in Claimant's submissions, Claimant's claims regarding Respondent's arbitrary treatment do not assert "a mere violation of a legal rule" or "mere illegality" by the CNEE in the ordinary exercise of its functions; to the contrary, Claimant's claims arise out of the deliberate and calculated actions taken by the CNEE during EEGSA's 2008-2013 tariff review to ensure a decrease in EEGSA's VAD, including by inducing EEGSA to withdraw its provisional *amparo* against the ToR in exchange for adopting Article 1.10, and then later acting in blatant violation of that agreement; by inserting an unlawful FRC formula

[146] Respondent's Post-Hearing Brief ¶ 276 (emphasis in original).

[147] Claimant's Post-Hearing Brief ¶ 46 (citing *Cargill v. Mexico* ¶ 293 **(CL-12)**).

[148] *Cargill v. Mexico* ¶ 293 (emphasis added) **(CL-12)**.

[149] *SAUR v. Argentina* ¶ 494 **(CL-107)**.

[150] *Id*. ("*Quand l'art. 3 de l'APRI définit le TJE « conforme aux principes du droit international », le traité se réfère aux dits principes tels qu'on les comprend actuellement. Et, actuellement, l'interprétation selon laquelle le principe n'exige pas d'élément volitif renforcé dans la conduite de l'État offenseur est pratiquement unanime*.") (emphasis added) (internal citations omitted).

into the ToR after EEGSA had withdrawn its provisional *amparo*; by enacting RLGE Article 98 *bis* and attempting to apply it retroactively to EEGSA's tariff review; by agreeing to Rule 12 of the Operating Rules and then later disavowing that agreement; by engaging in improper *ex parte* communications with Mr. Riubrugent; by preventing the Expert Commission from completing its task under Rule 12; by ignoring the Expert Commission's Report and Bates White's 28 July 2008 revised study; and by adopting Sigla's study without any input from EEGSA or its consultant.[151] Claimant thus never has argued that "mere illegality" constitutes arbitrary treatment in violation of the international minimum standard.

37. Finally, Respondent's assertion that "the doctrine of legitimate expectations is not applicable in the context of the international minimum standard"[152] is incorrect. As Claimant demonstrated in its Post-Hearing Brief, every DR-CAFTA and NAFTA Chapter Eleven tribunal to address the issue of an investor's legitimate expectations arising from the State's representations to induce its investment has recognized that they are an integral part of the obligation to accord an investment treatment that comports with the customary international law minimum standard,[153] including the tribunals in *RDC v. Guatemala*,[154] *Waste Management II*,[155] *Mobil and Murphy v. Canada*,[156] *Thunderbird v. Mexico*,[157] *Glamis Gold v. United States*,[158] and *Grand River Enterprises v. United States*.[159] Thus, to the extent that any of the non-disputing parties' submissions can be understood as supporting Respondent's assertion that the doctrine of legitimate expectations is not applicable in the context of the minimum standard of treatment, that position should be rejected, and indeed, has been rejected by the *RDC* tribunal.

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[151] *See infra* Section IV.B; Claimant's Post-Hearing Brief ¶¶ 117-164; Reply ¶¶ 89-227.

[152] Respondent's Post-Hearing Brief ¶ 284.

[153] Claimant's Post-Hearing Brief ¶¶ 25-29.

[154] *RDC v. Guatemala* ¶ 232-235 **(CL-92)**.

[155] *Waste Management II* ¶ 98 **(CL-46)**.

[156] *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum of 22 May 2012 ¶ 152 **(CL-106)**.

[157] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award of 26 Jan. 2006 ¶ 147 **(CL-25)**.

[158] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award of 8 June 2009 ¶ 621 **(CL-23)**.

[159] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award of 12 Jan. 2011 ¶ 140 **(CL-87)**.

Respondent, in fact, itself recognizes in its Post-Hearing Brief that "some tribunals have used the language of legitimate expectations in the context of the minimum standard," but argues that "the test applied for determining a violation is not different from that applied to determine manifest arbitrariness,"[160] and that "expectations of the correct interpretation of a regulatory framework are not sufficient in any case."[161] As Claimant repeatedly has explained, Claimant's claim that Guatemala violated its legitimate expectations is not based upon the CNEE's incorrect interpretation of the LGE and RLGE, but rather is based upon the specific representations that Guatemala made to attract and to induce foreign investment in EEGSA, and the actions that the CNEE subsequently took in contravention of those representations to ensure a decrease in EEGSA's 2008-2013 VAD.[162]

38. Respondent's further argument that Claimant "has not provided a single example of a case involving the international minimum standard in which such standard was violated due to a violation of legitimate expectations"[163] also is wrong. As noted above, the tribunal in *RDC* expressly found that "the manner in which and the grounds on which [Guatemala had] applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in Article 10.5 of CAFTA by being, in the words of *Waste Management II*, 'arbitrary, grossly unfair, [and] unjust'. . . . *including by evidencing that* lesivo *was in breach of representations made by Guatemala upon which Claimant reasonably relied* . . . . "[164] As Claimant explained in its Post-Hearing Brief, in holding that Guatemala had abused its authority in violation of Article 10.5, the tribunal found, among other things, that the claimant had a legitimate expectation that the contract at issue, which contained the same terms as a prior contract put out for public bidding, was not contrary to the public interest; that Guatemala had breached representations made to the claimant upon which it was entitled to rely; and that the contemporaneous evidence demonstrated that Guatemala was using the legal power granted to it

[160] Respondent's Post-Hearing Brief ¶ 285.

[161] *Id*. ¶ 286.

[162] Claimant's Post-Hearing Brief ¶ 26; Reply ¶¶ 247-260.

[163] Respondent's Post-Hearing Brief ¶ 287.

[164] *RDC v. Guatemala* ¶ 235 (emphasis added) **(CL-92)**.

under its laws for reasons other than their intended purpose.[165]

39. Respondent's suggestion that Claimant's "concept of legitimate expectations is erroneous, as it does not focus on the limits of prohibited behavior, but rather on the subjective position of the investor," likewise is incorrect.[166] As Claimant explained in its Post-Hearing Brief, consistent with the positions advanced by the non-disputing parties in this case,[167] the concept of legitimate expectations measures the investor's expectations *objectively*; that is, the tribunal must assess whether the State made specific representations upon which a reasonable investor would have relied, and whether the State then acted contrary to those specific representations.[168] As Claimant expressly noted, in making that assessment, *the focus of the tribunal thus must be on the conduct of the State, rather than on the investor's subjective or "mere" expectations*.[169]

40. Moreover, Respondent's argument that, "[e]ven when the concept of legitimate expectations applies, only specific and unambiguous commitments (such as a legal stability clause) give rise to such expectations,"[170] is inconsistent with its own acknowledgment that fundamental changes to essential aspects of the regulatory framework can constitute a violation of the minimum standard.[171] As Respondent notes in its Post-Hearing Brief, "[t]he changes to the regulatory framework that are condemnable are those that give rise to manifest arbitrariness, that are implemented through government or legislative instruments, and [that] result in a

[165] Claimant's Post-Hearing Brief ¶ 27; *RDC v. Guatemala* ¶¶ 232-235 **(CL-92)**; *see also id*. ¶ 222.

[166] Respondent's Post-Hearing Brief ¶ 291.

[167] *See* Tr. (4 Mar. 2013) 820:22-821:4 (Dominican Republic Submission) ("The conduct of the State is what is relevant as the only factor to take into account, since the Minimum Standard of Treatment should be an objective concept assessing the treatment that States afford to Investors."); *see also* Dominican Republic Art. 10.20.2 Submission dated 5 Oct. 2012 ¶ 10 ("What is relevant, and the only factor to consider, is the conduct of the State, since the Minimum Standard of Treatment should be an objective concept that evaluates the treatment that a State gives to an investor. Were it a variable concept that takes into account the investor's subjective assessment of the treatment he expects to receive, this would have a detrimental effect on the regulatory capacity of States.").

[168] Claimant's Post-Hearing Brief ¶¶ 25-26; Tr. (21 Jan. 2013) 120:17-121:3 (Claimant's Opening); Memorial ¶ 234.

[169] Claimant's Post-Hearing Brief ¶ 25.

[170] Respondent's Post-Hearing Brief ¶ 287.

[171] *Id*. ¶¶ 78, 287.

deliberate disregard for the commitments clearly undertaken with the investor."[172] Furthermore, as Claimant has demonstrated, numerous tribunals have found that domestic law and regulations can, in and of themselves, form the basis of the investor's legitimate expectations, particularly where, as here, the regulatory framework was adopted specifically with the aim of attracting and inducing foreign investment in a particular sector,[173] including the tribunals in *Merrill & Ring*,[174] *Suez v. Argentina*,[175] and *Total v. Argentina*.[176] As the tribunal observed in *Total*, "[a] foreign investor is entitled to expect that a host state will follow those basic principles (which it has freely established by law) in administering a public interest sector that it has opened to long term foreign investments," and that "[e]xpectations based on such principles are reasonable and hence legitimate, *even in the absence of specific promises by the government*."[177] Moreover, as previously explained and as elaborated below, Guatemala did act in violation of specific and unambiguous commitments made to Claimant in its Memorandum of Sale, which was prepared and distributed for the express purpose of inducing foreign investment in EEGSA.[178]

## IV. CLAIMANT HAS PROVEN A BREACH OF ARTICLE 10.5 OF THE DR-CAFTA

### A. Claimant Legitimately Relied Upon The Specific Representations Guatemala Made To Induce Foreign Investment In EEGSA

41. In its Post-Hearing Brief, Respondent argues that "the Hearing demonstrated the role of passive observer that Teco adopted at the time of its investment in EEGSA, omitting any material analysis of the regulatory framework or the company's prospects,"[179] and that, consistent with its "initial disinterest, Teco (and later TGH) silently assumed the role of *silent partner* in EEGSA during the life of the investment without involving themselves in the business of the company, which remained under the control of Iberdrola, the majority shareholder and

[172] *Id*. ¶ 289.

[173] Claimant's Post-Hearing Brief ¶¶ 31-35.

[174] *Merrill & Ring v. Canada* ¶ 233 **(CL-29)**.

[175] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability of 30 July 2010 ¶¶ 203, 207, 208, 212 **(RL-17)**.

[176] *Total v. Argentina* ¶¶ 122, 333 **(CL-70)**.

[177] *Id*. ¶ 333 (emphasis added).

[178] *See infra* Section IV.A.2; Claimant's Post-Hearing Brief ¶¶ 60-63, 70, 80, 90-91, 110, 142, 160.

[179] Respondent's Post-Hearing Brief ¶ 2.

operator."[180] Respondent thus asserts that "Teco's decision to invest in EEGSA was not based on any specific promise by Guatemala," and that Claimant "did not conduct any real due diligence, either on the company or with regard to Guatemala's regulatory framework in the electricity sector."[181] According to Respondent, "this is unsurprising," because Claimant's "true motivation for investing in EEGSA was the possibility of vertically integrating its electricity business in Guatemala, as 90% of the electricity produced by Teco's power stations in Guatemala was ultimately sold to EEGSA."[182] Respondent further asserts that the Memorandum of Sale prepared and circulated by Guatemala to potential investors cannot give rise to any legitimate expectations,[183] because a "mere sales memorandum cannot generate expectations that are protected under a BIT,"[184] and that Claimant allegedly "made up the supposed expectation of the Teco group with this arbitration."[185] Respondent thus argues that Claimant has no legitimate expectations that could be protected under Article 10.5 of the DR-CAFTA, and that its claim is inadmissible.[186] As set forth below, Respondent's arguments deliberately misconstrue the Hearing testimony, are inconsistent with the evidentiary record, misinterpret the governing law, and fail to acknowledge the consistent line of investment treaty cases in which tribunals have found an FET violation, when a State takes action contrary to representations made in sales memoranda and other similar materials, which are designed specifically to induce the investment.

### 1. Before Investing In EEGSA, The TECO Group of Companies Undertook Substantial Due Diligence

42. In its Post-Hearing Brief, Respondent argues that Claimant "has not presented a single document or any information relating to the due diligence supposedly carried out at the time of the investment in 2005, or anything from 1998 when other companies of the Teco group acquired their participation in EEGSA," and that, when Respondent requested "documentation

[180] *Id*. (emphasis in original).

[181] *Id*. ¶ 3.

[182] *Id*. ¶ 6 (internal citations omitted).

[183] *Id*. ¶¶ 306-308, 312-313.

[184] *Id*. ¶ 308.

[185] *Id*. ¶ 314.

[186] *Id*. ¶¶ 7, 318.

for that due diligence in its request for documents,"[187] Claimant allegedly "did not submit a single document" in response.[188] Respondent further asserts that "[i]t is unusual that a sophisticated U.S. company such as Teco did not seek legal advice in making an investment of this magnitude,"[189] and that "the minutes of the board of directors of Teco (not TGH) in 1998 show that the regulatory framework was discussed fleetingly and that the main motivation for making the investment was the integration of EEGSA's distribution business with Teco's power generation business."[190] Respondent's attempt to mislead this Tribunal by misconstruing and misrepresenting the evidence in this case must be rejected.

43. Respondent's assertion that the TECO group of companies invested US$ 135 million in EEGSA without conducting any due diligence defies common sense and is belied by the evidence. As Claimant has demonstrated, at the time of its investment in EEGSA, and as would be expected of any public company making a significant investment in a foreign country, the TECO group of companies undertook substantial due diligence, including analyses of the promotional materials circulated by Guatemala to attract foreign investment in EEGSA,[191] and "analyses to determine whether the estimated overall internal rates of return met [its] targets."[192] As Gordon Gillette explained at the Hearing, "there was a dedicated team at TECO Power Services ["TPS"] and many advisers that were doing the due diligence on this project,"[193] including "an investment banker, accounting, legal, environmental and rate expertise."[194] The

[187] *Id*. ¶ 317 (internal citation omitted).

[188] *Id*. ¶ 6 n.11.

[189] *Id*. ¶ 317.

[190] *Id*. (internal citation omitted).

[191] Gillette I ¶ 8 **(CWS-5)**; Empresa Eléctrica de Guatemala S.A., Road Show Presentation dated May 1998 ("Road Show Presentation") **(C-28)**; Empresa Eléctrica de Guatemala S.A., Preliminary Information Memorandum dated Apr. 1998 ("Preliminary Information Memorandum") **(C-27)**; Empresa Eléctrica de Guatemala S.A., Memorandum of Sale dated May 1998 ("Sales Memorandum") **(C-29)**.

[192] Gillette I ¶ 13 **(CWS-5)**; *see also* Gillette II ¶ 6 ("After learning of the opportunity to invest in EEGSA, TECO concentrated on assessing the expected returns of the potential investment.") **(CWS-11)**; Dresdner Kleinwort EEGSA Base Case Scenario dated June 1998 **(C-418)**.

[193] Tr. (22 Jan. 2013) 443:20-444:1 (Gillette Cross).

[194] *Id*. at 463:13-14; *see also id*. at 472:16-21 (testifying that "the team at TECO Power Services was reviewing the investment, some of our experts at TECO Energy were reviewing the investment. And we had a long list of advisers, including Dresdner, Deloitte and Touche, Millbank [*sic*], Olivero, Hagler Bailly, O&L Consulting").

TPS team thus attended Guatemala's Road Show presentation on behalf of the TECO group of companies,[195] and reviewed and analyzed both the Preliminary Information Memorandum and the Memorandum of Sale circulated by Guatemala,[196] which, as Mr. Gillette confirmed at the Hearing, included copies of the newly-enacted LGE and RLGE.[197] Mr. Gillette further explained that, during this process, he and other members of the senior management team at TECO Energy, Inc. ("TECO Energy") regularly were briefed by the TPS team both formally and informally regarding their due diligence,[198] culminating in TPS's Management Presentation to TECO Energy's Board of Directors on 9 July 1998, in which TPS recommended that the TECO group of companies participate in the bidding process for EEGSA as part of the Consortium.[199] As the Management Presentation reflects, the "external support team" engaged by the TECO group of companies for its due diligence on EEGSA included Dresdner Kleinwort Benson as Financial Advisor, Deloitte and Touche for Auditing, Milbank, Tweed, Hadley & McCloy LLP, a New York-based international law firm, for Legal, Bufete Olivero, a Guatemalan law firm, for Legal, Hagler Bailly and O&L Consulting for Demand Tariffs, Iberdrola for Labor, and ECT for Environmental.[200]

44. Respondent's contention that the TECO group of companies "did not conduct any real due diligence, either on the company or with regard to Guatemala's regulatory framework in

[195] *Id*. at 445:2-5 (testifying that "[m]embers of the TECO Power Services management team" attended Guatemala's Road Show presentation on behalf of the TECO group of companies); Roadshow Presentation **(C-28)**. As Claimant noted in its Post-Hearing Brief, these Road Show presentations were given by the then Minister of Energy and Mines and other members of the High-Level Committee, which Guatemala had established to oversee EEGSA's privatization. *See* Claimant's Post-Hearing Brief ¶ 61; Roadshow Presentation, at 44-45 **(C-28)**.

[196] Tr. (22 Jan. 2013) 457:6-20 (Gillette Tribunal Question); Tr. (22 Jan. 2013) 469:11-470:13 (Gillette Cross).

[197] Tr. (22 Jan. 2013) 469:11-470:10 (Gillette Cross) ("[T]he marketing materials were not only . . . glossy pictures and maps and those kinds of things, but they included the electricity law."); Sales Memorandum, at 63-141 **(C-29)**.

[198] Tr. (22 Jan. 2013) 443:20-444:3, 445:13-19, 446:19-447:4, 454:2-6 (Gillette Cross); Tr. (22 Jan. 2013) 450:18-451:7 (Gillette Tribunal Question).

[199] EEGSA Privatization, Management Presentation dated 9 July 1998 **(C-33)**; *see also* TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998 **(C-32)**.

[200] EEGSA Privatization, Management Presentation dated 9 July 1998, at 2 **(C-33)**.

the electricity sector"[201] thus is absurd and blatantly erroneous. Indeed, the Management Presentation prepared by TPS expressly discusses EEGSA's electricity sales, its growth rate, and its utility statistics,[202] as well as Guatemala's regulatory framework, noting that the new LGE is "similar to energy law implemented in Chile, Argentina, and El Salvador,"[203] and that EEGSA's VAD would be "recalculated every 5 years based on allowable return on new replacement cost of efficient network plus O&M costs."[204] The Board Book Write-Up prepared by TPS reflects similar analyses, noting that, "[a]s of December 31, 1997, EEGSA distributed electricity to approximately 511,000 customers," and that "EEGSA's client base has grown at an annual average of 4 percent in the last four years, while energy consumption in EEGSA's concession area has grown by over 7 percent per annum in the same period."[205] With respect to the regulatory framework, the Board Book Write-Up states, among other things, that "[t]he Law and its Regulations represent a new approach for Guatemala and its power sector investors," that "there is sufficient experience with similar systems in-place in Chile, Argentina, and El Salvador," and that "[t]he features of this system are more manageable than some found in other Latin American countries."[206] Moreover, as Mr. Gillette noted at the Hearing, in addition to the due diligence undertaken by the TECO group of companies, there also were "two other parallel

[201] Respondent's Post-Hearing Brief ¶ 3 (internal citation omitted). In addition, the testimony upon which Respondent relies for this assertion does not support Respondent's argument. *See* Respondent's Post-Hearing Brief ¶ 3 (citing Tr. (22 Jan. 2013) 445:2-13 (Gillette Cross)). As the transcript reflects, Mr. Gillette's testimony relates to the Road Show presentation, and whether the members of the TPS team who attended that presentation ever prepared a written report for Mr. Gillette. *See* Tr. (22 Jan. 2013) 445:2-13 (Gillette Cross). As Mr. Gillette testified, while he does not "recall seeing a document," he does "recall being briefed through the process as [they] learned more about the investment and the regulatory regime." *Id*. at 445:13-19.

[202] EEGSA Privatization, Management Presentation dated 9 July 1998, at 13-16 **(C-33)**.

[203] *Id*., at 29.

[204] *Id*., at 5; *see also* Tr. (22 Jan. 2013) 493:11-18 (Gillette Cross) (referencing the "second bullet point under the VAD components" on page 5 of Exhibit C-33, and explaining that the "words 'efficient network' is kind of the shorthand for the model efficient company").

[205] TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board BookWrite-up dated July 1998, at 7-4 **(C-32)**.

[206] *Id*., at 7-6. The Board Book Write-Up further notes that, "[i]n November of 1996, the Government Of Guatemala ('GOG') approved a new electricity law (the 'Law'), establishing a consistent regulatory framework for the sector," which "eliminated subsidies, mandated the unbundling of the generation, transmission and distribution assets, and prepared the two stateowned electric companies, EEGSA and the Instituto Nacional de Electricidad ('INDE') for privatization." *Id*. at 7-3. It also notes that "EEGSA's tariffs have been restructured pursuant to the Law," and that "EEGSA's tariffs will have three components: (i) a[n] electricity generation cost component; (ii) a transmission cost component; and (iii) a distribution value added component, based on an efficiently operated distribution company." *Id*.

due diligence processes going on within Iberdrola and EDP," the results of which were being shared amongst the Consortium partners.[207]

45. Respondent's argument that Claimant "has not presented a single document or any information relating to the due diligence supposedly carried out at the time of the investment in 2005"[208] similarly is unavailing. As Claimant repeatedly has explained, the transfer of the TECO group of companies' ownership interest in EEGSA to Claimant in 2005 was an internal corporate transfer between members of the same group of companies, as opposed to an asset sale; there thus would have been no reason whatsoever for the TECO group of companies to conduct any due diligence on EEGSA in 2005.[209] Respondent's further assertion that, "[d]espite Guatemala's request for documentation of any due diligence in its request for documents (Exhibit R-142, Documentation A.2), TGH did not present even a single document,"[210] likewise is false. As the record reflects, Claimant produced several documents and listed several more on its privilege log in response to Respondent's Request No. A.2, including several privileged communications between TECO Energy's former in-house counsel, Sheila McDevitt, and its external counsel, Milbank and Bufete Olivero regarding due diligence, which are protected by attorney-client privilege.[211] Respondent's assertion that the TECO group of companies "did not seek legal advice in making an investment of this magnitude"[212] thus also is erroneous. As Claimant's privilege log and the TPS's Management Presentation confirm, before making its investment in EEGSA, the TECO group of companies sought legal advice both from United States and Guatemalan legal counsel.[213]

46. Respondent likewise is wrong to assert that Mr. Gillette never "requested any legal analysis regarding Guatemalan electricity regulations from either his internal or external

[207] Tr. (22 Jan. 2013) 473:1-3 (Gillette Cross).

[208] Respondent's Post-Hearing Brief ¶ 317.

[209] Claimant's Post-Hearing Brief ¶ 92 & n.346; Reply ¶ 68; Gillette II ¶ 11 **(CWS-11)**.

[210] Respondent's Post-Hearing Brief ¶ 314 n.425 (emphasis omitted).

[211] Letter from Respondent to the Tribunal dated 29 Nov. 2011, Annex Nos. 3 & 6.

[212] Respondent's Post-Hearing Brief ¶ 317.

[213] Letter from Respondent to the Tribunal dated 29 Nov. 2011, Annex No. 6; EEGSA Privatization, Management Presentation dated 9 July 1998 **(C-33)**.

legal counsel," or "reviewed any of the promotional materials in the request for bids."[214] As Mr. Gillette explained at the Hearing, he is not an attorney, and "when it came to reviewing the regulatory regime, [he] viewed it . . . less as a legal matter and more as a regulatory business matter."[215] He and other members of TECO Energy's senior management team thus regularly were "briefed during that 1997/1998 time frame on the regulatory structure" by the TPS team.[216] In addition, as discussed above, although Mr. Gillette did not personally review in detail the promotional materials circulated by Guatemala, the TPS team reviewed, analyzed, and discussed those materials, including the Preliminary Information Memorandum and the Memorandum of Sale, with Mr. Gillette and with other members of TECO Energy's senior management team.[217] As Mr. Gillette testified, the TECO group of companies was "receiving voluminous roadshow and memoranda from Salomon Smith Barney, who was the investment banker at the time, on the investment in Guatemala, the regulatory framework, [and] those kinds of things," and "the basis of [their] management team's review of this investment was the materials that [they] were receiving and the representations that were contained in those materials."[218] The fact that Mr. Gillette himself did not personally review these materials in detail, but in his role as a senior manager was briefed on them, is both unremarkable and irrelevant.[219]

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[214] Respondent's Post-Hearing Brief ¶ 3; *see also id*. ¶ 315. Respondent's assertion that "Ms. Callahan also admitted to knowing nothing about tariff reviews, and to having never seen anything on the subject at the time the investment was made," likewise is irrelevant. *Id*. at 316. Ms. Callahan, who has a background in financial accounting, was appointed as CFO for TECO Energy in July 2009. Callahan I ¶ 4 **(CWS-2)**. As her witness statements reflect, she was not involved in—and has not testified regarding—the TECO group of companies' decision to invest in EEGSA in 1998; rather, Ms. Callahan has testified regarding EEGSA's financial situation following the CNEE's imposition of the 2008-2013 Sigla VAD, as well as Claimant's decision to sell its investment in EEGSA to EPM in 2010. *See generally* Callahan II **(CWS-8)**; Callahan I **(CWS-2)**.

[215] Tr. (22 Jan. 2013) 460:4-7 (Gillette Cross).

[216] *Id*. at 450:10-12; *see also* Tr. (22 Jan. 2013) 450:18-451:7 (Gillette Tribunal Question).

[217] Tr. (22 Jan. 2013) 457:6-20 (Gillette Tribunal Question); *see also* Gillette I ¶ 8 ("TPS received various promotional materials prepared by Salomon Smith Barney regarding EEGSA's privatization process, including a Road Show presentation, a Preliminary Information Memorandum, and a Memorandum of Sale. While I did not personally review these materials in detail, they were reviewed by the appropriate persons in the company as part of our due diligence process. I recall being briefed on certain aspects of the investment opportunity, and summaries of information contained in these materials were presented to TECO Energy's Board of Directors for its consideration.") (internal citations omitted) **(CWS-5)**.

[218] Tr. (22 Jan. 2013) 469:11-470:13 (Gillette Cross).

[219] The same is true with respect EEGSA's Authorization Agreement. In its Post-Hearing Brief, Respondent asserts that Mr. Gillette "never read the Concession Contract"; however, as Mr. Gillette testified at the Hearing, he is not a lawyer and, although he did not personally review the Authorization Agreement, TECO's

47. Respondent's assertion that Mr. Gillette testified that "he never actually obtained detailed or written information [regarding EEGSA], and that any information he did receive was obtained through 'casual inputs [. . .] in an informal way'"[220] also is incorrect. Mr. Gillette explained several times at the Hearing that his understanding of the regulatory framework was based upon both formal and informal briefings by the TPS team, as well as the Board Book Write-Up and the Management Presentation prepared by TPS.[221] As Mr. Gillette testified, TECO Energy's "board of directors made the ultimate decision to invest in TECO Guatemala," and it was on the basis of these "bottoms-up briefings that [he] got comfortable enough and other members of the TECO Energy senior management team got comfortable enough to recommend that [they] go to the board and seek board approval for this investment."[222]

48. Respondent's further assertion that Mr. Gillette confirmed that "the only thing that they were told was that it was a methodology similar [to] that of the Chile, Argentina, and El Salvador regimes, and that the tariffs were based on an efficiently operated distribution company"[223] similarly is belied by the evidence. As Mr. Gillette testified: "[i]n the oral briefing, which I attended, *I recall that there was more discussion*."[224] Moreover, as noted above, the Management Presentation prepared by TPS expressly states that EEGSA's VAD would be "recalculated every 5 years based on allowable return on *new replacement cost of efficient network plus O&M costs*."[225] It also expressly states, among other things, that the "Rates set for Years 1 – 5 [are] based on International cost standards and a 10% rate of return,"[226] and that the

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"advisers and people within our company did review it." Respondent's Post-Hearing Brief ¶ 315(i); Tr. (22 Jan. 2013) 465:6-7 (Gillette Cross).

[220] Respondent's Post-Hearing Brief ¶ 4 (emphasis omitted).

[221] Tr. (22 Jan. 2013) 443:20-444:3, 445:13-19, 446:19-447:4 (Gillette Cross); Tr. (22 Jan. 2013) 450:18-451:7 (Gillette Tribunal Question); *see also* Tr. (22 Jan. 2013) 454:2-7 (Gillette Cross) ("[T]o clarify, along the way, I was being briefed on the regulatory mechanics of the deal. And at the time I knew that people from TECO Power Services were attending various meetings to learn more about the investment. But my -- my knowledge was on the basis of the briefings that I received.").

[222] Tr. (22 Jan. 2013) 468:4-10 (Gillette Cross).

[223] Respondent's Post-Hearing Brief ¶ 4.

[224] Tr. (22 Jan. 2013) 480:17-18 (Gillette Cross). In a transparent attempt to misrepresent Mr. Gillette's testimony, Respondent deliberately omits this part of Mr. Gillette's answer to Respondent's question in its Post-Hearing Brief. *See* Respondent's Post-Hearing Brief ¶ 4 & n.8.

[225] EEGSA Privatization, Management Presentation dated 9 July 1998, at 5 (emphasis added) **(C-33)**.

[226] *Id*.

VAD "is adjusted annually to correct for foreign exchange exposure and inflation."[227]

49. Respondent's argument that Claimant's alleged lack of due diligence is "unsurprising," because "[t]he only motivation for the investment voiced by the Teco group at the time [it invested in EEGSA] was the vertical integration of its electricity generation business [in Guatemala]"[228] also is belied by the evidence and runs counter to common sense. As Claimant repeatedly has explained, the main consideration for the TECO group of companies to invest in EEGSA was not "the potential for synergies with its other electricity generation investments in Guatemala," but rather "whether the investment presented a favorable rate of return."[229] Indeed, as the Board Book Write-Up reflects, TPS recommended that TECO Energy's Board of Directors approve its participation in EEGSA's privatization bid, because of the "very significant long-term earnings through the potential opportunities for both cost-cutting and growth, which can potentially enhance our returns."[230] This is consistent with TPS's Management Presentation, which concluded that investing in EEGSA would provide an "Excellent Fit with Long Range Strategic plan to grow end-use businesses," highlighting the "Attractive Regulated Returns on Investment" and the "Attractive Opportunity for Growth in Revenues," as a result of Guatemala's low level of electrification, EEGSA's large customer base,

[227] *Id*., at 30.

[228] Respondent's Post-Hearing Brief ¶ 313; *see also id.* ¶ 6.

[229] Gillette II ¶ 7 **(CWS-11)**. Respondent's argument also is illogical, because the TECO group of companies held a minority interest in EEGSA, and thus did not control the company. This is confirmed by the Alborada dispute, about which Respondent notably has remained silent. As Claimant has explained, when EEGSA sought approval from the CNEE in 2007 to give effect to the automatic five-year extension of its Power Purchase Agreement ("PPA") with Tampa Centro Americana de Electricidad, Limitada ("TCAE"), which TCAE had purchased from the Government in 2001 for US$ 2.92 million, the CNEE rejected EEGSA's request based upon Governmental Accord No. 68-2007, which prohibited the extension of PPAs, and warned that, if EEGSA agreed to extend the PPA with TCAE, the Government would not recognize EEGSA's right to pass through the costs of electricity to consumers. *See* Tr. (22 Jan. 2013) 422:14-424:2 (Gillette Direct); Gillette II ¶¶ 17-18 **(CWS-11)**; Reply ¶¶ 224-226. EEGSA was unwilling to take this risk, and refused to formalize the extension. Consequently, TCAE focused its efforts on trying to find a negotiated resolution to the dispute, and ultimately was able to reach a negotiated settlement, whereby the PPA was extended at a much lower rate than that to which TCAE was entitled under the contract. *See* Tr. (22 Jan. 2013) 424:3-9 (Gillette Direct); Gillette II ¶ 19 **(CWS-11)**; Reply ¶ 226. That TECO did not control EEGSA and could not compel it to sign a document to which even EEGSA believed it was contractually bound, exposes the fallacy of Respondent's assertion that TECO's overriding reason for investing in EEGSA was to provide an advantage to TCAE and its other generation assets in Guatemala.

[230] TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 8 **(C-32)**.

and projected growth in demand.[231]

50. Significantly, as Mr. Gillette confirmed at the Hearing—and as Respondent continues to simply ignore—although the TECO group of companies' "ownership of those other assets made a difference in [their] decision to participate in the consortium . . . when the consortium was valuing the assets, [they] had two other partners who were not similarly situated, Iberdrola and EDP, [which] had no assets in Guatemala. So in determining [their] bid price, as a minority partner [they] couldn't really factor those synergies in."[232] Respondent's continued assertion that these "synergies had an impact on the valuation of the company" thus lacks any foundation.[233] Respondent never has asserted that the TECO group of companies paid more than 30 percent of the bid price for its 30 percent interest in EEGSA (in fact, as noted in Claimant's Post-Hearing Brief, Respondent attempted to leave the misimpression that TECO paid *less* than 30 percent for its interest),[234] and never has attempted to explain why the 70 percent owners would pay a premium for an alleged economic advantage in which they would not share.

51. As Claimant has explained and as Respondent has acknowledged, the valuation of EEGSA was based upon the cash flow that the company was expected to generate.[235] As Mr. Gillette testified at the Hearing, the TECO group of companies "had the general expectation from the offering memorandum that the real rate of return on the value of a new replacement system would be 7 to 13 percent," and "it was on that basis that [they] made some of [their] various assumptions for the scenarios that [they] ran on what the revenue stream would be over time."[236] Thus, "in order to find the bid price, once [they] had made some assumptions on what the revenues would be through time, [they] used the 13 percent rate of return to in effect back

[231] EEGSA Privatization Management Presentation dated 9 July 1998, at 17, 18 **(C-33)**.

[232] Tr. (22 Jan. 2013) 484:9-17 (Gillette Cross); *see also* Gillette II ¶ 9 **(CWS-11)**.

[233] Respondent's Post-Hearing Brief ¶ 323.

[234] *See* Claimant's Post-Hearing Brief ¶ 190.

[235] Tr. (22 Jan. 2013) 551:12-14 (Gillette Tribunal Question); *see also* Tr. (22 Jan. 2013) 614:11-13 (Calleja Direct) ("[T]he legal framework for establishment of tariffs was the value of the company . . . ."); DresdnerKleinwort EEGSA Base Case Scenario dated June 1998 (showing that DresdnerKleinwort ran various models using a DCF analysis to inform the TECO group of companies' bid for EEGSA) **(C-418)**; Respondent's Post-Hearing Brief ¶ 320 ("The value of the company was calculated on the basis of anticipated cash flow, and not on the value of physical assets.") (internal citation omitted).

[236] Tr. (22 Jan. 2013) 502:17-503:1 (Gillette Cross).

calculate what [they] could afford to spend in the form of [their] bid price."[237] The Management Presentation comports with this testimony, as it recommends submitting a bid price "based upon the Base Case Model achieving a minimum acceptable IRR under base case conditions after all key assumptions have been verified."[238] Although Respondent surprisingly maintains in its Post-Hearing Brief that "[t]he high purchase price offered by the Consortium indicates that other factors, such as synergies, had an impact on the valuation of the company,"[239] its allegation contravenes the testimony of its own expert, Dr. Abdala, who confirmed that the bid price was fair and that the model prepared by Dresdner for TECO to calculate a bid amount contained no evidence of valuing any so-called synergies.[240] As Mr. Gillette's testimony, Dr. Abdala's testimony, the documentary evidence, and the undisputed facts all confirm, TECO's so-called synergies thus had no effect on the bid price that the Consortium ultimately submitted.[241]

52. Finally, Respondent's assertion that, after it invested in EEGSA, the TECO group of companies, consistent with its initial disinterest, assumed the role of "silent partner" is erroneous.[242] As Claimant has shown, the TECO group of companies was anything but "disinterested" in determining whether to invest in EEGSA. And, as Mr. Gillette testified at the Hearing, although TECO was not the controlling shareholder, it actively managed its investment.[243] Mr. Gillette, "as president of TECO Guatemala, was responsible for [the TECO group of companies'] assets in Guatemala, including EEGSA," and the TECO group of companies had a member on EEGSA's Board of Directors who reported directly to him

[237] *Id*. at 503:2-6.

[238] EEGSA Privatization Management Presentation dated 9 July 1998, at 21 **(C-33)**.

[239] Respondent's Post-Hearing Brief ¶ 323.

[240] Tr. (5 Mar. 2013) 1580:9-17 (Abdala Cross) ("[Q.] You mentioned before the DKB model, the Dresdner model. And did you look at that model and have you seen any evidence that the valuation performed by DKB, which was what the Consortium's bid was based on, had you seen any evidence that their valuation took into account any so-called synergies in calculation of EEGSA's expected cash flow? A. No, on that, on the Dresdner valuation model, you cannot see that, no."); *id.* 1577:3-5, 1577:10-12 (testifying that "economists would say that in auctions we would normally take the winning bid as the fair market price of that asset" and that on "some occasions you could use the second bidder as the proxy for Fair Market Value."); *see also id.* 1575:15-16 (testifying, with respect to the bid amount, that he "wouldn't characterize it as unfair").

[241] Reply ¶ 64; Gillette II ¶ 9 **(CWS-11)**.

[242] Respondent's Post-Hearing Brief ¶ 2 (emphasis omitted).

[243] Tr. (22 Jan. 2013) 509:6-9 (Gillette Cross).

regarding EEGSA's operations.[244] In addition, as the various Board Book Write-Ups reflect, the TECO group of companies closely monitored EEGSA's activities,[245] and, in fact, invested an additional US$ 11 million in EEGSA during the first tariff period so that EEGSA could make the investments necessary to update and to expand the substandard distribution network that existed at the time of its privatization.[246]

53. As demonstrated above, Guatemala's arguments regarding TECO's alleged lack of expectations thus are contradicted by the testimonial and documentary record. Moreover, its arguments are legally irrelevant. As Claimant has shown, the role of legitimate expectations is to protect objectively reasonable expectations based upon a State's specific representations.[247] Respondent's attempt to delve into the subjective mindset of particular decision-makers at the TECO group of companies thus is misplaced. The evidence clearly shows that Respondent made and directed specific representations to the TECO group of companies for the express purpose of inducing its investment, and then acted contrary to those representations.[248] Respondent's attempts to disregard Claimant's legitimate expectations on the grounds that it held only a minority interest in EEGSA[249] also have no basis, as it is well settled that the investments of minority shareholders are entitled to the same protections under the Treaty as those of majority shareholders. Respondent's allegations regarding the extent of the due diligence undertaken by the TECO group of companies, moreover, is not only belied by the evidence, but also is irrelevant, because Guatemala has not—and cannot—show that if more due diligence had been undertaken, Claimant's expectations would have been different in any respect. Tellingly,

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[244] *Id*.

[245] *See, e.g.*, TECO Power Services Corp. Operating Project Activities, Board Book Write-up dated Jan. 1999 **(C-41)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 1999 **(C-44)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Jan. 2000 **(C-47)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2004 **(C-87)**.

[246] *See* Gillette I ¶ 17 **(CWS-5)**; Maté I ¶ 3 **(CWS-6)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2004, at 2-29 **(C-87)**; *see also* TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated Apr. 2000, at 2 **(C-430)**; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 2002, at 3 **(C-444)**.

[247] Claimant's Post-Hearing Brief ¶¶ 25-30; Reply ¶¶ 254-260.

[248] Preliminary Information Memorandum dated April 1998, at 9-10, 13 (C-27); Sales Memorandum dated May 1998 at 42-49 (C-29); Roadshow Presentation dated May 1998 at 15-20, 39 (C-28).

[249] *See, e.g.*, Respondent's Post-Hearing Brief ¶ 2.

Respondent has introduced *no* contemporaneous documentary evidence showing that, at the time of EEGSA's privatization—or, indeed, at any time before EEGSA's 2008-2013 tariff review—it interpreted the newly-enacted regulatory framework in a manner contrary to the way in which it was interpreted by Claimant, consistent with the representations made by Guatemala.

### 2. Guatemala Specifically Represented That EEGSA's VAD Would Be Calculated Based Upon The New Replacement Value Of A Model Efficient Company's Regulatory Asset Base, And That Any Dispute Regarding That Calculation Would Be Resolved By A Three-Member Expert Commission Appointed By The Parties

54. In its Post-Hearing Brief, Respondent continues to argue that the representations contained in the Memorandum of Sale prepared and circulated by Guatemala to potential investors cannot give rise to any legitimate expectations, because "a mere sales memorandum cannot generate expectations that are protected under a BIT."[250] According to Respondent, "[s]uch expectations require commitments that are much more specific, clear and repeated."[251] Respondent further contends that Claimant "cannot demonstrate any alleged legitimate expectation that it could have acquired at the time of the privatization of EEGSA, when TGH did not even exist,"[252] that "the evidence offered at the Hearing confirmed that TGH's investment expectations were not based on promises or representations made by Guatemala,"[253] and that Claimant allegedly has not provided, "either in its written submissions or at the Hearing, a description or list of those expectations."[254] Each of Respondent's contentions is baseless, as set forth below.

55. First, as Claimant has demonstrated, numerous investment treaty tribunals have found an FET violation when a State takes action contrary to representations made in sales memoranda and other similar materials, where, as here, those materials were prepared and distributed to potential investors for the specific purpose of inducing their investment,[255]

[250] *Id*. ¶¶ 306-308.

[251] *Id*. ¶ 308.

[252] *Id*. ¶ 309; *see also id*. ¶ 7.

[253] *Id*. ¶ 7.

[254] *Id*. ¶ 310.

[255] Claimant's Post-Hearing Brief ¶¶ 86-91.

including the tribunals in *EDF v. Argentina*,[256] *Suez v. Argentina*,[257] *Enron v. Argentina*,[258] *Sempra v. Argentina*,[259] *CMS v. Argentina*,[260] and *National Grid v. Argentina*.[261] As the tribunal found in *EDF*, the respondent in that case "had clearly embarked on a campaign to attract foreign investors," and its "road shows and Info Memo promoted *inter alia* a foreign investor-friendly legal regime that provided investors with reasonable returns as well as a series of protections tailored to make the investment more appealing to foreign capital markets."[262] The tribunal concluded that the respondent thus had given "specific guarantees and commitments that created strong expectations of a long-term investment subject to only *de minimis* political or regulatory risk,"[263] and that the regulatory agency responsible for the electricity sector had unilaterally modified the tariff regime, as well as the terms of the claimants' concession agreement, in violation of those specific guarantees and commitments.[264] In *National Grid*, the tribunal similarly found that "the Respondent solicited the investments in the power sector internationally," and that "[i]t is disingenuous for the Respondent now to rely on the disclaimers in the prospectus in order to distance itself from the information given therein."[265]

56. In its Post-Hearing Brief, Respondent "refers to the Argentine emergency cases in which some sales memoranda were considered to be relevant in establishing the existence of promises or guarantees by the State," but argues that the sales memoranda at issue in those cases "confirmed in a clear and unambiguous way what was already plainly stated in the regulations, in the bidding rules and in the concession contracts themselves," which allegedly is not the case

[256] *EDF v. Argentina* ¶ 1008 **(CL-86)**.

[257] *Suez v. Argentina* ¶ 33 **(RL-17)**.

[258] *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007 ¶ 103 (annulled on other grounds) **(CL-21)**.

[259] *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 Sept. 2007 (annulled on other grounds) ¶ 113 **(CL-43)**

[260] *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005 (partially annulled on other grounds) ¶ 284 **(CL-17)**.

[261] *National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award of 3 Nov. 2008 ("*National Grid v. Argentina*") ¶ 177 **(CL-33)**.

[262] *EDF v. Argentina* ¶ 1008 **(CL-86)**.

[263] *Id*.

[264] *Id*. ¶¶ 998-1090.

[265] *National Grid v. Argentina* ¶ 177 **(CL-33)**.

here.[266] Respondent's attempt to distinguish these cases fails. As Claimant has demonstrated, the promotional materials prepared by Guatemala,[267] including the Memorandum of Sale, were directly targeted at potential foreign investors, including the TECO group of companies,[268] and contained specific representations regarding the stability and operation of Guatemala's new regulatory framework, including the applicable tariff calculation methodology and the process by which EEGSA's VAD would be recalculated every five years, which were specifically designed and intended to attract and to induce foreign investment in EEGSA.[269] Guatemala thus expressly represented in the Memorandum of Sale that, under its newly-enacted legal and regulatory framework, "the tariff for a given distribution company is not equal to the costs it incurs, but to the 'market' costs inherent in distribution, which result from the theoretical costs of a highly-efficient 'model company.'"[270] Guatemala further represented that "*VADs must be calculated by distributors* by means of a study commissioned [by] an engineering firm," and that the CNEE "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*."[271] Similarly, in its Road Show presentation, Guatemala stated that EEGSA represented a "landmark opportunity for investors," providing access to "a growing economy within a stable political framework" and to "the leading company of an attractive electric market with high growth potential."[272]

57. These representations, moreover, accurately reflected the legal and regulatory reforms that Guatemala had adopted in the LGE and RLGE and, indeed, were adhered to and

[266] Respondent's Post-Hearing Brief ¶ 307.

[267] As Claimant noted in its Post-Hearing Brief, the Memorandum of Sale not only was prepared by EEGSA, which at the time was State-owned, with the assistance of Salomon Smith Barney, but also was directly approved by the High-Level Committee that was established by the Government of Guatemala to oversee EEGSA's privatization, which included the then Minister of Energy and Mines, Leonel López Rodas. *See* Claimant's Post-Hearing Brief ¶ 89; *see also* Empresa Eléctrica de Guatemala S.A. High-Level Committee Members dated 1997 **(C-18)**; Minutes of the High-Level Committee, Empresa Eléctrica de Guatemala, S.A. dated 27 Apr. 1998, at 5 **(C-548)**; Tr. (4 Mar. 2013) 1163:7-16 (Alegría Direct).

[268] *See* Empresa Eléctrica de Guatemala, S.A., Investors' Profiles dated 17 Feb. 1998, at 9, 53 (targeting "TECO" as a strategic investor) **(C-26)**.

[269] *See* Claimant's Post-Hearing Brief ¶ 90; Preliminary Information Memorandum, at 9-13 **(C-27)**; Roadshow Presentation, at 39 **(C-28)**; Sales Memorandum, at 46-53 **(C-29)**.

[270] Sales Memorandum, at 53 **(C-29)**.

[271] *Id*. (emphasis added).

[272] Roadshow Presentation, at 39 **(C-28)**.

reaffirmed by Guatemala up until EEGSA's 2008-2013 tariff review.[273] As Claimant has shown, not only do the provisions of the LGE and RLGE make clear that the distributor's VAD is calculated off of a regulatory asset base of a model efficient company that is valued as if all of its assets were new,[274] but EEGSA's 2003-2008 VNR was not depreciated, nor did the FRC formula set forth in EEGSA's 2003-2008 ToR contain a "2" in the denominator or otherwise calculate EEGSA's VAD off of a depreciated VNR.[275] Similarly, not only do the content and context of LGE Article 75 confirm that the role of the Expert Commission is *to resolve* the differences between the CNEE and the distributor relating to the distributor's VAD study through a binding decision,[276] but the CNEE expressly affirmed the dispute resolution function of the Expert Commission in EEGSA's 2003-2008 ToR, in its own pleading to the Guatemalan Constitutional Court, and in its own draft operating rules.[277] The contemporaneous evidence demonstrates that this also was the understanding of the CNEE's and the MEM's own consultants,[278] as well as the mainstream media.[279] Contrary to Respondent's assertions, Guatemala's representations in these

[273] Claimant's Post-Hearing Brief ¶¶ 98-99.

[274] *Id*. ¶ 81; LGE, Art. 67 **(C-17)**; RLGE, Arts. 91, 97 **(C-21)**; *see also* Tr. (1 Mar. 2013) 791:6-17 (Bastos Tribunal Question); Tr. (5 Mar. 2013) 1294:10-16 (Barrera Direct).

[275] Claimant's Post-Hearing Brief ¶ 82; Giacchino II ¶¶ 18-19 **(CWS-10)**; Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Arts. B, I **(C-59)**; *see also* Tr. (5 Mar. 2013) 1484:9-11 (Barrera Tribunal Question) (testifying that "in '03 they chose a normal VNR. Then in '08 they said, okay, your assets are depreciated by half").

[276] LGE, Art. 75 **(C-17)**; Alegría II ¶¶ 30-43; Alegría ¶ 31.

[277] *See* Claimant's Post-Hearing Brief ¶ 98; Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.5 **(C-59)**; CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 **(C-81)**; Email from M. Quijivix to M. Calleja dated 15 May 2008, Rule 3 **(C-210)**.

[278] *See* Claimant's Post-Hearing Brief ¶ 99; Letter from Maria Bonilla to the MEM dated 31 May 2012, at 1 (observing that, "[p]ursuant to Article 75 [of the LGE], *the CNEE and the distributor had to settle their differences through this [expert] commission to determine the applicable tariff* and the adjustments which would be applicable this quarter") (emphasis added) **(C-618)**; Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 (noting that, "[o]n May 5, 2008 EEGSA submitted the Stage 1.2 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*") (emphasis added) **(C-494)**; Letter from I. Coral Martinez to the CNEE dated 31 Aug. 2002, at 1-2 (stating that, under the LGE, the CNEE "*reviews* and comments on the distributors' studies" and that, "[i]n the case of discrepancies, the Law provides for arbitration proceedings to be conducted by an Expert Commission rather than *negotiators*, inasmuch as, according to the spirit of the Law, the Commission must render a decision based on technical criteria and grounds instead of subjective criteria, agreements, or mere negotiations") (emphasis in original) **(C-446)**.

[279] El Periódico, *Distribution tariff assessment pits EEGSA against the CNEE* dated 1 July 2008 (noting that the "[m]anager of the CNEE Sergio Velásquez recognized that 'discrepancies arose because EEGSA did not

promotional materials thus are supported by the regulatory framework, and are "specific, unambiguous, repeated, and definitive so as to give rise to legitimate expectations."[280]

58. Respondent's further argument, namely that Claimant allegedly misunderstood Guatemala's representations, and that "Guatemala cannot be held responsible for TGH's inaccurate interpretation of the regulatory framework"[281] is equally unavailing. As Claimant has shown, its understanding of the regulatory framework is based upon the specific representations that Guatemala made, as well as the legal and regulatory framework that Guatemala adopted, to attract and to induce foreign investment in EEGSA,[282] and is entirely consistent with the contemporaneous documentary record.[283] Indeed, as Claimant noted in its Post-Hearing Brief, Respondent has failed to introduce any contemporaneous documentary support for its current interpretation of the regulatory framework, including for its positions that the distributor's VAD must be calculated on the basis of a depreciated regulatory asset base, and that the decisions of the Expert Commission merely are advisory and thus can be ignored by the CNEE, neither of which is supported by the documentary record in this case, as discussed further below.[284]

59. Respondent's new assertion that the verb "to resolve" used by Guatemala in the Memorandum of Sale—and by the CNEE in its own pleading to the Guatemalan Constitutional Court—to describe the function of the Expert Commission "does not in and of itself mean binding,"[285] moreover, expressly disavows the opinion of its own legal expert. As Respondent's legal expert, Professor Aguilar, affirmed at the Hearing, "to resolve" the discrepancies means to give the decision binding effect.[286] Indeed, Professor Aguilar argued in his second legal opinion

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meet all technical aspects,'" and that "[a]ccording to the General Electricity Law . . . an expert commission will now need to be convened with three experts – two to be named by each of the parties, with the third member to be designated by mutual agreement – *to resolve the discrepancies and fix the applicable VAD cost within a term of 60 days*") (emphasis added) **(C-492)**.

[280] Respondent's Post-Hearing Brief ¶ 306.

[281] *Id*. ¶ 314.

[282] Claimant's Post-Hearing Brief ¶¶ 65, 72-73; Reply ¶¶ 62-66; Memorial ¶¶ 56-66.

[283] Claimant's Post-Hearing Brief ¶¶ 61-64, 66-71; Reply ¶¶ 58-61; Memorial ¶¶ 45-55.

[284] *See infra* Section IV.B.3; Claimant's Post-Hearing Brief ¶ 91.

[285] Respondent's Post-Hearing Brief ¶ 313.

[286] Tr. (4 Mar. 2013) 1165:1-5, 1172:8-18 (Alegría Direct); Tr. (4 Mar. 2013) 1214:22-1215:11 (Alegría Cross).

that, because LGE Article 75 contained the verb "to pronounce," the Expert Commission's rulings could not be binding, and, if it had wished to make the rulings binding, the Legislature would have used the verb "to resolve."[287]

60. Respondent's further assertion that the Memorandum of Sale "is clear in that the CNEE has the power to approve the VAD studies and set tariffs,"[288] likewise is incorrect. As Claimant has explained, in a transparent effort to confuse the issues, Respondent deliberately conflates the CNEE's power to determine the distributor's tariffs with the process for calculating the distributor's VAD, treating these two issues as if they were one and the same, when they are, in fact, different.[289] As the Memorandum of Sale reflects, the CNEE's power to set the distributor's tariff is separate from the process for calculating the distributor's VAD.[290] The Memorandum of Sale—which was produced in English by Respondent in order to induce foreign investment by the TECO group of companies, among other targeted companies—thus provides that the LGE created the CNEE "to regulate and oversee the electricity sector," and that the CNEE is responsible for, among other things, "setting the tariffs specified by law."[291] As discussed above, the Memorandum of Sale, however, specifically provides that "*VADs must be calculated by distributors* by means of a study commissioned from an engineering firm, but the [CNEE] may dictate that the studies be grouped by density," and that "[t]he [CNEE] 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*."[292] Thus, contrary to Respondent's contentions, Guatemala did not represent in the Memorandum of Sale that the CNEE would have unilateral power and discretion to ignore EEGSA's VAD study, and to set EEGSA's VAD at whatever level it wanted.

61. Second, Respondent's continued assertion that "TGH cannot demonstrate any

[287] Aguilar II ¶ 45 ("If the legislature's purpose had been to create a body that *resolves* with binding effects, the discrepancies between the CNEE and the distributor, it would have so expressly provided in the LGE and RLGE.") (emphasis in original) **(RER-6)**.

[288] Respondent's Post-Hearing Brief ¶ 313.

[289] Reply ¶¶ 14, 28-36, 60.

[290] *See* Sales Memorandum dated May 1998, at 47, 53 **(C-29)**.

[291] *Id*., at 47.

[292] *Id*., at 53 (emphasis added).

alleged expectation that it could have acquired at the time of the privatization of EEGSA, when TGH did not even exist"[293] is incorrect. As Claimant observed in its Post-Hearing Brief, Respondent accepted at the Hearing that the knowledge and expectations of one company may be transferred to another company in the same group of companies, provided that "the officers or directors will either be the same or at least people who have been well-informed of these matters."[294] And at the Hearing, Mr. Gillette confirmed, that although TGH was not incorporated until 2005, he "was involved in these companies, and there were other officers that were involved in TECO Power Services, TECO Wholesale Generation, which were the predecessor companies to TECO Guatemala Holdings, from the very beginning," and they "did, in fact, rely on – [he] personally relied on the representation of the Guatemalan government."[295] By Respondent's own admission, the knowledge and expectations that the TECO group of companies had and legitimately relied upon in deciding to invest in EEGSA thus became Claimant's expectations, when Claimant was incorporated in 2005.[296]

62. Finally, contrary to Respondent's assertions, Claimant repeatedly has set out the content of its legitimate expectations, both in its written submissions and at the Hearing.[297] Thus, as demonstrated in Claimant's Post-Hearing Brief and as specifically stated at the Hearing, Claimant legitimately expected, based upon Guatemala's specific representations during EEGSA's privatization, as well as Guatemala's statements and conduct following EEGSA's privatization, that EEGSA's 2008-2013 VAD would be based upon the VAD study prepared by its consultant; that its VNR would be calculated in accordance with technical criteria to reflect that of a model efficient company distributing electricity in EEGSA's area of distribution; that its VAD would be calculated off of that VNR so that it could obtain a real rate of return between 7 to 13 percent; and that any disputes regarding its consultant's VAD study would be resolved by

[293] Respondent's Post-Hearing Brief ¶ 309.

[294] Claimant's Post-Hearing Brief ¶ 92; Tr. (21 Jan. 2013) 277:21-278:6 (Respondent's Opening).

[295] Tr. (22 Jan. 2013) 435:4-11 (Gillette Cross). As Claimant demonstrated in its Post-Hearing Brief, this is corroborated by the documentary record. *See* Claimant's Post-Hearing Brief ¶ 92.

[296] Claimant's Post-Hearing Brief ¶ 92.

[297] *Id*. ¶¶ 60-100; Reply ¶¶ 254-271; Memorial ¶¶ 259-280; Tr. (21 Jan. 2013) 115:16-125:20; Claimant's Opening Slide Presentation, at 122-147.

an Expert Commission.[298] Indeed, as Mr. Gillette testified at the Hearing, "if at the time of EEGSA's privatization Guatemala had represented that the regulator, the CNEE, would have full discretion in setting EEGSA's VAD at whatever level it deemed appropriate," the TECO group of companies would not have invested in EEGSA.[299]

### B. The CNEE's Actions During EEGSA's 2008-2013 Tariff Review Violated Claimant's Legitimate Expectations, Fundamentally Changed Key Elements Of The Regulatory Framework, And Constituted Arbitrary Treatment In Violation Of The Minimum Standard

63. In its Post-Hearing Brief, Respondent continues to argue that "[t]his case involves a regulator, the CNEE, which in the exercise of its functions understood that once the opinion of the Expert Commission had been issued, it alone was responsible for determining whether the distributor's tariff study could be used to set the tariffs, or if the tariffs should be set based on an independent tariff study," and that "[t]here is nothing in the LGE and RLGE requiring that a new tariff study be conducted by the distributor following the pronouncement of the Expert Commission, and much less that that study be approved by the Expert Commission."[300] According to Respondent, "the LGE and the RLGE make it perfectly clear that the CNEE approves the methodology of the tariff review, the tariff studies, the VAD that complies with the law and, ultimately, the tariffs."[301] Respondent further contends that the LGE and RLGE establish that depreciation must be taken into account in calculating the investor's return,[302] that there were "numerous irregularities in the conduct of EEGSA and its consultant firm Bates White during the tariff review process,"[303] that Bates White's 28 July 2008 revised VAD study failed to incorporate the Expert Commission's decisions,[304] and that the tariffs proposed by EEGSA were unreasonable.[305] As set forth below, Respondent's arguments are fundamentally at odds with the

[298] Claimant's Post-Hearing Brief ¶ 73; Claimant's Opening Statement, Slides 122-147.

[299] Tr. (22 Jan. 2013) 425:6-11 (Gillette Direct); *see also* Gillette I ¶ 20 (noting that he believed that "the CNEE would follow the process set out in the law [for EEGSA's 2008 VAD review process], as it had done during the 2003 VAD review process") **(CWS-5)**.

[300] Respondent's Post-Hearing Brief ¶ 292.

[301] *Id*. ¶ 293.

[302] *Id*. ¶¶ 121-130.

[303] *Id*. ¶¶ 294, 176-183.

[304] *Id*. ¶¶ 190-246.

contemporaneous documentary record and testimonial evidence in this case.

### 1. In Blatant Violation Of Its Prior Representations, Guatemala Disregarded Both The Expert Commission's Rulings And EEGSA's Revised VAD Study, And Approved Its Own VAD Study, Which Calculated EEGSA's VAD Off Of A Depreciated VNR

64. In its Post-Hearing Brief, Respondent asserts that "[t]he CNEE at all times acted in accordance with its interpretation of the LGE and RLGE that is plausible at very least (and in fact is correct),"[306] and that "it is not surprising that the CNEE interpreted its role to include the power to decide the conclusions to be drawn from the Expert Commission's pronouncement."[307] According to Respondent, there is "no provision requiring that the tariffs be determined on the basis of [the distributor's] tariff study," and, "[i]n fact, a provision to such effect was contained in the draft LGE, but [] was eliminated from the draft."[308] Respondent further asserts that Article 3 of the Law on Administrative Disputes ("LCA") prohibits the Expert Commission's decisions from binding the CNEE,[309] and that "depreciation must always be included" in the distributor's VAD calculation.[310] Respondent's assertions are belied by the evidence, as set forth below.

65. First, the CNEE's actions in this case were not motivated by a good faith interpretation of the LGE and RLGE, nor do they reflect the actions of an independent regulatory agency, "which in the exercise of its functions understood that once the opinion of the Expert Commission had been issued, it alone was responsible for determining whether the distributor's tariff study could be used to set the tariffs, or if the tariffs should be set based on an independent tariff study,"[311] as Respondent erroneously asserts. Rather, as Claimant demonstrated in its Post-Hearing Brief, the CNEE deliberately disregarded the key principles set forth in the LGE and RLGE to achieve the outcome that it wanted—namely, a sharp reduction in EEGSA's VAD by preventing EEGSA from using the new replacement value of its network to calculate that

[305] *Id*. ¶¶ 217-230.

[306] *Id*. ¶ 296.

[307] *Id*. ¶ 293.

[308] *Id*. ¶ 292.

[309] *Id*. ¶¶ 161-166.

[310] *Id*. ¶¶ 58, 121-130.

[311] *Id*. ¶ 292.

VAD.[312] The CNEE thus devised an improper FRC formula with its consultant, Mr. Riubrugent, which calculated EEGSA's annuity off of a VNR that was depreciated by 50 percent and which, according to Mr. Riubrugent, "*yield[ed] the lowest tariff*";[313] directed that EEGSA's demand be calculated in a manner that grossly undervalued the VNR by understating the assets that a model efficient company would need to service the area;[314] and instructed that old prices, rather than current prices, be used to calculate the regulatory asset base of the model efficient company.[315] When the Expert Commission ruled against the CNEE on these key discrepancies, the CNEE proceeded to ignore both the Expert Commission's decisions and EEGSA's revised VAD study, which incorporated the Expert Commission's rulings, and to approve its own VAD study, which did not comply with the Expert Commission's decisions,[316] in blatant violation of Guatemala's prior representations and Claimant's legitimate expectations.[317]

66. As the record reflects, "once the opinion of the Expert Commission had been issued," the CNEE did not determine "whether the distributor's tariff study could be used to set the tariffs, or if the tariffs should be set based on an independent tariff study,"[318] as Respondent contends. In fact, as Mr. Moller expressly testified at the Hearing, the CNEE did not even review Bates White's 28 July 2008 revised VAD study at the time, but only did so "much further down the line."[319] As the CNEE's own internal documents confirm, the *only* analysis undertaken

[312] Claimant's Post-Hearing Brief ¶¶ 130-138.

[313] *Id*. ¶¶ 131-134; Email chain from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez Yat, and A. Garcia dated 13 Dec. 2007 (emphasis added) **(C-490)**.

[314] Claimant's Post-Hearing Brief ¶¶ 73, 117.

[315] *Id*. ¶¶ 4, 117.

[316] Tr. (4 Mar. 2013) 1056:11-18 (Moller Cross) (testifying that "the SIGLA Study didn't have to abide by" the Expert Commission's decisions, because "[n]owhere in the law or the regulations did it say that the independent study had to abide by the results of the Expert Commission").

[317] Claimant's Post-Hearing Brief ¶¶ 73-80.

[318] Respondent's Post-Hearing Brief ¶ 292.

[319] *See* Tr. (4 Mar. 2013) 1054:12-21 (Moller Cross) (testifying that, when EEGSA's 28 July 2008 VAD study "was submitted, [the CNEE] did not look at it in detail immediately because, according to the recommendation of lawyers, this was a study that was not within the law, that departed from the powers that the Experts had," that "it was not a study that [the CNEE] had to assess or evaluate because this study was a study that departed from the Regulations and the law," and that the CNEE "evaluated the study much further down the line but not at that time"); *id*. at 1054:7-8 (acknowledging that the presentation prepared by the CNEE analyzing the Expert Commission's rulings "does not mention" the Bates White July 28 revised study); Analysis of the Expert

by the CNEE at the time was with respect to the quantitative effect of applying the Expert Commission's decisions to Sigla's VAD study.[320] As this internal analysis shows, the CNEE concluded, among other things, that "[t]he decisions of the Expert Commission would tend to make significant changes [to] EEGSA's [VNR as calculated by Bates White in its 5 May 2008 VAD study] by reducing it ([by] approximately 50%)," but that the VNR, as revised to incorporate the Expert Commission's rulings, "remains higher than the [VNR] of the CNEE's Independent Study" prepared by Sigla; that "[t]he effect of the [FRC] formula increases the [VNR's] Annuity [by] 47% compared to the formula set forth in the ToR"; and that, "[a]ssuming that neither SIGLA's [VNR] nor the costs are changed and that the new [FRC] formula is applied, the [VAD] would be increased [by] approximately 25%."[321] Respondent notably ignores this document in its Post-Hearing Brief, referring only to a graph contained therein showing EEGSA's 2003 VNR.[322]

67. Having determined that applying the Expert Commission's decisions to Sigla's VAD study would *increase* EEGSA's VAD, the CNEE thus proceeded to disregard the Expert Commission's decisions and EEGSA's 28 July 2008 revised VAD study, and to approve Sigla's VAD study as the basis for setting EEGSA's VAD and tariffs, which *reduced* EEGSA's VAD by approximately 45 percent.[323] As Mr. Colom subsequently boasted in his April 2010 presentation to the *Asociación Iberoamericana de Entidades Reguladoras de la Energía*, the VAD-setting process was "exhausting, but *highly rewarding for the regulator*," and succeeded in eliminating alleged "*[h]istorical distortions* from the VAD (*the user pays what it should pay*)."[324] The President of Guatemala, Álvaro Colom, Mr. Colom's uncle, similarly celebrated the CNEE's

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Commission Opinion (undated), at 9 (including no mention of Bates White's 28 July 2008 VAD study) **(C-547)**.

[320] Analysis of the Expert Commission Opinion (undated) **(C-547)**; *see also* Tr. (4 Mar. 2013) 1046:10-15 (Moller Cross) (acknowledging that Exhibit No. C-547 is "a PowerPoint presentation prepared by the [CNEE]").

[321] Analysis of the Expert Commission Opinion (undated), at 9 **(C-547)**.

[322] Respondent's Post-Hearing Brief ¶ 240.

[323] Resolution No. CNEE-144-2008 dated 29 July 2008 **(C-272)**; *see also* Tr. (4 Mar. 2013) 1055:4-1056:18 (Moller Cross).

[324] Colom Bickford, Carlos E., Presidente CNEE, *Evolucion de la Methodología del Calculo Tarifario en Guatemala* dated Apr. 2010, at 47 ("*Proceso desgastante pero* altamente enriquecedor para el regulador . . . *Se eliminan* distorsiones históricas *del VAD (el usuario paga lo que debe de pagar)*) (emphasis changed) **(C-348)**.

publication of EEGSA's new tariffs as a significant "achievement."[325] What Guatemala had specifically represented would be a fair, depoliticized process for determining EEGSA's VAD, in which neither the CNEE nor the distributor would have the final word on any discrepancies between them, thus was turned on its head, with the CNEE itself determining EEGSA's VAD and what users, in its own view, rightly should pay. Indeed, all of Respondent's arguments concerning what it now contends is the proper function of the Expert Commission were advanced only after the CNEE imposed the Sigla VAD on EEGSA, and are contrary to Respondent's prior specific representations, as well as the contemporaneous views of the CNEE's and the MEM's own advisors.[326]

68. Second, Respondent's defense—raised for the very first time at the Hearing and reiterated in its Post-Hearing Brief—that the CNEE's actions could not have violated Claimant's legitimate expectations or amounted to arbitrary treatment, because there is "no provision [in the LGE] requiring that the tariffs be determined on the basis of [the distributor's] tariff study," and, "[i]n fact, a provision to such effect was contained in the draft LGE, but [] was eliminated from the draft,"[327] is unavailing. As Claimant noted in its Post-Hearing Brief, LGE Article 74 expressly provides that the distributor's consultant shall calculate the VAD,[328] a principle which also is reiterated in the Memorandum of Sale.[329] The removal of draft Article 54 from the final version of the LGE, which provided that "[t]he costs for the distribution activity approved by the Commission shall correspond to standard distribution costs of efficient companies, *determined by a study commissioned by distributors*,"[330] thus did not eliminate this principle from the LGE in any way, as it remained in LGE Article 74.[331] In addition, any suggestion that the LGE does

[325] Óscar Ismatul, *Colom Lists Achievements for the Week* dated 25 Aug. 2008 **(C-604)**.

[326] Claimants Post-Hearing Brief ¶¶ 123-129.

[327] Respondent's Post-Hearing Brief ¶ 292.

[328] LGE, Art. 74 ("Each distributor shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE]") **(C-17)**; *see also* Tr. (4 Mar. 2013) 1192:1-1197:19 (Alegría Cross).

[329] Sales Memorandum, at 53 (emphasis added) ("VADs *must be calculated by distributors* by means of a study commissioned [by] an engineering firm") **(C-29)**.

[330] Draft General Electricity Law, Republic of Guatemala dated 4 Apr. 1995, Art. 54 **(C-13)**.

[331] Tr. (4 Mar. 2013) 1192:13-21 (Alegría Cross) (testifying that this principle "wasn't taken out. It's in Article 74" of the LGE).

not require the CNEE to use the VAD resulting from the distributor's study in setting the tariffs is incorrect; as the language of LGE Articles 74 and 76 reflect, "[e]ach distributor *shall* calculate the VAD components,"[332] and the CNEE "*shall* use the VAD and the prices for acquisition of energy referenced to the inlet to the distribution network to structure a set of rates for each awardee."[333] There is no reference to any other VAD or VAD study in the LGE. This is confirmed by the documentary record. When asked in August 2008 why the CNEE had not relied upon its own study to set EEGSA's VAD in 2003, Mr. Colom responded as follows: "At that time, this is what the regulation and the law established; that is, the Distributor was supposed to conduct its own study. However, *the Regulations were modified in March last year, and now the CNEE is allowed to conduct a parallel study*."[334] Similarly, in his April 2010 presentation, Mr. Colom stated that the CNEE had "[l]earned from past mistakes," that "[t]here was a clear need for the regulator to have a technical study (*not just the distributor . . .*)," and that the "*RLGE was amended in 2007 so that the regulator has a technical study*."[335] As Mr. Colom's own prior statements confirm, before Guatemala enacted the 2007 amendment to RLGE Article 98,[336] the *only* manner in which the VAD could be set thus was through a study commissioned by the distributor, as provided by LGE Article 74.

69. Moreover, while Claimant does not dispute the CNEE's authority under LGE Article 5 to "commission its own tariff studies from independent consultants,"[337] as Mr. Colom himself has acknowledged, the CNEE was not entitled to rely upon those studies to set the distributor's VAD until Guatemala amended RLGE Article 98, thus fundamentally changing the regulatory framework.[338] Even under the terms of that amendment, however, the CNEE was not

[332] LGE, Art. 74 (emphasis added) **(C-17)**.

[333] *Id*., Art. 76 (emphasis added).

[334] SIGLO XXI, *EEGSA needs to be efficient* dated 21 Aug. 2008, at 2 (emphasis added) **(C-603)**.

[335] Colom Bickford, Carlos E., Presidente CNEE, *Evolucion de la Methodología del Calculo Tarifario en Guatemala* dated Apr. 2010, at 29 ("*Se* ***aprende de los errores*** *del pasado . . . Se evidencia la necesidad que el* ***regulador haga un estudio técnico*** *(no sólo el de la distribuidora . . .) . . . Se modifica el RLGE en el 2007 para que el regulador haga un estudio técnico.*") (emphasis changed) **(C-348)**.

[336] Amended RLGE, Art. 98 **(C-105)**.

[337] Respondent's Post-Hearing Brief ¶ 293.

[338] *See* SIGLO XXI, *EEGSA needs to be effifient* dated 21 Aug. 2008, at 2 **(C-603)**; *see also* Colom Bickford, Carlos E., Presidente CNEE, *Evolucion de la Methodologia del Calculo Tarifario en Guatemala* dated Apr. 2010 **(C-348)**.

entitled to rely upon its own VAD study in the present case.[339] As Claimant has explained, under amended RLGE Article 98, the CNEE is so empowered only in two limited circumstances: (i) where the distributor fails to submit a VAD study; and (ii) where, after the distributor submits a VAD study and the CNEE has made observations on the same, the distributor fails to respond to the CNEE's observations by correcting its VAD study in accordance with the CNEE's observations, or by indicating its disagreement with the CNEE's observations in writing.[340] This is confirmed by the two CNEE Resolutions that Respondent relies upon for the proposition that "[t]he CNEE frequently approves tariffs on the basis of VAD studies carried out by its own consultants."[341] Although Respondent submitted only partial translations of these Resolutions with its Post-Hearing Brief, which notably omit their reasoning or "motivations,"[342] as the full translations of these documents reflect, the CNEE approved tariffs for these two *municipal* distribution companies—notably, not privately-owned companies—on the basis of its own VAD studies, *because these companies had failed to submit their own studies*.[343] There are no analogous circumstances here, as there is no dispute that EEGSA prepared and submitted its own VAD study in accordance with LGE Article 74.

70. Third, Respondent's argument that "the 'itself' that follows the verb 'shall pronounce' in the text of Article 75 turns this verb into a reflexive verb," and that "the only purely reflexive meaning of the verb pronounce (oneself) offered by the RAE dictionary is 'to declare or express oneself for or against somebody or something,' a definition that obviously

[339] Claimant's Post-Hearing Brief ¶ 118.

[340] Amended RLGE, Art. 98 **(C-105)**.

[341] Respondent's Post-Hearing Brief ¶ 293 & n.405 (citing CNEE Resolution 184-2008 of 25 September 2008, approving the Tariff Study prepared by the Association of companies comprised of Mercados Energéticos Consultores, Sociedad Anónima and Geotecnología, Construcción y Servicios, Sociedad Anónima (GEOCONSA), corresponding to the Empresa Eléctrica Municipal Zacapa (**R-241**) and CNEE Resolution 16-2009 of 28 January 2009, approving the Tariff Study prepared by the Association of companies comprised of Mercados Energéticos Consultores, Sociedad Anónima and Geotecnología, Construcción y Servicios, Sociedad Anónima (GEOCONSA), corresponding to the Empresa Hidroeléctrica Municipal de Retalhuleu **(R-244)**).

[342] *See* CNEE Decision 184-2008 dated 25 Sept. 2008 **(R-241)**; CNEE Decision 16-2009 dated 28 Jan. 2009 **(R-244)**.

[343] *See* Claimant's complete translations of CNEE Decision 184-2008 dated 25 Sept. 2008 **(C-630)** and CNEE Decision 16-2009 dated 28 Jan. 2009 **(C-631)**. Notably, Respondent points to no example of any privately-owned distribution company failing to prepare a VAD study, as required under LGE Article 74. *See* Respondent's Post-Hearing Brief ¶ 293.

does not assign a binding nature to the term," is absurd.[344] As Claimant has shown, the *Diccionario de la Real Academia Española* contains six definitions for the Spanish verb "*pronunciar*," including "to determine, to resolve" and "to publish a sentence or decision," both of which connote a binding decision.[345] In addition, the definition "to publish a sentence or decision" is preceded by the abbreviation "*Der.*" for "*derecho*," which means that it is the definition to be used in a legal context.[346] As Professor Alegría has demonstrated, consistent with this definition, the reflexive verb "*pronunciarse*" is used numerous times in Guatemalan law in the context of the resolution of differences or issuance of a final decision or judgment,[347] including in the Guatemalan Constitution,[348] in the Guatemalan Civil and Commercial Code,[349] and in the Guatemalan Arbitration Law.[350] It also was used by the tribunal in the *Iberdrola* arbitration in referring to its own decision in that case.[351] Neither Claimant nor Professor Alegría thus has ignored an "analysis of the text of Article 75," as Respondent erroneously suggests.[352]

71. Fourth, Respondent's argument regarding the application of LCA Article 3 is both incorrect and irrelevant.[353] As Claimant explained in its Post-Hearing Brief, the purpose of LCA Article 3, which provides that "[a]dministrative resolutions shall be issued by a competent

[344] Respondent's Post-Hearing Brief ¶ 158. Respondent's argument regarding the dictionary definition of the term "expert" also is wrong. *Id*. ¶ 159. While Respondent asserts that "the adjective 'expert' obviously derives from the noun 'expert' and according to the RAE dictionary, this word means 'person who, possessing certain scientific, artistic and technical or practical knowledge, reports, under oath, to the judge on contentious issues as they relate to their special knowledge or experience,'" the expert commission established under LGE Article 75 does not report to a judge in a court proceeding; rather, as LGE Article 75 provides, the expert commission decides the discrepancies submitted to it by the CNEE. *Id*. (emphasis omitted).

[345] Dictionary of the Royal Spanish Academy, 2001, definition of verb "*pronunciar*" **(C-50)**.

[346] *Id*.

[347] Alegría I ¶ 77 **(RER-1)**.

[348] Constitution, Art. 266 (requiring all courts to "pronounce" regarding claims of unconstitutionality) **(C-11)**.

[349] Civil and Commercial Code dated 14 Sept. 1963, Art. 197 (providing that all judges and tribunals may perform certain evidence-gathering procedures before "pronouncing" their judgment) **(C-2)**.

[350] Arbitration Law dated 17 Nov. 1995, Chapter VI, Art. 40 (providing that, in the award, the arbitrators shall "pronounce" regarding costs) **(C-14)**.

[351] *Iberdrola v. Guatemala* ¶ 346 ("The Claimant did not submit a claim or application to the Tribunal to declare that Article 3.2 *in fine* of the Treaty is an umbrella clause and, moreover, the Parties gave no importance to the topic. *Accordingly, the Tribunal will not pronounce itself on this issue*.") (emphasis added) **(RL-32)**.

[352] Respondent's Post-Hearing Brief ¶ 159.

[353] Claimant's Post-Hearing Brief ¶ 85.

authority, quoting the statutes or regulations on which they are grounded," and that "[t]he opinions of a technical or legal advisory body shall under no circumstances be deemed as resolutions,"[354] is to compel administrative authorities to issue formal resolutions, so that private citizens may exercise their rights and avail themselves of the remedies to challenge those resolutions as provided under the LCA.[355] As legal commentary establishes, when LCA Article 3 refers to "technical or legal advisory organs," it refers to the permanent advisory units within the internal organizational structure of each Ministry, such as the CNEE's Legal Department, and not to specialized, temporary bodies, such as an Expert Commission established pursuant to LGE Article 75.[356] The Supreme Court of Guatemala, for example, found that the MEM had violated LCA Article 3, because it had not made its own critical analysis of the facts based upon the applicable law and the legal opinions received from its legal advisory unit, but rather simply had cited and transcribed those legal opinions.[357] There are no analogous circumstances here. The Expert Commission, which is not a permanent advisory unit, does not approve the distributor's tariffs, nor does it approve the distributor's VAD; rather, the Expert Commission decides the discrepancies between the CNEE and the distributor relating to the distributor's VAD study, which the CNEE itself records in writing and refers to the Expert Commission for resolution under LGE Article 75.[358] That these decisions are binding upon the CNEE in setting the distributor's VAD does not in any way violate LCA Article 3.

72. In any event, even if LCA Article 3 were interpreted by a Guatemalan court (which it has not been) to preclude the Expert Commission's decisions from having binding effect, that would not absolve Respondent from liability under Article 10.5 of the DR-CAFTA arising from the arbitrary actions it took in violation of its prior representations, as it is well

[354] Law on Administrative Disputes, Art. 3 **(C-425)**.

[355] Alegría II ¶ 42 **(CER-3)**.

[356] Franklin Azurdia Marroquín, "*Ley de lo Contencioso Administrativo Didáctica y Desarrollada*," Editorial Estudiantil Fénix, 2009, at 12-13 **(C-506)**; Hugo H. Calderón, ADMINISTRATIVE PROCEDURAL LAW (2d ed.) (excerpt) dated May 1999, at 27 **(C-632)**; Jorge Mario Castillo Gónzalez, "*Derecho Procesal Administrativo Guatemalteco*," Universidad de San Carlos de Guatemala, 2006, at 674 **(C-473)**.

[357] Supreme Court of Guatemala, Administrative Case No. 281-2011 dated 13 Aug. 2012 **(C-633)**.

[358] Alegría II ¶ 26 **(CER-3)**.

established that a State may not rely upon its own internal law to avoid international liability.[359] As the record reflects, Guatemala not only specifically represented that the function of the Expert Commission was "*to resolve*" the discrepancies,[360] but the CNEE also agreed to remove from its first draft of the operating rules the provisions stating that the Expert Commission's decisions would not be binding.[361] In its second draft, the CNEE thus referred to the Expert Commission members as "arbitrators," and made clear in Rule 3 that the Expert Commission's decisions would be binding: "The EC shall decide the discrepancies and the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and must deliver it to CNEE, which shall review the incorporation of the decision of the [EC], and which shall approve the Tariff Study."[362] This further demonstrates the CNEE's understanding that the Expert Commission's decisions would be binding, and directly contradicts Respondent's assertion in this arbitration that LCA Article 3 prohibited the CNEE from applying the Expert Commission's decisions.

73. Finally, Respondent's contention that the LGE and RLGE establish that accumulated depreciation must be taken into account in calculating the distributor's return is baseless.[363] No such provision is included in either the LGE or the RLGE. In its Post-Hearing Brief, Respondent therefore is reduced to arguing that accumulated depreciation is mentioned in the LGE "implicitly," through references in LGE Article 73 to the constant annuity of the cost of capital and the typical useful life of distribution facilities.[364] Contrary to Respondent's contention, however, neither of those references supports its assertion. As Claimant explained in its Post-Hearing Brief, the language Respondent references from LGE Article 73 merely requires that the distributor be provided with a return of its investment over the life of its investment in

[359] Claimant's Post-Hearing Brief ¶ 84; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2005), Art. 32 ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.") **(CL-54)**.

[360] Sales Memorandum, at 53 **(C-29)**; Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.5 **(C-59)**; CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 **(C-81)**.

[361] Email from M. Quijivix to M. Calleja dated 14 May 2008, attaching the Proposed Rules of the Expert Commission, Arts. 1 and 17 **(R-70)**; Calleja II ¶ 30 **(CWS-9)**; Maté II ¶ 21 **(CWS-12)**.

[362] Email from M. Quijivix to M. Calleja dated 15 May 2008, Rule 3 **(C-210)**; *see also* Tr. (22 Jan. 2013) 693:13-698:16 (Calleja Tribunal Question).

[363] Respondent's Post-Hearing Brief ¶¶ 121-130.

[364] *Id*. ¶¶ 122, 125.

equal annual installments.[365] It does not mean that accumulated depreciation must be taken into account in calculating the distributor's return. Indeed, as Claimant's experts have demonstrated, reducing the distributor's regulatory asset base by accumulated depreciation is contrary to the concept of new replacement value,[366] which *is* expressly set forth in the LGE. The notion that depreciation, upon which Respondent places so much emphasis, is implicit in the LGE and, even more, that a requirement to depreciate should be implied, when the LGE expressly provides that the *new* replacement value should be used, is simply not credible.

74. Respondent's further assertion that RLGE Article 83 was "a source of great confusion during the Hearing," and that "Mr. Barrera attempted to argue for the first time, during his direct examination, that this article provided a regulatory basis to justify Bates White's exclusion of accumulated depreciation in calculating EEGSA's profit,"[367] is wrong. Claimant's experts testified consistently regarding the interpretation of RLGE Article 83, which is straightforward; the only confusion arises directly from Respondent's own attempts to avoid the clear implication of this Article. As explained in Claimant's Post-Hearing Brief, Dr. Barrera, as well as Mr. Kaczmarek—whose testimony on this point Respondent simply ignores—have explained that RLGE Article 83 precludes the distributor from recovering depreciation as a cost in the base tariffs, because, under the VNR method, the assets comprising the regulatory asset base are new, and there thus is no need to incur maintenance capital expenditures.[368] As they both testified, this explains why the distributor must receive a return off of an asset base that is valued as if it were new;[369] if its return were calculated off of a depreciated asset base, as Respondent insists, the distributor never would receive its cost of capital, because it would have to use a portion of its profit to maintain the network.[370] Respondent's argument that the

[365] Claimant's Post-Hearing Brief ¶ 135.

[366] *See, e.g.*, Barrera ¶¶ 25-29 (CER-4); Tr. (5 Mar. 2013) 1294:9-16, 1302:5-8 (Barrera Direct); Tr. (5 Mar. 2013) 1490:13-16, 1493:22-1494:2 (Kaczmarek Tribunal Question).

[367] Respondent's Post-Hearing Brief ¶ 128.

[368] *See* Claimant's Post-Hearing Brief ¶ 67; Tr. (5 Mar. 2013) 1506:10-1508:20, 1510:16-1511:1 (Kaczmarek Direct); Tr. (5 Mar. 2013) 1295:7-14 (Barrera Direct); *see also* Tr. (4 Mar. 2013) 961:11-19 (Giacchino Cross).

[369] Tr. (5 Mar. 2013) 1295:7-1296:15 (Barrera Direct); Tr. (5 Mar. 2013) 1508:9-1509:6 (Kaczmarek Direct).

[370] *See* Tr. (5 Mar. 2013) 1511:2-6 (Kaczmarek Direct) ("[W]hat that does is that leaves the utility with less profit, and in fact, what they have to do is use their profit to cover the maintenance CAPEX, never really getting any kind of return out of the company at all.").

distributor is compensated for the cost of maintenance capital expenditures as part of the cost of capital[371] is just another way of saying that the distributor should use a portion of its return on investment for maintenance capital expenditures, the result of which would be to decrease the investor's return below its cost of capital or WACC, in contravention of LGE Article 79.

75. Similarly, Respondent's argument that Dr. Barrera conceded that EEGSA would not reinvest the exact same amounts that it would receive as its return of its investment, and that this demonstrates that EEGSA's return cannot be calculated on an undepreciated VNR[372] is misplaced. Respondent's error stems from the fact that it wrongly equates the distributor's return of capital with depreciation, and uses those terms interchangeably.[373] If all of the distributor's return of capital needed to be reinvested to maintain the network, the distributor never would recover the cost of its investment. Contrary to Respondent's assertion, moreover, Dr. Barrera did not testify that *all* of the investor's return would be reinvested in the company; rather, he agreed that as "the assets comprising the regulatory base depreciate . . . they are simultaneously replaced; and, therefore this simultaneous replacement means that the VNR method assumes that the assets are always new."[374] As he explained, as an accounting matter, assets are amortized over time, but this does not mean that the company invests that same amount each year to replace those assets.[375] This is shown by EEGSA's capital expenditure chart, relied upon by Respondent.[376] While Respondent states that this chart shows that "EEGSA's historical average investments never exceeded US$ 20 million,"[377] the chart, in fact, reveals that EEGSA's capital expenditures over a twelve-year period ranged from a high of nearly US$ 30 million to a low of approximately US$ 10 million,[378] showing that the

[371] Respondent's Post-Hearing Brief ¶ 129.

[372] *Id*. ¶¶ 138-141.

[373] *See, e.g.*, Respondent's Post-Hearing Brief ¶ 138 (arguing that Dr. Barrera testified that the investor "will automatically reinvest the amounts received for depreciation (*return of investment*) into the service") (emphasis in original)).

[374] Tr. (5 Mar. 2013) 1337:10-1338:11 (Barrera Cross).

[375] *Id*. at 1345:4-8.

[376] Respondent's Post-Hearing Brief ¶ 139.

[377] *Id*.

[378] *Id*. In addition, the chart shows amounts in nominal terms. Thus, the capital expenditures in the earlier years are understated in real terms when compared to later years.

replacement of investments is neither regular nor simultaneous with their depreciation, as an accounting matter. Indeed, where a company, such as EEGSA, makes large up-front investments, its capital expenditures may decrease over time, regardless of the fact that those assets are being depreciated on its books. Moreover, over the twelve-year time span depicted by the chart, EEGSA's VNR varied to a large extent, which also necessarily will affect the level of capital expenditures, as it determines how much cash is available to the company for reinvestment.[379]

76. As further support for its argument, Respondent quotes selectively and misleadingly to Dr. Barrera's testimony concerning the FRC formula that was used in EEGSA's 2003-2008 tariff review,[380] and to the regulatory regime in Chile, which served as a model for Guatemala.[381] Contrary to Respondent's assertion, Dr. Barrera never disputed that a mortgage formula was applied by the CNEE in EEGSA's 2003-2008 tariff review.[382] While both Dr. Barrera and Mr. Kaczmarek consistently have maintained that they share Mr. Giacchino's view that the mortgage formula undercompensates the distributor,[383] they likewise have explained, that, unlike the case with Sigla's FRC formula, the VNR is not depreciated when a mortgage formula is used.[384] As Dr. Barrera thus testified, in Chile, where a mortgage formula is used, the distributor's regulatory asset base is valued as new every five years.[385] As he further confirmed, the manner in which the VNR method is implemented in Chile comports with the way in which the Expert Commission ruled with regard to EEGSA's FRC formula.[386]

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[379] Tr. (5 Mar. 2013) 1344:21-1346:22 (Barrera Cross); Tr. (5 Mar. 2013) 1509:13-1510:14 (Kaczmarek Direct).

[380] Respondent's Post-Hearing Brief ¶¶ 131-135.

[381] *Id*.

[382] *Id*.; Tr. (5 Mar. 2013) 1302:9-16 (Barrera Direct); Tr. (5 Mar. 2013) 1335:3-1336:2 (Barrera Cross).

[383] Tr. (5 Mar. 2013) 1302:14-20 (Barrera Direct); Tr. (5 Mar. 2013)1505:2-8 (Kaczmarek Direct).

[384] Tr. (5 Mar. 2013) 1330:2-17 (Barrera Cross); Tr. (5 Mar. 2013) 1504:15-18 (Kaczmarek Direct); Claimant's Post-Hearing Brief ¶ 82; Giacchino ¶ 13 (citing NERA Stage E Report: Distribution Added Value and Energy and Power Balance dated 30 July 2003, at 11-15 **(C-75)**) **(CWS-4)**.

[385] Tr. (5 Mar. 2013) 1332:13-15 (Barrera Tribunal Question).

[386] Tr. (5 Mar. 2013) 1333:5-9 (Barrera Tribunal Question) (President Mourre: "If you take the Expert Commission Decision, you would have something similar in Guatemala as to what you explained in the case of Chile; correct?", Dr. Barrera: "Exactly.").

77. Respondent's further argument, namely that the CNEE could have adapted the FRC formula in the ToR to EEGSA's "actual" depreciation level,[387] not only is illogical, but also is not supported by the documentary record. As Claimant explained in its Post-Hearing Brief, in the distributor's VAD study, the assets that are being valued are those of "optimal facilities," and not the distributor's actual assets.[388] It thus makes no sense to go through the exercise of calculating the new replacement value of the assets of a model efficient company, only to depreciate that value by the amount by which the distributor's actual assets have depreciated or, in lieu of that, by 50 percent.[389] In addition, there is no evidence that the CNEE ever requested EEGSA's actual level of depreciation in order to adapt the FRC formula, as Respondent asserts.[390] The two letters that Respondent cites in its Post-Hearing Brief for the proposition that the CNEE requested, and EEGSA refused to provide, this information do not request EEGSA's financial statements for the purpose of adapting the FRC formula;[391] nor did the CNEE subsequently request this information in its observations on Bates White's VAD study regarding the FRC formula.[392] Rather, the CNEE, in its 30 October 2007 letter to EEGSA—which notably was sent to EEGSA *before* the CNEE had even inserted its FRC formula into EEGSA's ToR in January 2008[393]—requested EEGSA's financial statements for the purpose of conducting its study of the rate of the cost of capital.[394] Respondent never has suggested that the CNEE had any difficulty in conducting that study, and in issuing the Resolution that calculated EEGSA's cost of capital for the 2008-2013 tariff period.

[387] Respondent's Post-Hearing Brief ¶¶ 146-148.

[388] Claimant's Post-Hearing Brief ¶ 134.

[389] *Id*.

[390] Respondent's Post-Hearing Brief ¶ 146.

[391] *Id*. ¶ 188; Letter from Carlos Colom Bickford to Luis Maté dated 30 Oct. 2007 **(R-236)**; Letter from Miguel Calleja to Carlos Colom Bickford dated 6 Nov. 2007 **(R-237)**.

[392] Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 11-12 **(C-193)**; Resolution No. CNEE-96-2008 dated 16 May 2008 **(C-209)**.

[393] CNEE Resolution 124-2007 dated Jan. 2008 (containing the Terms of Reference for EEGSA's 2008 tariff review, as amended to add the FRC formula) **(C-417)**.

[394] Letter from Carlos Colom Bickford to Luis Maté dated 30 Oct. 2007 **(R-236)**.

78. Moreover, despite Ms. Peláez's email exchanges with Mr. Riubrugent regarding EEGSA's financial statements,[395] there is no evidence that the Expert Commission relied upon EEGSA's financial statements, as Respondent contends, and, indeed, Respondent does not cite any section of the Expert Commission's Report as support for its contention.[396] Respondent's further assertion that "Mr. Bastos himself admitted during the Hearing that "when depreciation criteria are used, one uses an accounting basis, […] and real depreciation [should be used],"[397] likewise misconstrues his testimony. As the hearing transcript reflects, Mr. Bastos did not endorse the use of "real depreciation," nor did he endorse the CNEE's FRC formula; to the contrary, Mr. Bastos testified that the CNEE's FRC formula was inconsistent with the regulatory framework adopted by Guatemala.[398] As he noted, real depreciation should be used when an accounting basis is used to value the regulatory asset base, as is the case in cost-of-service regimes.[399] As Respondent itself acknowledges, this is *not* the regulatory regime that was adopted by Guatemala with the enactment of the LGE: "*[T]he Guatemalan regulatory system is not based on the accounting tariff base*."[400]

### 2. It Was The CNEE, And Not EEGSA, Which Acted Arbitrarily And In Bad Faith During EEGSA's 2008-2013 Tariff Review

79. As Claimant has demonstrated, Respondent also breached its obligation to accord Claimant's investment in EEGSA FET by conducting EEGSA's 2008-2013 tariff review in a blatantly arbitrary and bad faith manner by, among other things, inducing EEGSA to withdraw its provisional *amparo* against the ToR and then disavowing the agreement reached with EEGSA to induce that withdrawal; failing to constructively engage with EEGSA or its consultant during the tariff review process; adopting an improper FRC formula; enacting and then attempting to apply RLGE Article 98 *bis* retroactively to EEGSA's tariff review; engaging in improper *ex*

[395] Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 **(C-496)**.

[396] Respondent's Post-Hearing Brief ¶ 188 & n.281.

[397] *Id*. ¶ 188 (emphases omitted).

[398] Tr. (1 Mar. 2013) 791:5-22 (Bastos Tribunal Question); *id.* at 792:20-22 (Bastos Tribunal Question); *see also* Bastos I ¶¶ 21-22 **(CWS-1)**.

[399] Tr. (1 Mar. 2013) 792:18-793:15 (explaining that this type of system is generally adopted in countries where the network is not growing, such as in Australia and New Zealand, and not in newer systems, such as Guatemala's, where demand is growing) (Bastos Tribunal Question).

[400] Respondent's Post-Hearing Brief ¶ 340.

*parte* communications with its appointed expert on the Expert Commission; unilaterally dissolving the Expert Commission and preventing it from completing its mandate under Rule 12 by threats; and adopting Sigla's VAD study without even granting EEGSA or its consultant the opportunity to review it.[401] In its Post-Hearing Brief, Respondent argues that its actions were not arbitrary, because "the law assigns solely and exclusively to the CNEE" the responsibility "to define the 'methodology' for calculating the tariffs, which occurs through the issuance of the Terms of Reference for the tariff review," and that, once the ToR have been issued, "they are of mandatory application."[402] According to Respondent, EEGSA and its consultant, Bates White, allegedly used Article 1.10 "as a tool to unilaterally change the finalized Terms of Reference,[403] and that, "[a]s a result of the deviations by Bates White, the study was impossible to audit and presented a highly overvalued VNR and VAD."[404] Respondent also continues to assert that the Expert Commission allegedly exceeded its authority as set forth in its constituent documents,[405] and that "the regulatory framework contained no provision that would allow the consultant firm to correct the study and submit it for the 'approval' of the Expert Commission."[406] Respondent further contends that, during the tariff review process, Mr. Giacchino of Bates White did not act as an independent consultant to EEGSA,[407] and that Mr. Pérez's proposal "exposed EEGSA's lack of transparency, as well as the lack of credibility of its tariff studies."[408] Respondent also contends that the proposed Operating Rules were contrary to the regulatory framework and never approved by the parties,[409] and that it was Mr. Giacchino who engaged in improper *ex parte* communications with EEGSA, and not the CNEE with Mr. Riubrugent.[410] Respondent's contentions are baseless, as set forth below.

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[401] *See* Claimant's Post-Hearing Brief ¶¶ 117-164; Reply ¶¶ 89-227.

[402] Respondent's Post-Hearing Brief ¶ 82 & heading III(A)(1).

[403] *Id*. ¶ 95.

[404] *Id*.

[405] *Id*. ¶ 184.

[406] *Id*. ¶ 190.

[407] *Id*. ¶¶ 96-100.

[408] *Id*. ¶ 149.

[409] *Id*. ¶¶ 167-175.

[410] *Id*. ¶¶ 18, 181-182.

80. First, Respondent's argument that, "subject to judicial control, the CNEE has the last word regarding the Terms of Reference in light of its responsibilities as regulator to comply with and enforce the LGE and RLGE"[411] ignores the language of Article 1.10 of the ToR, as well as the context in which EEGSA withdrew its provisional *amparo* against the 2008-2013 ToR. As Claimant explained in its Post-Hearing Brief, the 2008-2013 ToR contained many provisions that predetermined the results of EEGSA's VAD study in violation of the efficiency principles set forth in the LGE and RLGE, with which—as Respondent itself acknowledges in its Post-Hearing Brief[412]—the ToR must comport.[413] EEGSA thus challenged these ToR in the Guatemalan courts, and obtained a provisional *amparo* suspending them.[414] As a condition for withdrawing its provisional *amparo* and proceeding with the tariff review process as scheduled, EEGSA insisted, however, on the addition of Article 1.10, which expressly provides that the ToR are "guidelines to follow in preparation of the Study," and thus are subject to and do not amend the LGE or RLGE, and that EEGSA's consultant could deviate from the ToR, if it provided a reasoned justification for doing so.[415] As Messrs. Calleja and Giacchino confirmed at the Hearing, if the CNEE did not agree with EEGSA's deviations, the CNEE—consistent with its authority under LGE Article 74—was entitled under Article 1.10 to *make observations* on those deviations, confirming that its observations were consistent with the guidelines of the study,[416] *i.e.*, confirming that its observations were not proposing new criteria, but rather were consistent

[411] *Id*. ¶ 42.

[412] *Id*. ¶ 84 ("As is logical, the LGE affords the CNEE the discretion to issue the Terms of Reference, but requires that those comport with the efficiency principles set forth in the LGE.").

[413] Claimant's Post-Hearing Brief ¶ 120.

[414] *Id*. ¶¶ 118-120; EEGSA Amparo Request to the First Civil Court dated 29 May 2007, at 6 **(C-112)**; Decision of the Sixth Civil Court of First Instance dated 4 June 2007 **(C-114)**; Decision of the Sixth Civil Court of First Instance Confirming Amparo C2-2007-4329 dated 11 June 2007 **(C-115)**.

[415] Claimant's Post-Hearing Brief ¶ 121; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**; Tr. (22 Jan. 2013) 627:19-628:1 (Calleja Cross) (testifying that "[A]rticle 1.10 of the Terms of Reference allowed the consultant, who is the consultant established under the law who has to calculate [the VAD,] in cases of conflict between the Terms of Reference and the law, the law prevailed").

[416] Tr. (22 Jan. 2013) 627:4-628:18 (Calleja Cross); Tr. (4 Mar. 2013) 844:5-9 (Giacchino Cross); 2007 Terms of Reference dated Jan. 2008, Art. 1.10 ("If there are changes in the methodologies set forth in the Study Reports, which must be fully justified, *the CNEE shall make such observations regarding the changes as it deems necessary, confirming that they are consistent with the guidelines for the Study*.") (emphasis added) **(C-417)**.

with the ToR.[417] As Mr. Calleja testified, this agreement was reached between the parties, because there were "many contradictions between the Terms of Reference and the law," and it was "impossible to negotiate article by article."[418] The parties thus agreed that any discrepancies between them relating to EEGSA's deviations from the ToR were to be submitted to the Expert Commission for resolution, in accordance with the procedure stipulated in LGE Article 75.[419]

81. In its Post-Hearing Brief, Respondent continues to dispute this interpretation, arguing that Article 1.10 "contains no *carte blanche* allowing EEGSA to unilaterally depart from the Terms of Reference," and that "[t]he text of article 1.10 clearly establishes that the CNEE has the obligation—in line with its sole and exclusive power to define the methodology—to approve any change to the Terms of Reference."[420] According to Respondent, "the consultant's proposed changes to the methodology had to be consistent with the Terms of Reference and the regulatory framework," and had to be approved by the CNEE.[421] As Claimant demonstrated in its Post-Hearing Brief, the CNEE, however, never disputed EEGSA's use and interpretation of Article 1.10 at the time; to the contrary, the CNEE responded to Bates White's deviations under Article 1.10 by making observations, which in turn gave rise to discrepancies that were submitted by the CNEE to the Expert Commission for resolution, after the CNEE itself called for the establishment of an Expert Commission.[422] There thus is *no* documentary evidence showing that the CNEE considered and rejected EEGSA's deviations pursuant to its purported authority under Article 1.10. Nor is there any documentary evidence showing that the CNEE informed EEGSA—or the Expert Commission—that EEGSA was not permitted to deviate from the ToR under Article 1.10 without its prior express approval. Indeed, the Expert Commission, reviewing both the ToR and the discrepancies submitted to it by the CNEE, concluded—consistent with Claimant's interpretation—that EEGSA's consultant had the authority under Article 1.10 "to

[417] Claimant's Post-Hearing Brief ¶ 126 & n.486; *see also* Tr. (4 Mar. 2013) 952:6-953:5 (Giacchino Redirect).

[418] Tr. (22 Jan. 2013) 679:1-4, 680:10-15 (Calleja Tribunal Question); Calleja II ¶ 20 **(CWS-9)**; Calleja I ¶ 22 **(CWS-3)**.

[419] Tr. (22 Jan. 2013) 677:2-20 (Calleja Tribunal Question).

[420] Respondent's Post-Hearing Brief ¶ 92.

[421] *Id*. ¶ 90.

[422] Claimant's Post-Hearing Brief ¶ 125; Resolution No. CNEE-63-2008 dated 11 Apr. 2008 **(C-193)**; Resolution No. CNEE-96-2008 dated 15 May 2008 **(C-209)**.

deviate from the guidelines in the TOR,"[423] and that the issue to be resolved by the Expert Commission was "whether the Consultant's justification in the Tariff Study is in accordance with the Law and the Regulations of the General Law of Electricity."[424]

82. In addition, Respondent's assertion that "Mr. Calleja accepted that it was the CNEE that was supposed to 'verify' that the [deviations] were consistent with the Terms of Reference,"[425] misconstrues his testimony. As Mr. Calleja made clear throughout his testimony, Article 1.10 permitted EEGSA's consultant to deviate from the ToR, where they were inconsistent with the LGE and RLGE, and that it was the role of the Expert Commission—not the CNEE—to determine whether these deviations were justified.[426] As Claimant noted in its Post-Hearing Brief, making observations on the consultant's deviations—and on their consistency with the ToR—is not the same as approving those deviations.[427] Indeed, if, as Respondent continues to assert, EEGSA's consultant were permitted to deviate from the ToR only when the CNEE had expressly approved its deviation, Article 1.10 would *require* the CNEE's *approval* of each and every deviation, which it plainly does not.[428] Rather, Article 1.10 provides that the CNEE shall make such observations "*as it deems necessary*."[429]

83. Moreover, as Claimant explained in its Post-Hearing Brief, Article 1.10, as now interpreted by Respondent, would have provided *no* benefit to EEGSA that would have induced it to withdraw its provisional *amparo*.[430] As noted above, EEGSA challenged the 2008-2013 ToR, because many of the provisions contained therein predetermined the results of EEGSA's VAD study in violation of the efficiency principles set forth in the LGE and RLGE.[431] If, as Respondent now asserts, "the consultant's proposed changes to the methodology had to be

[423] EC Report, at 11 **(C-246)**.

[424] *Id*., at 12 (emphasis omitted).

[425] Respondent's Post-Hearing Brief ¶ 91.

[426] Tr. (22 Jan. 2013) 614:19-20 (Calleja Direct); Tr. (22 Jan. 2013) 634:5-7, 640:8-9 (Calleja Cross); Tr. (22 Jan. 2013) 672:22-673-1, 673:8-11 (Calleja Redirect); Tr. (22 Jan. 2013) 693:7-10 (Calleja Tribunal Question).

[427] Claimant's Post-Hearing Brief ¶ 124; Tr. (4 Mar. 2013) 844:5-9 (Giacchino Cross).

[428] Claimant's Post-Hearing Brief ¶ 124.

[429] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 (emphasis added) **(C-417)**.

[430] Claimant's Post-Hearing Brief ¶ 127.

[431] *Id*. ¶ 120; Tr. (22 Jan. 2013) 628:12-15 (Calleja Cross).

consistent with the Terms of Reference," and approved by the CNEE, EEGSA's consultant never would have been able to deviate from the ToR, because its proposed changes would have had to be consistent therewith. There thus would have been no reason whatsoever for EEGSA to withdraw its provisional *amparo*.

84. Respondent's further assertion that, "[i]f EEGSA has opposed [this] formulation, then it should have appealed the Terms of Reference on this point in court (which it did not do),"[432] also is misplaced. As the record reflects, there was no dispute between the parties regarding the interpretation or application of Article 1.10 at the time. As noted above, consistent with EEGSA's understanding, the CNEE responded to Bates White's deviations by making observations, which in turn gave rise to discrepancies that were submitted by the CNEE to the Expert Commission for resolution.[433] In such circumstances, there was no reason for EEGSA to challenge Article 1.10 in the Guatemalan courts; in fact, if the parties had not reached an agreement on Article 1.10 that was amenable to EEGSA and that addressed its concerns regarding the ToR, EEGSA simply would not have withdrawn its provisional *amparo*, but would have continued its challenge in the Guatemalan courts.[434]

85. As the record confirms, the CNEE changed its position on Article 1.10 only after determining that it did not want to accept the Expert Commission's resolution of the discrepancies.[435] Having persuaded EEGSA to withdraw its provisional *amparo* by agreeing to amend the ToR to permit EEGSA's consultant to deviate from them, the CNEE thus proceeded to use EEGSA's deviations from the ToR as the very basis for approving its own VAD study in Resolution No. CNEE-144-2008.[436] As Claimant observed in its Post-Hearing Brief, the CNEE's actions with respect to Article 1.10 is the epitome of arbitrary, bad faith action by the State against which the fair and equitable treatment obligation is designed to protect.[437]

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[432] Respondent's Post-Hearing Brief ¶ 92.

[433] Claimant's Post-Hearing Brief ¶ 125; Resolution No. CNEE-63-2008 dated 11 Apr. 2008 **(C-193)**; Resolution No. CNEE-96-2008 dated 15 May 2008 **(C-209)**.

[434] *See* Tr. (22 Jan. 2013) 627:1-17, 647:11-14 (Calleja Cross).

[435] Claimant's Post-Hearing Brief ¶¶ 124-125, 161-163.

[436] Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 **(C-272)**.

[437] Claimant's Post-Hearing Brief ¶¶ 118-129.

86. Second, Respondent's contentions that it did not act arbitrarily by unilaterally dissolving the Expert Commission before the Expert Commission had completed its task under Rule 12, because the Operating Rules "never went beyond the discussion stage," and never were "approved" by the parties are baseless.[438] As Respondent itself acknowledges in its Post-Hearing Brief, Mr. Colom admitted at the Hearing that a "verbal" agreement did exist between the CNEE and EEGSA regarding procedural rules, but asserted that this agreement never was "formalized."[439] As Claimant demonstrated in its Post-Hearing Brief, an agreement was reached at a meeting held at the CNEE on 28 May 2008 for that express purpose, following which the parties proceeded to appoint the third member of the Expert Commission and to constitute the Expert Commission officially under LGE Article 75.[440] As Mr. Calleja has explained, EEGSA simply would not have proceeded to constitute the Expert Commission if agreement on the Operating Rules had not been reached, because it was rightly concerned that the CNEE was intent on manipulating the Expert Commission process and would not, in good faith, approve the incorporation of the Expert Commission's rulings into the VAD study in the absence of such Rules.[441]

87. Moreover, Respondent's argument that, under Guatemalan law, a formal agreement must be recorded in writing, and that there is no written document signed by the CNEE and EEGSA agreeing to the Operating Rules, is unavailing.[442] As Claimant noted in its Post-Hearing Brief, Respondent cannot rely upon its own domestic law to avoid international liability arising from the arbitrary actions that the CNEE took in disavowing the Operating Rules, after it had expressly agreed to them.[443] Respondent's further argument, namely that the Notarized Act of the Appointment of the Expert Commission demonstrates that the parties never reached agreement on the Operating Rules, because the Operating Rules are not reflected in that

[438] Respondent's Post-Hearing Brief ¶¶ 167-175.

[439] *Id*. ¶ 169 n.247 (citing Tr. (4 Mar. 2013) 1121:3-7 (Colom Cross)).

[440] Claimant's Post-Hearing Brief ¶ 143; Calleja II ¶ 33 **(CWS-9)**; Maté II ¶¶ 24-25 **(CWS-12)**; Tr. (22 Jan. 2013) 693:11-700:14 (Calleja Tribunal Question).

[441] Calleja II ¶ 34 **(CWS-9)**.

[442] Respondent's Post-Hearing Brief ¶ 170.

[443] Claimant's Post-Hearing Brief ¶¶ 84, 145.

Act, is equally unavailing.[444] As Claimant has explained, the purpose of the Notarized Act was to appoint the members of the Expert Commission and to constitute the Expert Commission as a formal matter under LGE Article 75; the Notarized Act thus does not address the operation of the Expert Commission, nor does it address how the Expert Commission was supposed to function during its 60-day review of the discrepancies.[445] Respondent's further contention that Mr. Calleja sent the Operating Rules to Mr. Bastos "without informing or copying the CNEE"[446] also is wrong, and ignores both Mr. Bastos's testimony that he discussed the Operating Rules with both Mr. Calleja and Mr. Quijivix of the CNEE (who, notably, was not proffered as a witness by Respondent),[447] and the fact that Mr. Bastos's economic offer, which was sent to the CNEE, referenced those Rules.[448] Moreover, as Claimant noted in its Post-Hearing Brief, not only did the CNEE never object to the application of the Operating Rules by the Expert Commission,[449] but the Expert Commission itself incorporated the Operating Rules into its 25 July 2008 Report, which the CNEE's own appointee to the Expert Commission, Mr. Riubrugent, signed.[450]

88. Respondent's further assertion that the Expert Commission exceeded its authority as set forth in its constituent documents, and that its mandate only "was to verify that the Bates White study complied with the Terms of Reference" similarly is belied by the evidence.[451] As the record reflects, and as Respondent itself repeatedly has emphasized, in accordance with Articles 1.8 and 1.10 of the ToR, Bates White expressly deviated from the ToR, where it considered that the ToR were inconsistent with the LGE and RLGE.[452] There thus was no dispute between the parties as to whether Bates White's 5 May 2008 VAD study complied with

[444] Respondent's Post-Hearing Brief ¶ 171.

[445] Email from M. Quijivix to J. Riubrugent, L. Giacchino, and C. Bastos, attaching Notarized Record Establishing the Expert Commission dated 6 June 2008, at 2 **(C-223)**; *see also* Calleja II ¶ 38 **(CWS-9)**; Maté II ¶ 27 **(CWS-12)**.

[446] Respondent's Post-Hearing Brief ¶ 172 (emphasis omitted).

[447] Tr. (1 Mar. 2013) 727:3-728:18 (Bastos Direct); Tr. (1 Mar. 2013) 752:18-753:21 (Bastos Cross).

[448] Letter from C. Bastos to M. Calleja and M. Quijivix dated 6 June 2008 **(C-225)**.

[449] *See, e.g.*, Tr. (1 Mar. 2013) 745:16-21 (Bastos Cross).

[450] EC Report, at 10 **(C-246)**.

[451] Respondent's Post-Hearing Brief ¶ 184.

[452] *See, e.g.*, Bates White Stage D Report: Annuity of the Investment dated 5 May 2008, at 4 (invoking ToR Article 1.10 as the basis for Bates White's departure from the FRC formula set forth in the ToR) **(C-199)**; Tr. (21 Jan. 2013) 306:3-4 (Respondent's Opening); Tr. (22 Jan. 2013) 650:13-16 (Calleja Cross).

the ToR. Nor was the Expert Commission ever tasked with determining whether Bates White's 5 May 2008 VAD study complied with the ToR; to the contrary, the Expert Commission was tasked with deciding the discrepancies between the parties in accordance with the applicable legal and regulatory framework.[453] Similarly, as noted in Claimant's Post-Hearing Brief and above, in reviewing the Expert Commission's decisions, the CNEE itself did not analyze whether Bates White's 5 May 2008 VAD study complied with the ToR, but rather analyzed the quantitative effect of the Expert Commission's decisions on the VNR and VAD calculated by Sigla in its VAD study.[454]

89. Respondent's position also is inconsistent with EEGSA's 2003-2008 ToR. As those ToR reflect, the role of the Expert Commission was not to verify that EEGSA's consultant had complied with the ToR, but rather to decide the discrepancies that arose between the CNEE and the distributor: "In the event that the intermediate results redrafted by the CONSULTANT should be rejected by the DISTRIBUTOR on reasonable grounds, a clear, concrete, and express written statement shall be drafted containing the amounts or values related to such intermediate results where discrepancies or disagreement exist. *It is regarding these intermediate differences, where the same have been identified in writing as discrepancies, that the Expert Commission mentioned in Section 75 of the Law shall issue its decision if, upon completion of the tariff review process, discrepancies should still exist between the CNEE and the DISTRIBUTOR which should be reconciled by the aforementioned Expert Commission*."[455]

90. Furthermore, if the CNEE actually had believed at the time, as Respondent continues to assert, that EEGSA's consultant was not permitted under the regulatory framework to revise its VAD study in accordance with the Expert Commission's rulings and to submit it for review and approval, the CNEE would not have negotiated with EEGSA for nearly two weeks

[453] *See, e.g.*, EC Report, at 12 ("Considering that the TOR constitute guidelines related to the manner in which the Consultant must perform the Tariff Study, and that the TOR themselves indicate that: a) the Consultant may deviate from [the] same justifiably, with [the] CNEE able to make observations to such deviations when [the] same are not consistent with the Study and b) that the TOR incorporate all the terms of the LGE and RLGE," the issue to be resolved by the Expert Commission is "whether the Consultant's justification in the Tariff Study is in accordance with the Law and the Regulations of the General Law of Electricity.") (emphasis omitted) **(C-246)**.

[454] *See supra* Section IV.B.1; Claimant's Post-Hearing Brief ¶¶ 78-79,161.

[455] Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.5 (emphasis added) **(C-59)**.

over whether the Expert Commission or the CNEE would be responsible for reviewing EEGSA's revised VAD study and determining whether it fully complied with the Expert Commission's decisions.[456] Nor would the CNEE have included specific provisions in its own draft operating rules proposing that it review and approve EEGSA's revised VAD study, as the CNEE did.[457] Moreover, as Mr. Bastos confirmed at the Hearing, the CNEE's position on Rule 12 of the Operating Rules regarding the Expert Commission's review and approval of EEGSA's revised VAD study shifted only *after* the Expert Commission had rendered its decisions.[458] As Mr. Bastos testified, "[u]p to July 25th, when [the Expert Commission] actually delivered the report, there had been no dispute or discrepancy between the Parties" regarding the "scope of [their] task and also what [they] were doing;" however, "after July 25th, [they] had all of this new interpretation as to the scope of the review or the lack of the review of the results by the [Expert Commission]. Up to then . . . the Experts clearly understood as well as the [CNEE], and also the company, that [their] task was going to conclude with the review of the study; that is to say the application of the results derived from the study."[459]

91. Moreover, as Claimant noted in its Post-Hearing Brief, while neither the LGE nor the RLGE expressly indicates whether it is the CNEE or the distributor's consultant which revises the distributor's VAD study after the Expert Commission has rendered its decisions, it is axiomatic that the Expert Commission's decisions must be incorporated either by the CNEE or the distributor's consultant, and that the CNEE simply cannot ignore the Expert Commission's decisions, if it disagrees with them, as the CNEE did in the present case.[460] Indeed, if the CNEE could ignore the Expert Commission's decisions, as Respondent continues to assert, the Expert

[456] Claimant's Post-Hearing Brief ¶ 147.

[457] *Id.*; E-mail from M. Quijivix to M. Calleja, attaching Rules Proposed by the CNEE dated 15 May 2008, Rule 3 ("**The EC must decide exclusively on the discrepancies that are resolved:** The EC shall decide the discrepancies and *the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and must deliver it to CNEE, which shall review the incorporation of the decision of the CNEE, and which shall approve the Tariff Study*.") (emphasis added) **(C-210)**; Email from M. Quijivix to M. Calleja attaching Proposed Operating Rules for the Operation of the Expert Commission dated 21 May 2008, Rule 13 ("The Distributor shall inform its consultant of the decision of the Expert Commission, and *the Consultant shall perform all the changes requested in the EC's decision, and remit the new version to CNEE for its review and approval*.") (emphasis added) **(C-213)**.

[458] Claimant's Post-Hearing Brief ¶ 147; Tr. (1 Mar. 2013) 756:21-757:18 (Bastos Cross).

[459] Tr. (1 Mar. 2013) 756:21-757:18 (Bastos Cross).

[460] Claimant's Post-Hearing Brief ¶ 71 n.264.

Commission process under LGE Article 75 would serve no purpose whatsoever. Nor would it be consistent with Guatemala's prior representations. As noted above, Guatemala expressly represented in the Memorandum of Sale that "VADs must be calculated by distributors by means of a study commissioned [by] an engineering firm," and that the CNEE "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*."[461] If the CNEE had the authority to ignore the Expert Commission's decisions and to decide the discrepancies itself, Guatemala would not have stated that "a Commission of three experts will be convened *to resolve the differences*."

92. Third, Respondent's argument that its improper *ex parte* communications with Mr. Riubrugent does not evidence arbitrary or bad faith conduct, because it became clear at the Hearing that "Mr. Giacchino decided to give his Bates White team advance notice of the Expert Commission's pronouncements before they were issued and without informing the CNEE,"[462] that Mr. Bastos "unequivocally confirmed" this fact,[463] and that there also were "unilateral contacts between the Expert Commission (through Bates White) and EEGSA, of which the CNEE" allegedly never was informed, are baseless.[464] As the record reflects, in their very first witness statements in this arbitration, Messrs. Bastos and Giacchino both testified that the Expert Commission agreed that Mr. Giacchino would communicate to Bates White the Expert Commission's decision on each discrepancy as it was decided.[465] As Messrs. Bastos and Giacchino explained, proceeding in this manner would allow Bates White to begin revising its tariff study while the Expert Commission was completing its work, and would enable the new tariff schedule to be published on time.[466] Mr. Bastos's testimony at the Hearing that Mr. Giacchino "was conveying the decisions made by the Expert Commission" to Bates White thus is consistent with his prior witness statements and does not support Respondent's baseless accusation that Mr. Giacchino was engaging in improper *ex parte* communications with

[461] Sales Memorandum, at 53 (emphasis added) **(C-29)**.

[462] Respondent's Post-Hearing Brief ¶ 181.

[463] *Id*.

[464] *Id*. ¶ 182.

[465] Memorial ¶ 145; Bastos I ¶ 14 **(CWS-1)**; Giacchino I ¶ 46 **(CWS-4)**.

[466] Memorial ¶ 145; Bastos I ¶ 14 **(CWS-1)**; Giacchino I ¶ 46 **(CWS-4)**.

EEGSA.[467] As Mr. Giacchino has expressly affirmed, he did not communicate the Expert Commission's decisions to EEGSA.[468] Similarly, Mr. Giacchino's testimony that he conveyed specific requests for information from the Expert Commission to EEGSA does not reflect any improper *ex parte* communications,[469] because these specific requests for information came from and were shared with all three members of Expert Commission.[470] Respondent's attempt to portray these communications as improper *ex parte* communications thus fails.

93. Respondent's further assertion, namely that Mr. Giacchino failed to exercise independence of judgment in preparing EEGSA's VAD study, as required under Article 1.5 of the ToR, also is baseless.[471] Indeed, Respondent's only purported evidence of Mr. Giacchino's alleged lack of independence is the January 2008 Contract entered into between EEGSA and Bates White for EEGSA's 2008-2013 tariff review, which Respondent alleges "openly violated the independence requirement provided for in article 1.5," because Article 6 "established that any modifications to the tariff study that were requested by [the] CNEE were subject to the prior approval of EEGSA."[472] As the record reflects, EEGSA, however, delivered a copy of this Contract to the CNEE pursuant to the CNEE's own request.[473] If the CNEE believed that Article 6 of EEGSA's Contract with Bates White "openly violated the independence requirement provided for in article 1.5," the CNEE thus would have raised an objection after receiving a copy of that Contract. There is no evidence, however, that the CNEE ever did so, and Respondent's untimely attempt to raise this issue now thus should be rejected.

94. The same is true with respect to Article 9.3(c) of the Contract, which provides that

[467] Respondent's Post-Hearing Brief ¶ 181 (citing Tr. (1 Mar. 2013) 762:4-16 (Bastos Cross)).

[468] Giacchino II ¶ 23 **(CWS-10)**. In fact, in response to Respondent's request for all communications between Mr. Giacchino and EEGSA during the Expert Commission process, Claimant produced all such communications to Respondent. *See* Letter from Respondent to the Tribunal dated 29 Nov. 2011, Annex 3, at 2. Notably, Respondent has not relied upon *any* of these documents in this arbitration, because none of them reflects any improper *ex parte* communications between Mr. Giacchino and EEGSA.

[469] Respondent's Post-Hearing Brief ¶ 182 (citing Tr. (4 Mar. 2013) 935:5-18 (Giacchino Cross)).

[470] Tr. (4 Mar. 2013) 935:10-18 (Giacchino Cross); Tr. (4 Mar. 2013) 952:17-956:5 (Giacchino Redirect).

[471] Respondent's Post-Hearing Brief ¶¶ 98-100.

[472] Respondent's Post-Hearing Brief ¶ 98 (emphasis omitted) (citing Contract between EEGSA and Bates White LLC for the performance of the 2008-2013 Tariff Study dated 23 Jan. 2008, Art. 6 **(R-55)**).

[473] Letter No. CNEE-15225-2007 from the CNEE to EEGSA dated 17 Dec. 2007 **(C-134)**; Letter No. GG-017-2008 from EEGSA to the CNEE dated 31 Jan. 2008 **(C-159)**.

Mr. Giacchino would serve as EEGSA's representative on any Expert Commission formed in connection with the tariff review.[474] Having received a copy of EEGSA's Contract with Bates White, the CNEE never raised any objections with respect to this Article. In addition, as Mr. Giacchino has explained, "it is standard practice in tariff reviews to appoint persons who worked on the tariff study to expert commissions charged with resolving disputes between the regulated entity and the regulator . . . because such persons are already familiar with the complex issues that typically arise in a tariff review and thus are in a position to resolve the dispute within the tight deadlines that typically are in place for tariff reviews."[475] Indeed, as Mr. Colom himself noted in his first witness statement, the CNEE appointed Mr. Riubrugent to the Expert Commission precisely because Mr. Riubrugent already "had a solid understating of the tariff study under discussion" through his analysis of the EEGSA and Sigla studies.[476] There thus was nothing "irregular" about Article 9.3(c) of the Contract between EEGSA and Bates White and, indeed, no objections ever were raised by the CNEE at the time.

95. Finally, Respondent's continued assertions that EEGSA's proposal to the CNEE was unlawful, and that it is indicative of EEGSA's bad faith,[477] are both legally irrelevant and contravened by the documentary record. In fact, Respondent never has explained the legal relevance of its assertions regarding EEGSA's proposal to the CNEE. Respondent's assertions do not prove that EEGSA engaged in any unlawful conduct, nor do they absolve Respondent of liability arising from its arbitrary actions in this case in any way. Moreover, Respondent's contention that this proposal could not have been part of a settlement discussion, because it "was made on 22 April 2008, when the CNEE did not even have EEGSA's final study (which was only submitted on 28 July 2008),"[478] is erroneous. As Claimant has explained, EEGSA's proposal to accept a 10 percent increase of its VAD, while maintaining the same overall tariff rates for EEGSA's regulated consumers,[479] was a settlement offer made in good faith.[480]

[474] Contract between EEGSA and Bates White LLC for the performance of the 2008-2013 Tariff Study dated 23 Jan. 2008, Art. 9.3(c) **(R-55)**.

[475] Giacchino II ¶ 25 **(CWS-10)**.

[476] Colom I ¶ 117 **(RWS-1)**.

[477] Respondent's Post-Hearing Brief ¶¶ 149-156.

[478] *Id*. ¶ 150.

[479] *See* Calleja I ¶ 29 **(CWS-3)**.

Respondent's assertion that, at the time of this meeting, there was no dispute between EEGSA and the CNEE in connection with EEGSA's 2008-2013 tariff review thus is wrong.[481] As the record reflects, this proposal was made *after* the CNEE had issued its 11 April 2008 observations on EEGSA's VAD study, which would form the basis of the discrepancies submitted to the Expert Commission;[482] at the time EEGSA made this proposal, there thus already was a dispute between the parties with respect to EEGSA's VAD study.

96. In addition, in light of the fact that the CNEE had adopted objectionable ToR;[483] that the CNEE had held only one meeting with EEGSA in November 2007 to discuss its Stage A report and then had refused to schedule any subsequent meetings to discuss the other Stage reports;[484] that, one month after their only meeting, the CNEE, in December 2007, threatened to consider EEGSA's Stage A report "not received," because it was not accompanied by a notarized power of attorney authorizing Mr. Calleja to deliver it, thus opening the door for the CNEE to disregard the study under amended RLGE Article 98;[485] and that the CNEE had inserted an improper FRC formula into the revised ToR in January 2008,[486] EEGSA rightly was concerned that the CNEE was intent on hijacking the tariff review process. As Mr. Maté—who, notably, Respondent chose not to cross-examine at the Hearing—has explained, "[i]n light of the CNEE's uncooperative and unreceptive attitude during the tariff review process and Mr. Moller's question to [him] as to whether EEGSA would accept a decrease in the VAD, it seemed inevitable that the parties would have to resort to an Expert Commission," and that, "[i]n order to avoid the expense and uncertainty that is present in any adjudicatory process, EEGSA was willing to negotiate and accept a VAD rate that was lower than that to which it was entitled."[487] As he further noted, "[t]here is nothing remarkable about this: companies negotiate all of the

[480] Tr. (21 Jan. 2013) 60:19-61:22 (Claimant's Opening Statement); Reply ¶¶ 126-128.

[481] Respondent's Post-Hearing Brief ¶ 150.

[482] Resolution No. CNEE-63-2008 dated 11 Apr. 2008 **(C-193)**.

[483] Claimant's Post-Hearing Brief ¶¶ 118-138.

[484] *Id*. ¶ 136; Giacchino I ¶¶ 21-22 **(CWS-4)**; Calleja I ¶¶ 24-25 **(CWS-3)**; Calleja II ¶ 22 **(CWS-9)**.

[485] *See* Letter No. CNEE-15225-2007 from the CNEE to EEGSA dated 17 Dec. 2007, at 1-2 **(C-134)**; *see also* Maté I ¶ 16 **(CWS-6)**; Calleja I ¶ 25 **(CWS-3)**.

[486] Claimant's Post-Hearing Brief ¶¶ 130-138; 2007 Terms of Reference dated Jan. 2008, Art. 8.3 **(C-417)**.

[487] Maté II ¶ 18 **(CWS-12)**.

time and accept less than that to which they are entitled in order to avoid litigation, whose outcome is always uncertain."[488]

97. There also was nothing unlawful about this proposal, nor did "EEGSA and TGH [do] everything possible to ensure that no trace of [the] proposal remained,"[489] as Respondent contends. As Mr. Maté has explained, EEGSA's meeting with the CNEE "was not secret: it was attended by each of the three directors of the CNEE and the President and General-Manager of EEGSA at the CNEE's offices."[490] In addition, as Mr. Colom himself confirmed on cross-examination, no one at the CNEE made any report to the authorities regarding this meeting or proposal, even though the CNEE's officials would have been required to do so under Guatemalan law, if there had been any unlawful activity.[491] In fact, as Claimant has shown, similar proposals had been made to the CNEE previously, including by INDE's transmission company, ETCEE, while Mr. Colom himself was INDE's General Manager.[492] Respondent's attempts to differentiate this proposal from the proposal made by EEGSA are unavailing.[493] As the proposal itself reflects, ETCEE, together with EEGSA's transmission company, TRELEC, informed the CNEE that they "would be willing to concede, under strict compliance with the Current Rules and Regulations . . . a unilateral, one-time discount of 40%, which consequently achieves intermediate results similar to those proposed by the CNEE."[494] As Mr. Calleja has explained, "[t]his proposal, like EEGSA's proposal, thus offered the Government the opportunity to apply a discounted tariff, *i.e.*, one lower than the applicable rate pursuant to the study provided for by law."[495] Mr. Colom's alleged ignorance of this proposal is not credible.[496] ETCEE simply could not have offered a 40 percent reduction in its tariffs to the CNEE without the

[488] *Id*.

[489] Respondent's Post-Hearing Brief ¶ 151.

[490] Maté II ¶ 19 **(CWS-12)**.

[491] Tr. (4 Mar. 2013) 1095:11-1096:1 (Colom Cross).

[492] *See* Colom II ¶ 56 **(RWS-4)**; Tr. (4 Mar. 2013) 1101:17-1102:4, 1103:5-9 (Colom Cross); Reply ¶¶ 124-125; Calleja II ¶ 25 **(CWS-9)**; Maté II ¶ 18 **(CWS-12)**; Letter 0-553-170-2005 from TRELEC and ETCEE to the CNEE dated 9 May 2005 **(C-91)**.

[493] Rejoinder ¶¶ 353-354.

[494] Letter 0-553-170-2005 from TRELEC and ETCEE to the CNEE dated 9 May 2005, at 3-4 **(C-91)**.

[495] Calleja II ¶ 27 **(CWS-9)**.

[496] Tr. (4 Mar. 2013) 1099:16-19, 1102:12-1103:4, 1103:10-1104:1 (Colom Cross).

knowledge of INDE's General Manager.

98. Respondent's assertion that "[a]t no time in these proceedings did TGH attempt to explain why EEGSA offered a discount of this magnitude,"[497] also is incorrect. As Mr. Calleja has explained, in view of the legal challenges to EEGSA's previous tariffs and the political changes in Guatemala with the election of President Colom in 2007, EEGSA feared that, for political reasons, the CNEE would be opposed to any increase to the current tariffs.[498] EEGSA nevertheless "needed to increase its VAD, because, among other things, the part of the VAD estimated in U.S. Dollars in 2003 (approximately 50 percent of the VAD) had not been adjusted to reflect changes in the U.S. Consumer Price Index for the U.S. Dollar during the entire 2003-2008 tariff period."[499] As Mr. Calleja has explained, EEGSA proposed a 10 percent increase, because its tariff rates for the 2003-2008 period had included a 10 percent electricity adjustment surcharge so that EEGSA could recover the accrued deferred amounts from the 1998-2003 tariff period; the last installment for the repayment of this deferred amount was in July 2008 and, thus, if EEGSA's VAD were to increase by 10 percent, the resulting tariff rate would have remained the same for EEGSA's regulated consumers.[500]

99. Finally, EEGSA's proposal of a 10 percent increase did not reveal "the lack of credibility of the studies submitted by EEGSA,"[501] as Respondent asserts. As Mr. Maté has explained, at the meeting Mr. Pérez "did not say that the Bates White study was 'good for nothing,'" but rather "told the CNEE's Directors that EEGSA had the authority to agree to a VAD that was lower than the VAD calculated in the Bates White study."[502] Respondent's continued reliance on a handwritten note reflected on the CNEE's own copy of EEGSA's presentation in no way demonstrates that EEGSA did not trust the work being done by Bates White on its tariff study.[503] Indeed, the fact that the Expert Commission ruled in EEGSA's favor

[497] Respondent's Post-Hearing Brief ¶ 154.

[498] Calleja II ¶ 25 **(CWS-9)**.

[499] *Id*.

[500] *See* Calleja I ¶ 29 **(CWS-3)**.

[501] Respondent's Post-Hearing Brief ¶ 156.

[502] Maté II ¶ 19 **(CWS-12)**.

[503] Respondent's Post-Hearing Brief ¶ 156.

with respect to most of the discrepancies having the greatest impact on the VAD shows that the work done by Bates White was reliable.

### 3. Respondent's *Post-Hoc* Arguments Regarding Bates White's 28 July 2008 VAD Study Are Both Legally Irrelevant and Factually Incorrect

100. In its Post-Hearing Brief, Respondent continues to criticize Bates White's 28 July 2008 revised VAD study, and to insist that it could not be used to set EEGSA's VAD, because the study purportedly did not fully incorporate the Expert Commission's rulings, and its results allegedly were unreasonable.[504] As Claimant has explained, Respondent's *post-hoc* arguments cannot absolve Respondent from liability for its breach of the Treaty.[505] It is undisputed that the CNEE's decision to impose the Sigla VAD on EEGSA had nothing to do with the accuracy or reasonableness of Bates White's 28 July 2008 revised VAD study. As the documentary evidence shows, and as Respondent's own witness confirmed, the CNEE rejected Bates White's 28 July 2008 revised VAD study without even examining it, because the CNEE had determined that abiding by the Expert Commission's rulings would result in a VNR and VAD for EEGSA that was higher than it wanted.[506] Respondent now cannot, after the fact, escape or minimize its liability by attempting to poke holes in the 28 July 2008 revised VAD study. This is especially true in light of the fact that Respondent made *no* attempt to incorporate the Expert Commission's rulings into Sigla's VAD study, which it unilaterally imposed on EEGSA.[507] In any event, as Claimant has shown, and as further demonstrated below, Respondent's criticisms of Bates White's 28 July 2008 revised VAD study are entirely without merit.

#### a. Bates White Fully Incorporated The Expert Commission's Rulings Into Its 28 July 2008 Revised VAD Study

101. Respondent's argument that Bates White's 28 July 2008 revised VAD study could not serve as the basis for setting EEGSA's 2008-2013 VAD and tariffs, because it failed to incorporate all the Expert Commission's rulings,[508] is unavailing. As Mr. Moller himself

[504] Respondent's Post-Hearing Brief ¶¶ 190-215, 224-227.

[505] Claimant's Post-Hearing Brief ¶¶ 153-164; Reply ¶ 281.

[506] Claimant's Post-Hearing Brief ¶¶ 78-79, 146, 157; Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross).

[507] Tr. (4 Mar. 2013) 1055:22-1056:14 (Moller Cross).

[508] Respondent's Post-Hearing Brief ¶¶ 191-196.

expressly admitted at the Hearing, the CNEE did not review Bates White's 28 July 2008 revised VAD study when it was submitted to the CNEE.[509] Rather, as Mr. Moller confirmed, the CNEE only reviewed Bates White's 28 July 2008 revised VAD study "much further down the line."[510] Accordingly, the CNEE's 29 July 2008 decision to set EEGSA's tariffs on the basis of Sigla's VAD study was not based upon any alleged deficiencies in Bates White's 28 July 2008 revised VAD study.[511] Respondent's repeated assertions regarding the alleged defects in Bates White's 28 July 2008 revised VAD study thus are legally irrelevant to the Tribunal's decision regarding liability and damages in this case.

102. Moreover, as Claimant demonstrated in its Post-Hearing Brief, the Sigla VAD study upon which Respondent relied to set EEGSA's 2008-2013 VAD and tariffs, as well as the Quantum VAD studies for DEORSA and DEOCSA, which were accepted by the CNEE, suffered from the same defects as those allegedly contained in Bates White's 28 July 2008 revised VAD study, further demonstrating the *post-hoc* nature of Respondent's complaints.[512] Mr. Damonte thus admitted at the Hearing that both the Sigla VAD study and the Quantum VAD studies used pasted values, and were not linked to allow a change to one variable to be automatically carried over to all other files.[513] Respondent's assertion that "[t]he 'partial' traceability suggested by Mr. Barrera was not sufficient for the CNEE,"[514] thus is baseless. Not only did the CNEE not even review Bates White's 28 July 2008 revised VAD study at the time,

[509] Claimant's Post-Hearing Brief ¶¶ 146, 157; Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross).

[510] *See* Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross); *id*. at 1054:7-8 (acknowledging that the presentation prepared by the CNEE analyzing the Expert Commission's rulings "does not mention" the Bates White July 28 revised study); Analysis of the Expert Commission Opinion (undated), at 9 (including no mention of Bates White's 28 July 2008 VAD study) **(C-547)**.

[511] Resolution No. CNEE-144-2008 dated 29 July 2008 **(C-272)**.

[512] Claimant's Post-Hearing Brief ¶ 157; *see also* Tr. (5 Mar. 2013) 1317:15-1318:4 (Barrera Direct); Barrera Direct Presentation, Slide 35; Barrera ¶¶ 276-278 **(CER-4)**.

[513] Tr. (5 Mar. 2013) 1430:22-1431:15 (Damonte Cross) (testifying that the Sigla study "[o]f course" had pasted values and that he "wouldn't do it like that. I probably would have made some indication or simply linked this to the original sheet"); Tr. (5 Mar. 2013) 1442:8-14 (Damonte Cross) (testifying with regard to the Quantum studies that "there must be a spreadsheet in which this calculation is made" and that "then what happened was that somebody pasted that value from the other spreadsheet"); Tr. (5 Mar. 2013) 1424:1-8 (Damonte Cross) (testifying that Dr. "Barrera is right" that "[m]any links between formulas and spreadsheets in the SIGLA model appear broken with the consequence that changes in one spreadsheet are not automatically carried over into subsequent files"); Tr. (5 Mar. 2013) 1434:16-1436:2 (Damonte Cross) (agreeing that the reference prices for Peru included in the Sigla tariff model are "pasted values").

[514] Respondent's Post-Hearing Brief ¶ 208.

but both the Sigla VAD study and the Quantum VAD studies, which were expressly approved by the CNEE, used pasted values and contained missing links between spreadsheets.

103. In addition to the fact that Respondent's arguments concerning Bates White's 28 July 2008 revised VAD study are *post-hoc* and, thus, should be disregarded, its arguments also are factually incorrect, because Bates White did incorporate all of the Expert Commission's rulings into its 28 July 2008 revised VAD study. As Claimant explained in its Post-Hearing Brief, Respondent has failed to provide any meaningful analysis of whether Bates White's 28 July 2008 revised VAD study fully implemented the Expert Commission's decisions.[515] Unlike Dr. Barrera, who extensively reviewed and verified compliance of Bates White's 28 July 2008 revised VAD study with every one of the Expert Commission's decisions,[516] Mr. Damonte, in his expert reports, instead embarked upon a "recalculation" of Bates White's 5 May 2008 VAD study.[517] Mr. Damonte's "recalculation," however, failed to implement the Expert Commission's decisions in a number of respects, including with respect to matters that have a direct impact on the VNR (such as the reference prices), and the difference between the VNR calculated by Bates White in its 28 July 2008 revised VAD study and the figure Mr. Damonte obtained through his "recalculation" thus does not support Respondent's position.[518]

104. Evidently aware of this fundamental flaw in Mr. Damonte's opinion, Respondent now asserts that Mr. Damonte did not analyze Bates White's 28 July 2008 revised VAD study, because such analysis "would have been extremely complicated," as the Bates White 28 July 2008 model allegedly was not linked.[519] Dr. Barrera, however, was able to analyze the 28 July 2008 revised VAD study, and demonstrated that the Bates White model was linked as required

[515] Claimant's Post-Hearing Brief ¶ 179. Claimant notes that, while Respondent previously relied upon a 2009 report by Mercados Energéticos in support of its assertion that Bates White's 28 July 2008 revised VAD study did not fully implement the Expert Commission's decisions, the Mercados Energéticos report was not a contemporaneous analysis, but an attempt by Guatemala to create justification for its conduct after the fact and in anticipation of arbitration. *See* Claimant's Reply ¶ 178. In any event, the Mercados Energéticos report was thoroughly rebutted by Dr. Barrera (*see* Barrera ¶¶ 66-192 **(CER-4)**), and effectively has been abandoned by Respondent after its authors withdrew as witnesses in this arbitration.

[516] *See* Barrera ¶¶ 65-192 **(CER-4)**.

[517] *See generally* Damonte I **(RER-2)**; Damonte II **(RER-5)**.

[518] Claimant's Post-Hearing Brief ¶ 179.

[519] Respondent's Post-Hearing Brief ¶ 195 (citing Tr. (5 Mar. 2013) 1414:7-1415:15 (Damonte Direct)).

by the Expert Commission.[520] In any event, Respondent's argument is contradicted by Mr. Damonte himself, who stated in his first report that, while "the files delivered by BW on 5-5-08 did not contain an integrated model," as part of Mr. Damonte's "recalculation" of the 5 May 2008 study, "it was first necessary to integrate all the linked files in such a way that they operate autonomously and enable the calculation of the impact on VNR produced by each change established in the pronouncements of the EC," and that he and his colleagues were able to complete such integration in "50 hours of work."[521] Mr. Damonte could have undertaken a similar exercise with respect to the 28 July 2008 revised VAD study, to the extent that it was necessary (which it was not).

105. Respondent's argument that Dr. Barrera himself has admitted that certain decisions of the Expert Commission were not incorporated into Bates White's 28 July 2008 revised VAD study, because "not all of the international reference prices required by the Expert Commission had been included,"[522] also is erroneous. Respondent's argument relates to Dr. Barrera's expert opinion, which he affirmed at the Hearing, that the Bates White 28 July 2008 revised VAD study complied with the Expert Commission's decision by adding two international reference prices for each material, and by adopting the lowest of the local price and the two international prices.[523] As the record reflects, there are more than 150 major materials included in Bates White's 28 July 2008 revised VAD study.[524] As Dr. Barrera explained, for eight of those materials, less than two international prices were included for the reasons explained in the study.[525] These reasons included, for example, the fact that the relevant material was made to

[520] *See* Barrera ¶¶ 73-75 **(CER-4)**.

[521] Damonte I ¶¶ 161, 162 **(RER-2)**.

[522] Respondent's Post-Hearing Brief ¶ 206.

[523] Barrera ¶¶ 78-86 **(CER-4)**; Tr. (5 Mar. 2013) 1305:4-22 (Barrera Direct) (stating that "the Commission ruled that Bates White should have two international prices for major materials and make other adjustments. We reviewed the Bates White study and concluded that they implemented the Expert Commission's rulings," and describing how Dr. Barrera verified compliance).

[524] *See* 28 July 2008 Bates White model delivered to the CNEE, file "Precios representativos 05May08.xls," tab "Resumen," column C **(C-564)** (listing more than 150 "Mayor" (major) materials).

[525] Barrera ¶ 79 **(CER-4)**.

order, and no international reference price thus existed for it.[526] While Respondent asserts that Dr. Barrera pointed to these explanations in an "attempt[] to justify" the non-inclusion of the international prices, Respondent notably does not contend that the explanations set forth in the study were unjustified or unreasonable.[527]

106. Furthermore, as Dr. Barrera has explained, although two international reference prices were not added for four major materials, these four materials were "not used in subsequent calculations and thus did not require any adjustment."[528] The fact that these materials were not included in the model—and that they thus were irrelevant to the VNR calculation—is not disputed. Respondent's complaint thus essentially is that the 28 July 2008 Bates White model should have included a footnote indicating that, following the implementation of the Expert Commission's decisions, the four materials no longer were used and thus did not need international reference prices. That, however, is not what the Expert Commission required. Nor would it have been too difficult for the CNEE to ascertain that these four materials were not used in the final model, as Respondent contends.[529] Dr. Barrera was able to ascertain this fact without difficulty;[530] in any event, it is undisputed that the CNEE never attempted to check the reference prices in Bates White's 28 July 2008 model at the time,[531] and, had it done so, it could have requested assistance from or asked questions of Bates White.[532] Moreover, while Respondent questions Dr. Barrera's explanation, Mr. Damonte testified with respect to Sigla's model that the lack of supporting documentation for certain reference prices could be excused, if Sigla's model

[526] 28 July 2008 Bates White model delivered to the CNEE, file "Precios representativos 05May08.xls," tab "Resumen," cell Y24 **(C-564)** (stating "[m]aterial made to order, there is no international price" ["*Material hecho sobre pedido, no existe precio internacional*"]).

[527] *See* Respondent's Post-Hearing Brief ¶ 206.

[528] Barrera ¶ 79 **(CER-4)**.

[529] Respondent's Post-Hearing Brief ¶ 206 (arguing that "the CNEE would have had to undertake an extremely complicated exercise to identify and confirm which prices had not been used").

[530] Barrera ¶ 79 fn 47 **(CER-4)**.

[531] Claimant's Post-Hearing Brief ¶¶ 146, 157; Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross).

[532] *See* Barrera ¶ 70 **(CER-4)**.

did not actually use those prices in the VNR calculation.[533]

107. Respondent's assertion that "EEGSA's 28 July study continued to request over US$ 3 million in 'arbitration fees' for a non-existent arbitration, even after the Expert Commission pronounced against the inclusion of such fees in the VNR"[534] likewise is incorrect. As the Expert Commission's Report reflects, this discrepancy did not relate to the US$ 3 million in "arbitration fees," but rather to the consultants' costs for the preparation of EEGSA's VAD study.[535] As Dr. Barrera confirmed at the Hearing, consistent with the Expert Commission's decision on this discrepancy, Bates White capped the consultants' costs for the two studies "at the same amount, US$ 279,000,"[536] as required. Respondent's argument regarding the US$ 3 million in arbitration fees thus is baseless.

108. Because Respondent cannot rebut Claimant's showing that Bates White duly incorporated the Expert Commission's decisions into its 28 July 2008 revised VAD study, Respondent resorts in its Post-Hearing Brief to attacking Dr. Barrera's credibility, arguing that Dr. Barrera "openly acknowledged during the Hearing that 26% of his combined professional experience was comprised of consulting work for Iberdrola," that "he was working for EPM on the 2013-2018 tariff review," that, "in the process of preparing his report . . . he had consulted and interacted with Mr. Giacchino himself," and that "Messrs. Barrera and Giacchino had known each other since 2002, when both worked for NERA Consulting (NERA), the consultant firm that advised EEGSA in the 2003-2008 tariff review."[537] Each of Respondent's assertions is

[533] Tr. (5 Mar. 2013) 1439:4-7 (Damonte Cross) ("Q. So, it would not surprise you that SIGLA has not provided the backup documentation for this value? A. The issue is whether they use it. If they don't use it, then there is no need to provide it.").

[534] Respondent's Post-Hearing Brief ¶ 202.

[535] EC Report, Discrepancy F.9, at 141-143 **(C-246)**; *see also* Barrera Direct Presentation, Slides 22-23.

[536] Tr. (5 Mar. 2013) 1306:1-1307:5 (Barrera Cross). Moreover, although Bates White complied with the Expert Commission's decision on this discrepancy, this is yet another example where the Expert Commission's decision was conservative in favoring the CNEE's position. As Dr. Barrera observed in this expert opinion, "the actual amounts of value-for-money consultant costs are routinely taken into account in tariff reviews," rather than being capped at the low level required by the Expert Commission. *See* Barrera ¶ 218 **(CER-4)**. As Dr. Barrera further showed at the Hearing, the capped costs required by the Expert Commission were nearly half of the actual costs for Mercados Energéticos in EEGSA's 2013-2018 tariff review. *See* Barrera Direct Presentation, Slide 26 (showing that Mercados Energéticos's fees for the 2013-2018 tariff review are US$ 576,501); Tr. (5 Mar. 2013) 1308:19-1309:5 (Barrera Cross).

[537] Respondent's Post-Hearing Brief ¶ 23 (emphasis omitted).

baseless. As Dr. Barrera testified at the Hearing, he has not done any work for Iberdrola since 2007, when he was employed by NERA, as "Iberdrola was not [his] client," but his "boss's client" at NERA.[538] Dr. Barrera also expressly rejected Respondent's suggestion that he was interested in gaining Iberdrola as a client now, or that his past work in any way influenced his testimony in this case (where Iberdrola is not even involved).[539] Dr. Barrera also did not affirm at the Hearing that he currently is working for EPM on its 2013-2013 tariff review in Guatemala, as Respondent erroneously asserts; rather, as his CV reflects, Dr. Barrera worked for EPM in the context of the Colombian distribution price review for 2008-2013.[540]

109. Nor does the fact that Dr. Barrera consulted with Mr. Giacchino during his review of the Bates White model, or that he first met Mr. Giacchino in 2003 at a senior staff meeting in New York, while he was employed at NERA, render his expert report unreliable. As Dr. Barrera explained in his report, in his "experience in many tariff reviews involving tariff models, the type of assistance [he] received from Dr. Giacchino is routinely provided by consultants to clients and regulators, and often is an important part of the regulatory review process . . . because tariff models usually are quite complex and it is in the interest of all parties that the regulator and the consultant interact so that the regulator obtains a proper understanding of the model."[541] As Dr. Barrera further explained, "regulators often request presentations by consultants concerning the model, seek guidance and/or manuals as to how the model operates and how changes to various parameters would impact the model, and generally remain in contact with the consultant throughout the regulatory process."[542] In addition, as Dr. Barrera confirmed at the Hearing, although he consulted with Mr. Giacchino regarding how the Bates White model operates and how the individual Excel spreadsheets comprising the model work together, his opinion regarding the Bates White 28 July 2008 revised VAD study is his own opinion, and consulting with Mr. Giacchino merely saved him time in reviewing the model.[543] Notably, while making these unwarranted attacks on Dr. Barerra's credibility, Respondent conveniently omits reference

[538] Tr. (5 Mar. 2013) 1323:7-1324:6 (Barrera Cross).

[539] *Id*. at 1324:7-12.

[540] Barrera, at 101 **(CER-4)**; Tr. (5 Mar. 2013) 1325:2-12 (Barrera Cross).

[541] Barrera ¶ 70 **(CER-4)**.

[542] *Id*.

[543] Tr. (5 Mar. 2013) 1361:1-8 (Barrera Cross).

to the fact that the CNEE "thoroughly understood the Sigla study, *not least because its preparation had lasted seven months, during which time we had been in close contact with the consulting firm*."[544] As Dr. Barrera observed, "had the CNEE acted as a regulator in good faith, its alleged concerns about [the Bates White study] could have been resolved through interactions with Bates White."[545]

110. Respondent's further argument, namely that Dr. Barrera "worked on models that had undergone modifications after 28 July 2008, the date that the study was delivered to the CNEE,"[546] is equally unavailing. As Respondent demonstrated in its Post-Hearing Brief, a comparison of the Excel files in the two copies of the model at issue shows that the spreadsheets are identical, including the data, formulas, and links that they contain, with the exception of one single file containing a difference that does not impact the VNR and VAD figures.[547] There simply is no evidentiary support for Respondent's assertion that Claimant "incorporate[ed] additional documentation into the model."[548] In addition, as Claimant noted in Post-Hearing Brief, Respondent, prior to the Hearing, had ample opportunity to raise any concerns it had regarding the model, which was submitted by Claimant with its Memorial; Respondent, however, waited to raise this issue until *after* the cross-examination of Mr. Giacchino, the author of the model, thus depriving Mr. Giacchino of an opportunity to respond.[549]

111. Finally, in addition to Dr. Barrera, Mr. Bastos also reviewed Bates White's 28 July 2008 revised VAD study, in accordance with his obligation under the Expert Commission's Operating Rule 12, and concluded that Bates White had revised that study in accordance with the Expert Commission's rulings on each discrepancy.[550] In an effort to cast doubt upon the

[544] Colom I ¶ 150 (emphasis added) **(RWS-1)**.

[545] Barrera ¶ 278 **(CER-4)**.

[546] Respondent's Post-Hearing Brief ¶ 211.

[547] Claimant's Post-Hearing Brief ¶ 158 n.601.

[548] Respondent's Post-Hearing Brief ¶ 213.

[549] Claimant's Post-Hearing Brief ¶ 158.

[550] Tr. (1 Mar 2013) 732:8-733:8 (Bastos Direct); Bastos II ¶¶ 20 **(CWS-7)**. Respondent's assertion that "Mr. Bastos was presented by TGH in this arbitration to explain how Bates White had incorporated the pronouncements of the Expert Commission into its study of 28 July 2008" is misleading. Respondent's Post-Hearing Brief ¶ 197. As Mr. Bastos's witness statements reflect, Mr. Bastos offered testimony on a range of issues, including the parties' agreement on the Operating Rules; the manner in which the Expert Commission

reliability of Mr. Bastos's review and approval of Bates White's 28 July 2008 revised VAD study, Respondent argues that it would have been impossible for Mr. Bastos "to do much more than 'validate' the affirmations of Mr. Giacchino and his team regarding their changes,"[551] that Mr. Bastos affirmed the superficial nature of his review at the Hearing,[552] and that his testimony in the *Iberdrola* arbitration contradicts his testimony in this arbitration that he was able to review the spreadsheets and models.[553] Respondent's arguments are baseless.

112. As Mr. Bastos testified at the Hearing, during his review of Bates White's 28 July 2008 revised VAD study, he was able to determine that all of the Expert Commission's rulings had been incorporated, and that this could be corroborated through the model's links, as required by the Expert Commission.[554] As he explained, he looked "at how each one of those decisions made by the Commission was incorporated into the computational models," and "verified specifically in each one of the Excel model spreadsheets which had been the cells that had been changed and how the models had been affected."[555] He further explained that "Excel models have a mathematical function that allow linkages between preceding data and further data," and that "[t]here is a linkage between those two sets of data; and, by using this function, one can follow step by step each one of the links that exists amongst all the models."[556] As he noted, "[d]uring those two days, [he] verified that all decisions had been included and that those

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conducted its work; his instruction to the other two experts to refrain from *ex parte* communications with the party that had appointed them; the proper interpretation of ToR Article 1.10; the nature of the discrepancies and his explanation of the Expert Commission's rulings, including on the FRC formula, the demand calculation, undergrounding, and reference prices; and his review of Bates White's revised 28 July 2008 VAD study. *See generally* Bastos I **(CWS-1)**; Bastos II **(CWS-7)**.

[551] Respondent's Post-Hearing Brief ¶ 198.

[552] *Id*. ¶ 199.

[553] *Id*. ¶ 201.

[554] Tr. (1 Mar. 2013) 732:8-12 (Bastos Direct). Respondent's comparison of Mr. Bastos's review of the 28 July 2008 revised VAD study with Dr. Barrera's review of the same, which lasted approximately one month and a half, also is misplaced. *See* Respondent's Post-Hearing Brief ¶ 198. As Dr. Barrera testified, his team did not work full time on this case during this period. *See* Tr. (5 Mar. 2013) 1361:21-1362:4 (Barrera Cross). In addition, during this time, Dr. Barrera not only was reviewing the 28 July 2008 revised VAD study, with which he was unfamiliar, but he also was preparing his expert report for this arbitration; by contrast, Mr. Bastos was reviewing a model with which he had worked for nearly two months, and was not preparing an expert report for use in an arbitration.

[555] Tr. (1 Mar. 2013) 732:16-21 (Bastos Direct).

[556] *Id*. at 732:22-733:5.

decisions had been passed from one model on to the next model."[557] As the hearing transcript reflects, Mr. Bastos thus did not testify that he reviewed every single spreadsheet in the model, as Respondent erroneously asserts,[558] but rather that he reviewed each spreadsheet containing cells that had been modified in accordance with the Expert Commission's decisions.[559] This is entirely consistent with his testimony in the *Iberdrola* arbitration, where he affirmed that he did not verify all of the calculations performed in the entire model, but rather verified those that had been affected by the Expert Commission's decisions.[560]

### b. Bates White's 28 July 2008 VNR And VAD Were Reasonable, Unlike Sigla's VNR and VAD

113. As Claimant has noted, it is not the role of this Tribunal to make a determination as to the reasonableness of Bates White's 28 July 2008 revised VAD study; to the contrary, the regulatory framework adopted by Guatemala to induce foreign investment in its electricity sector established the role of an expert commission to resolve disputes concerning the technical aspects of a distributor's VAD study.[561] Indeed, Respondent, on the one hand, repeatedly introduces arguments concerning the technical aspects of the Bates White and Sigla studies, and, on the other hand, argues that the Tribunal lacks jurisdiction over Claimant's claim, because it cannot decide such issues. Respondent's self-serving arguments must be rejected. Even if the Bates White VAD study were technically flawed or would have resulted in a VAD that was too high—both of which Claimant rejects—that would have no impact on the validity of Claimant's claim, as Respondent specifically represented that such disputes would be resolved by an expert commission under LGE Article 75.

114. In any event, none of Respondent's arguments concerning the alleged unreasonableness of Bates White's revised 28 July 2008 VAD study have any merit. The primary and alleged "very large problem identified [by Respondent] in the Bates White VNR" is

[557] *Id*. at 733:6-8.

[558] Respondent's Post-Hearing Brief ¶ 200.

[559] Tr. (1 Mar. 2013) 732:16-733:8 (Bastos Direct); *see also* Bastos I ¶ 36 **(CWS-1)**; Bastos II ¶ 20 **(CWS-7)**.

[560] *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/05), Tr. Day Two (26 July 2011) 635:10-20 (Bastos Cross) **(R-140)**.

[561] Tr. (21 Jan. 2013) 19:10-20:7 (Claimant's Opening Statement); Reply ¶¶ 4, 247-253.

the purported inclusion of over US$ 400 million for underground lines.[562] Respondent persists in arguing that this alleged inclusion violated LGE Article 52, and that it resulted in the "overvaluation of the VNR."[563] Neither of these assertions is correct. As Claimant has shown, the LGE does not "establish[] that the service must be provided with aerial lines;"[564] rather, it simply requires that the cost for such service be borne by the communities benefitting from the undergrounding.[565] In addition, Respondent shockingly bases its complaint on the cost of undergrounding in the VNR from *earlier* versions of Bates White's VAD study, and not from the final 28 July 2008 revised VAD study.[566] As the record reflects, and as Mr. Giacchino has explained, in response to the CNEE's observations on its 31 March 2008 VAD study, Bates White, in its 5 May 2008 VAD study, eliminated undergrounding in its model company design, with the exception of EEGSA's existing underground lines and those places where undergrounding would be required to comply with technical norms;[567] this reduced the VNR attributable to undergrounding by nearly US$ 400 million.[568] Then, to comply with the Expert

[562] Respondent's Post-Hearing Brief ¶ 109.

[563] *Id*. ¶¶ 109, 113.

[564] *Id*. ¶ 109.

[565] Tr. (4 Mar. 2013) 829:13-18 (Giacchino Direct); *id.* at 871:16-20 (Giacchino Cross); *id*. at 890:21-891:4 (Giacchino Cross).

[566] Respondent's Post-Hearing Brief ¶ 133 (citing Tr. (5 Mar 2013) 1410:18-21 (Damonte Direct) and Mario C. Damonte: "Analysis of Bates White 5-5-2008 and Recalculation of VNR and VAD based on the pronouncement of the Expert Commission," presented in *Iberdrola Energía, S.A .v. Republic of Guatemala*, ICSID Case No. ARB/09/05 ¶ 328 **(R-190)**).

[567] Tr. (4 Mar. 2013) 830:13-831:2 (Giacchino Direct); *id.* at 883:16-19 (Giacchino Cross); *id.* at 885:11-21 (Giacchino Cross); Giacchino I ¶ 31 **(CWS-4)**; Memorial ¶ 122.

[568] Bates White 31 March 2008 Model (showing approximately US$ 699 million in the VNR for underground lines, as shown in tabs "MT," "CT," and "BT" in the file "VNR 2006.xls" and tab "Resumen" in the file "Acometidas.xls" **(C-189)**; Bates White 5 May 2008 Model (reflecting approximately US$ 303 million in the VNR for underground lines, calculated using tabs "MT," "CT," and "BT" in the file "VNR 2006.xls" and tab "Resumen" in the file "Acometidas.xls") **(C-206)**; While the total VNR amount for underground lines are indicated above, the net decrease in the overall VNR attributable to eliminating undergrounding is different, because the lines eliminated from the underground network are moved to the aerial network (otherwise, the areas formerly modeled as having underground lines would be left without any power lines). This causes a proportional increase in the VNR for aerial lines. Moreover, when lines are moved from underground to aerial, adjustments are made for different treatment of engineering costs, contingencies, interest during construction, and easements in the studies, which also impacts the net effect of eliminating undergrounding. When the foregoing factors are taken into account, the net impact on the overall VNR of eliminating the underground lines in the 5 May 2008 and 28 July 2008 studies was US$ 395 million and US$ 57 million, respectively. *See* Giacchino I ¶¶ 29-31 & Figure 1 **(CWS-4)**; Tr. (4 Mar. 2013) 830:13-831:10 (Giacchino Direct); (4 Mar. 2013) 876:6-18, 883:16-19, 885:11-21 (Giacchino Cross).

Commission's ruling, in its 28 July 2008 revised VAD study, Bates White reduced this amount by an additional US$ 241 million, leaving only approximately US$ 62 million in the VNR cost attributable to undergrounding.[569] The relatively small amount remaining in the 28 July 2008 revised VAD study reflected only the cost for EEGSA's *existing* underground lines.[570] Respondent's assertion that "EEGSA was remunerated for the investment costs of underground lines which were never constructed,"[571] thus is a blatant misrepresentation. Moreover, it is disingenuous and misleading for Respondent to continue to leave the misimpression that the issue of undergrounding had a material impact on EEGSA's VNR in the 28 July 2008 revised VAD study, or that the inclusion of the cost for the existing underground lines rendered Bates White's VNR overvalued, when the Expert Commission expressly authorized the inclusion of that cost. Indeed, the CNEE's own internal analysis contradicts Respondent's position taken in this arbitration. As that analysis reflects, the remaining cost of undergrounding in the VNR was negligible, compared with the effect of the FRC: "The effect of eliminating *Underground Facilities,* Optimum Technologies and *Construction Units* affects the [VNR] of EEGSA's Study [by] 600 million. *Such effect will not be sensitive given that the [FRC] difference has a multiplying factor for such [VNR]. For this reason, it is not expected to significantly affect Distribution Charges*."[572]

115. Respondent's further assertion that the price used by Bates White for the underground lines was excessive[573] fares no better. In support of this assertion, Respondent relies upon Mr. Damonte's expert report submitted in the *Iberdrola* arbitration, purportedly showing that "the price per kilometer of underground network requested by Bates White was double that requested by . . . Deorsa and Deocsa."[574] In accordance with the Tribunal's

[569] Bates White July 28, 2008 Model (showing approximately US$ 62 million in the VNR for underground lines, as shown in tabs "MT," "CT," and "BT" in the file "VNR 2006.xls" and tab "Resumen" in the file "Acometidas.xls" **(C-564)**; *see also* Tr. (4 Mar. 2013) 831:5-10 (Giacchino Direct); Tr. (4 Mar. 2013) 890:4-12 (Giacchino Cross); Memorial ¶¶ 165, 185 & n.740; Giacchino I, Figure 1 at ¶ 31 **(CWS-4)**.

[570] Tr. (4 Mar. 2013) 831:5-10 (Giacchino Direct); Tr. (4 Mar. 2013) 889:15-890:12 (Giacchino Cross); EC Report, Discrepancy C.3.f, p. 74 **(C-246)**; Giacchino I ¶ 67 **(CWS-4)**; Memorial ¶ 185.

[571] Respondent's Post-Hearing Brief ¶ 111.

[572] Analysis of the Expert Commission Opinion, undated, at 8 (emphasis added) **(C-547)**.

[573] Respondent's Post-Hearing Brief ¶ 113.

[574] *Id*.

direction, this evidence is inadmissible.[575] Had Respondent wished to rely upon this evidence, Mr. Damonte should have incorporated it into one of his expert reports submitted in *this* arbitration, which would have permitted Claimant's experts and witnesses to review and rebut any such evidence.

116. In any event, and apart from the fact that the Quantum studies prepared for DEOCSA and DEORSA by Mr. Damonte included the cost for underground lines, which further undermines Respondent's argument that including such costs violates LGE Article 52, the table from Mr. Damonte's *Iberdrola* testimony shows that Mr. Damonte has compared Bates White's cost with Sigla's costs, and not with DEOCSA's and DEORSA's claimed costs.[576] As Claimant has shown, Sigla used poorly-adjusted prices, some dating from 2004, in violation of the Expert Commission's ruling, which required the use of the most recent prices available.[577] Furthermore, Sigla in its model does not use underground ducts, which allow the cables to be maintained or replaced without destroying the road, which is necessary in places such as Antigua, a UNESCO heritage site, where the power lines are underground.[578] This discrepancy between the costs of underground cables thus does not show that Bates White's VNR was overvalued, but rather

[575] Letter of the Tribunal dated 10 Feb. 2012 at 2, 3 (ruling that "the present arbitration is distinct from the *Iberdola* arbitration and that, as a general matter, the Arbitral Tribunal does not believe necessary to refer to the evidence produced in a separate arbitration to decide this case," and striking the transcript of Mr. Colom's testimony from the *Iberdrola* arbitration, submitted by Respondent, because his "written statement [submitted in this arbitration] should contain Mr. Colóm's direct testimony with no need for the Respondent to refer to other documents drawn from another arbitration").

[576] Mario C. Damonte, "Analysis of Bates White 5-5-2008 and Recalculation of VNR and VAD based on the pronouncement of the Expert Commission," presented in *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/05, ¶ 328 (showing that although the prices listed in the columns for DEOCSA/DEORSA and for Sigla are different, in rows 5, 6, 32, and 33, where those prices are subtotaled, the chart simply pastes the subtotals for the Sigla prices into the columns for DEOCSA/DEORSA) **(R-160)**. In addition, the table is presented without any explanation, and it is unclear why Mr. Damonte compares the Bates White cost in column 7 with column 10, instead of with column 8. In any event, as noted, this evidence should be ruled inadmissible.

[577] Claimant's Post-Hearing Brief ¶ 156; Barrera ¶¶ 54, 262-269, Figures 1 & 2 at ¶¶ 55, 56 **(CER-4)**; Barrera Direct Presentation, Slide 33; Tr. (5 Mar. 2013) 1315:4-10 (Barrera Direct), 1466:19-22 (Barrera Tribunal Question).

[578] Damonte II ¶¶ 257-261 (indicating that underground ducts are not used by Sigla) **(RER-5)**; Sigla Model, file "Costos2006-Urbano VF.xls," Tab "CostosdeInversión" **(C-589)**; Damonte I ¶ 147 (acknowledging that underground "ducts allow the cables to be changed without the need to break the road, in case of failures or when it is necessary to replace an underground cable with another of greater capacity or a different type. Their use is justified exceptionally at street junctions or in special historical heritage areas.") **(RER-2)**; *see also* Tr. (4 Mar. 2013) 886:7-10 (Giacchino Cross); Tr. (4 Mar. 2013)901:3-5 (Giacchino Tribunal Question).

shows that Sigla's VNR was understated as a result of failing to abide by the Expert Commission's ruling on reference prices and failing to use underground ducts in appropriate places, among other things.

117. Respondent also references Dr. Barrera's opinion that, "absent objective justification, the number and types of assets of the model company would not differ greatly from that of the actual company,"[579] and represents that, while EEGSA had only 10 voltage regulators, the 28 July 2008 Bates White study included 463 voltage regulators, which, it argues, demonstrates that the Bates White VNR was inflated.[580] This is incorrect. EEGSA's actual network relied upon relatively inexpensive transformers that did not have built-in voltage regulation, and at least one voltage regulator therefore had to be installed on each line at the beginning of each circuit (after exiting the substation).[581] Because the actual network used a total of 148 circuits, each with a three-phase line, the number of voltage regulators used in EEGSA's network was 444 (148 x 3), plus an additional 23 that were used in rural and urban-rural lines, for a total of 467.[582] To draw its erroneous conclusion that EEGSA had only 10 voltage regulators (which the CNEE undoubtedly would know is incorrect), Respondent relies upon a letter providing an incomplete inventory of only 10 *points* of voltage regulation (not to be equated with the *number* of regulators), covering only those rural and semi-rural circuits that were so long as to require more than the usual number of regulators after the exit from the substation.[583] The letter thus does not support Respondent's assertion. Respondent's reliance upon Mr. Damonte's expert report in the *Iberdrola* arbitration in support of its position that Bates White's VNR was overstated because of an allegedly inflated number of voltage regulators,[584] is mistaken for this same reason. Furthermore, that evidence is inadmissible, pursuant to the

[579] Barrera ¶ 61 **(CER-4)**; *see also id.* ¶¶ 38, 41.

[580] Respondent's Post-Hearing Brief ¶ 235.

[581] *See* Bates White Stage B Report: Reference Prices, at 80 (citing CNEE Resolution 31-2000, which regulates the type of transformers that EEGSA must use in its network) **(C-256)**.

[582] *See* 28 July 2008 Bates White model delivered to the CNEE, file "Inv_Activos_SIGRE_I_2007.xls," tab "Conductores," rows 6 to 154 (showing the number of voltage regulators used in the actual network as reflected in the SIGRE database) **(C-564)**.

[583] Respondent's Post-Hearing Brief ¶ 235 (citing Letter from EEGSA to Mr. Colom dated 17 Sept. 2007 **(R-235)**).

[584] *Id*. (citing Mr. Damonte's expert report in *Iberdrola* **(R-181)** [sic – **(R-190)**], ¶ 300).

Tribunal's order prohibiting a party from relying upon the testimony of its own witness or expert in the *Iberdrola* arbitration.[585] If Respondent wished to rely upon Mr. Damonte's testimony on this issue, Mr. Damonte should have included his opinion in either one of his expert reports submitted in *this* arbitration. Respondent's attempt to once again rely upon inadmissible evidence and have Mr. Damonte evade cross-examination on this evidence must be rejected. Finally, although Respondent accepts that the network of the model company should not differ significantly from the actual assets of the real company, it has failed to offer any response to Dr. Barrera's testimony that Mr. Damonte's model includes only one-third of the low voltage transformers that EEGSA's actual network contains, and that the Sigla model similarly dramatically understates the number of necessary transformers.[586]

118. Respondent further asserts that various construction units in Bates White's VAD study were more costly than those in Sigla's VAD study, and argues that this results in Bates White's VNR being inflated.[587] According to Respondent, the difference in the cost of construction units constitutes the "principal difference" between the Bates White and Sigla VNRs, and "the FRC or the price of materials used by Sigla in its study, are only part of the disagreements between the parties and are not even the principal ones."[588] Respondent's assertions are unfounded, for a number of reasons. As noted above, and as Mr. Damonte has not disputed, Sigla used poorly-adjusted 2004 prices, rather than the most recently available prices, as the Expert Commission ruled.[589] Not surprisingly, Sigla's prices thus are lower than Bates

[585] Letter of the Tribunal dated 10 Feb. 2012 at 2, 3 (ruling that "the present arbitration is distinct from the *Iberdola* arbitration and that, as a general matter, the Arbitral Tribunal does not believe necessary to refer to the evidence produced in a separate arbitration to decide this case," and striking the transcript of Mr. Colom's testimony from the *Iberdrola* arbitration, submitted by Respondent, because his "written statement [submitted in this arbitration] should contain Mr. Colóm's direct testimony with no need for the Respondent to refer to other documents drawn from another arbitration.").

[586] Tr. (5 Mar. 2013) 1316:9-1317:7 (Barrera Direct); *id*. at 1465:15-20 (Barrera Tribunal Question).

[587] Respondent's Post-Hearing Brief ¶¶ 232-234.

[588] *Id*. ¶¶ 228, 230.

[589] *See* Barrera ¶¶ 54, 262-269, Figures 1 & 2 at ¶¶ 55, 56 **(CER-4)**; Barrera Direct Presentation, Slide 33-34; Tr. (5 Mar. 2013) 1315:4-10 (Barrera Direct), 1466:19-22 (Barrera Tribunal Question); Tr. (5 Mar. 2013) 1444:20-1445:6 (Damonte Cross); Damonte II ¶¶ 381-398 **(RER-5)**.

White's prices.[590] In addition, the configuration of construction units themselves is, in part, a function of the prices used for the component parts. Thus, for example, if the price of a particular type of cable increases more rapidly than that of other cables, it may become necessary to reconfigure the construction units to use the less expensive cables.[591]

119. Dr. Barrera also did not minimize the impact of Sigla's failure to use the correct reference prices, as Respondent suggests. In its quote of Dr. Barrera's testimony,[592] Respondent notably omits what immediately follows, where Dr. Barrera explains that one of the principal reasons why the difference in the construction units between the Bates White and Sigla studies had a significant effect on the VNR was because Sigla used smaller blocks to calculate demand, contrary to the Expert Commission's decision on that discrepancy.[593] Dr. Barrera also testified that the different reference prices used by Bates White and Sigla had a substantial effect of their respective VNRs.[594] Respondent's reliance on this same excerpt from Dr. Barrera's testimony to support its assertion that the FRC is not a "principal disagreement" between the parties similarly is misplaced; the FRC affects the VAD, and not the VNR, and thus, any testimony relating to the reasons for the differences between the Bates White and Sigla VNRs would not have discussed the FRC. As the testimony made clear, and as the CNEE's own internal analysis confirms, Sigla's failure to use the Expert Commission's FRC formula had a significant impact upon EEGSA's VAD.[595]

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[590] *See* Respondent's Post-Hearing Brief ¶ 236. Respondent identifies one type of aluminum cable for which Bates White has a lower price than Sigla. *See id.* This one exception does not detract from the overall conclusion that Bates White's more recent reference prices are higher than Sigla's older prices.

[591] *See, e.g.*, Tr. (5 Mar. 2013) 1390:18-1391:3 (Damonte Direct) ("In other words, if I have a copper line, I look at what is the best way to build that line today? So, today, the price of aluminum is low, so I will use the price of aluminum, and the copper line I would valuate as if it were an aluminum line, not of the same thickness, but I would adjust the thickness for the aluminum for it to conduct the same current as the copper line.").

[592] Respondent's Post-Hearing Brief ¶ 228.

[593] Tr. (5 Mar. 2013) 1466:4-18 (Barrera Tribunal Question).

[594] Tr. (5 Mar. 2013) 1463:14-18, 1464:13-19 (Barrera Tribunal Question) ("There are a number of differences, of course. First of all, obviously he didn't use the Reference Prices that Bates White introduced in the modification of the model."); *id.* at 1466:19-22.

[595] Claimant's Post-Hearing Brief ¶ 78; Tr. (4 Mar. 2013) 1046:10-15; 1055:4-1056:18 (Moller Cross); *id.* at 1017:17-20 (Moller Tribunal Question); Tr. (5 Mar. 2013) 1505:12-13, 1506:1-2 (Kaczmarek Direct); Barrera ¶ 256 **(CER-4)**; Bastos I ¶ 21 **(CWS-1)**; Kaczmarek I ¶ 122 **(CER-2).**

120. Indeed, Respondent's examples of the alleged differences in the configuration of Bates White's and Sigla's construction units serve merely to underscore the unreasonableness of Sigla's VAD study. Respondent's very first example, a US$ 172.9 million difference in the VNR, is the result of Sigla having located poles directly on the corners of intersections, in violation of Guatemalan technical norms,[596] whereas Bates White considered the placement of poles *near* intersections, as directed by the Expert Commission, and concluded that placing a pole near an intersection was uneconomic.[597] Respondent's bar chart, in which it chose one particular construction unit and replaced only one particular reference price for one material in that construction unit, thus does not demonstrate that the references prices were immaterial, as Respondent contends.[598] In addition, it is notable that the particular material depicted in this chart—a specific medium-voltage line—is not even used by Sigla in its optimization.[599]

121. Finally, Respondent relies on a table purportedly summarizing the differences between Bates White's VNR and Sigla's VNR.[600] That table is copied and translated from slide 20 of Mr. Damonte's direct presentation; however, Respondent did not copy the entire table, omitting Mr. Damonte's footnote explaining that the table compares Sigla's VNR to the *5 May 2008* Bates White VNR, as "corrected" by Mr. Damonte.[601] The table therefore does not provide a comparison of the differences between Bates White's *28 July 2008* VNR and Sigla's VNR, and, as such, should be disregarded.

122. Respondent also argues that the Bates White study was unreliable and unreasonable, because, if the CNEE had applied the VAD calculated in Bates White's 28 July 2008 revised VAD study, tariffs for low voltage customers would have increased by 40 percent

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[596] *See* Barrera ¶¶ 273-274 **(CER-4)**.

[597] *See id*. ¶¶ 123-124.

[598] Respondent's Post-Hearing Brief ¶ 237.

[599] *See* Sigla Model, file\EEGSA Archivos de Soporte Jul08\EEGSA Etapa B – Precios de Referencia \Costos2006-Urbano VF, Tab "Inputs Modelo Urbano," Table "Subterraneo", cells B70 to F76 **(C-589)**.

[600] Respondent's Post-Hearing Brief ¶ 234.

[601] *See* Damonte Direct Presentation, Slide 20 (entitled "Principales Diferencias entre el VNR de *BW 28-7-08* y el de Sigla," [Main Differences between the VNR of BW 28-7-08 and Sigla's], but containing a footnote stating "Elaboración en base a Modelo-*BW-5-5-08* corregido MD segun CP C-568" [Elaboration based on Model-BW-5-5-08 MD [Mario Damonte] corrected according to CP [Expert Commission] C-568]) (emphasis added).

and for residential customers eligible for social tariff by 37 percent, while the Sigla VAD resulted in approximately a 2 percent increase and approximately an 8 percent decrease in these two tariff categories.[602] As in initial matter, even if this were true, that would not affect the reliability or reasonableness of the Bates White study. As Claimant has shown, Respondent adopted the LGE in order to depoliticize the tariff review process and to ensure that electricity tariffs were set based upon technical criteria;[603] thus, for example, if the price of commodities outpaces inflation, or if the distributor's network is expanded, electricity tariffs will increase, and Respondent represented that it would not interfere to prevent such increases for political reasons. In any event, while there is no material dispute between the parties concerning the impact of the Sigla VAD on tariffs,[604] Respondent's calculation of the impact of the Bates White VAD is erroneous and significantly overstated.

123. Respondent's graph, for the period through July 2008, is based upon the assumed monthly electricity consumption of 400 kWh per month by residential consumers not eligible for social tariffs and 170 kWh per month by residential consumers eligible for social tariffs.[605] Respondent nowhere explains how it arrived at the results in the table, but applying these same monthly consumption levels to the Bates White VAD-based tariffs results in increases of 2.62 percent and 10.21 percent for residential customers not eligible for social tariffs and for residential customers eligible for social tariffs, respectively.[606] These are almost identical tariff increases as those calculated in Claimant's Post-Hearing Brief using slightly different consumption rates.[607] Respondent's unexplained asserted tariff increases are erroneous. The

[602] Respondent's Post-Hearing Brief ¶¶ 243-244.

[603] Reply ¶¶ 12-19; Memorial ¶¶ 27-44; Alegría I ¶¶ 20-33 **(CER-1)**; Alegría II ¶¶ 2-10, 21-22, 27 **(CER-3)**.

[604] Claimant demonstrated that the Sigla study resulted in a tariff increase of 2.4 percent for residential customers not eligible for social tariffs and a tariff decrease of 8.2 percent for residential customers eligible for social tariff. Claimant's Post-Hearing Brief ¶ 159 n.608.

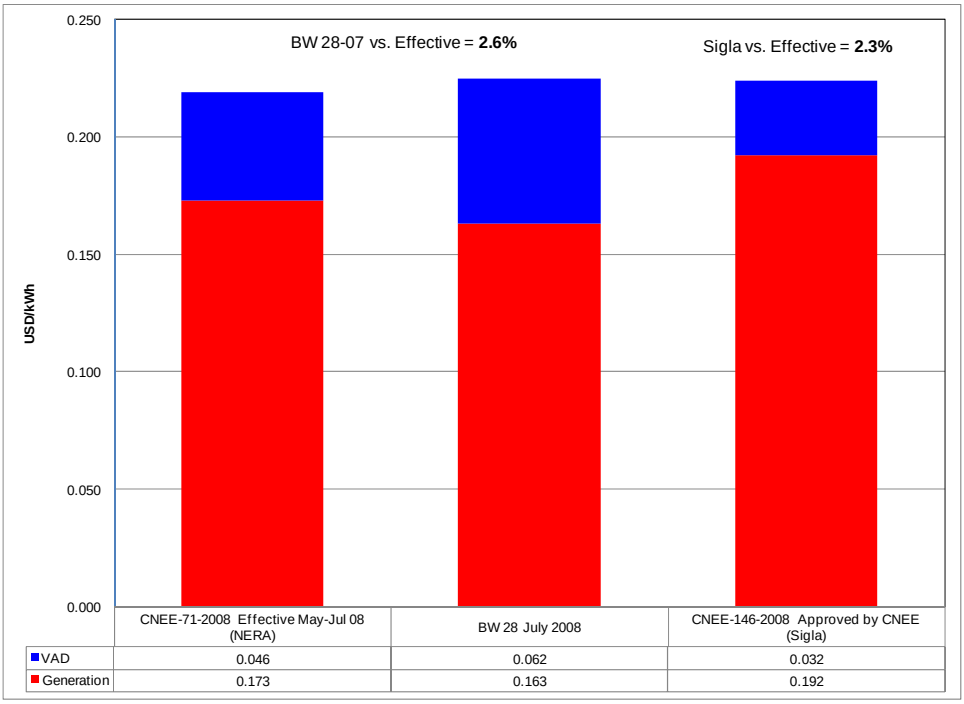
[605] This can be reverse-calculated from Respondent's graphs by using the variable charge based on consumption, the fixed charge, and the generation-related charge established for the period through July 2008 by CNEE's Resolution No. CNEE-72-2008 dated April 2008, p. 3 **(C-634)**. Respondent cites erroneously Resolution No. CNEE-71-2008, April 2008 **(R-240)** as the source of this information. *See* Respondent's Post-Hearing Brief ¶ 244 n.360.

[606] Based on the calculations set forth in Claimant's Post-Hearing Brief ¶ 159 n.608.

[607] *See* Claimant's Post-Hearing Brief ¶ 159 n.608 (calculating tariff increases of 2.3 percent and 13.6 percent for residential customers not eligible for social tariffs and for residential customers eligible for social tariffs, respectively).

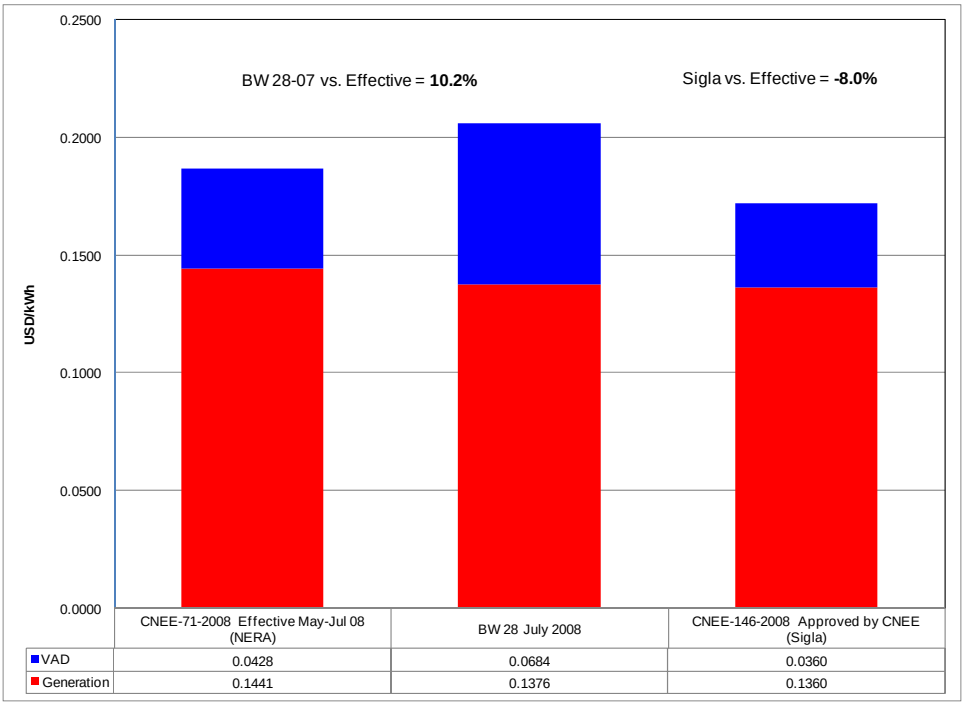
following graphs present the correct comparison of the tariffs resulting from the Bates White VAD and the Sigla VAD to the tariffs in place as of July 2008, although the CNEE could have reallocated this cost in any number of ways during the tariff design process, including to avoid increases for residential customers and shift them to commercial customers, as it did in 2003.[608]

**Figure 1: Impact of Bates White and Sigla VADs on End-User Low-Voltage Simple Tariffs Compared to Tariffs in Effect in July 2008**




[608] *See* Claimant's Post-Hearing Brief ¶ 159 n.608.

**Figure 2: Impact of Bates White and Sigla VADs on End-User Low-Voltage Social Tariffs Compared to Tariffs in Effect in July 2008**




| | CNEE-71-2008 Effective May-Jul 08 (NERA) | BW 28 July 2008 | CNEE-146-2008 Approved by CNEE (Sigla) |
|---|---|---|---|
| VAD | 0.0428 | 0.0684 | 0.0360 |
| Generation | 0.1441 | 0.1376 | 0.1360 |

## V. DAMAGES

124. As Claimant has shown and as Respondent confirmed in its Post-Hearing Brief, with respect to damages, "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."[609]

[609] Respondent's Post-Hearing Brief ¶ 334. Because the parties' damages dispute centers nearly exclusively on EEGSA's but-for value, Claimant limits its comments on Respondent's arguments concerning EEGSA's actual value to the following. First, Respondent mistakenly asserts that "both experts have valued EEGSA based on the transaction price, using EEGSA's share in the EBITDA of DECA II to estimate EEGSA's contribution to the total value of the transaction." Respondent's Post-Hearing Brief ¶ 360. This is incorrect. As Claimant has explained, Mr. Kaczmarek used the DCF, comparable public company, and comparable transaction approaches to value EEGSA in the actual scenario, and used the EPM purchase price as a reasonableness check for his valuation results. Claimant's Post-Hearing Brief ¶ 168; Kaczmarek II ¶¶ 134-135 **(CER-5)**; Kaczmarek I ¶¶ 240-241 **(CER-2)**. Second, Respondent's criticism that Mr. Kaczmarek used the EBITDA for the 12 months of 2009, but should have used the EBITDA for the 12 months preceding the EPM sale is both irrelevant and wrong. Respondent's Post-Hearing Brief ¶ 360. It is irrelevant, because, as explained, Mr. Kaczmarek did not use the results of this analysis to value EEGSA, but only to confirm his valuation (which was at the high end of Dr. Abdala's range, and thus served to decrease TECO's damages). It also is wrong, because the purpose of the exercise was to ascertain what portion of DECA II's purchase price EPM allocated to EEGSA, and to do this, it makes sense to look at the information that was available to EPM at the time that it performed its valuation of EEGSA. *See* Kaczmarek I ¶ 135 (noting that "the valuation practitioner should not use information in 'hindsight' that might bias the valuation conclusion. Rather, the valuation practitioner should base his or her assumptions on reasonable expectations, as they would have existed, as of the valuation

Respondent has failed to identify any legitimate flaws in Mr. Kaczmarek's but-for value for EEGSA and, instead, in its Post-Hearing Brief, resurrects arguments that its own expert long ago abandoned, misconstrues the evidence, and advances a series of misleading arguments.[610]

### A. Respondent's Attempt To Introduce A New Measure Of Damages Should Be Rejected

125. Since their initial reports in this arbitration, the parties' experts have agreed that the appropriate measure of damages is the difference in cash flow and share value that TECO received from its indirect ownership in EEGSA (corresponding to EEGSA's actual value) and what it would have received had there been no breach by Guatemala (corresponding to EEGSA's but-for value).[611] Because TECO sold its shares in EEGSA in October 2010, its losses have crystallized. Thus, Claimant's measure of damages equals the loss that it sustained during the two-year period that EEGSA, while still owned by DECA II, operated under the Sigla tariffs, and the difference between TECO's share of the purchase price that it received from EPM and what it would have received had Guatemalan not breached the DR-CAFTA in setting EEGSA's VAD.

126. Despite this common ground, for the very first time in its Post-Hearing Brief Respondent asserts that TECO's damages should be measured only for the 2008-2013 five-year

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date.") **(CER-2)**. EPM made its non-binding offer in July 2010; at that time, it would have had access to DECA II's 2009 financial statements, but would not have had the full year 2010 financial statements. Thus, it does not make sense for Dr. Abdala to use 2010 financial information that was unavailable to EPM to replicate EPM's decision-making at that time.

[610] Respondent in its Post-Hearing Brief continues to misconstrue Claimant's claim for damages and the evidence supporting it. Respondent, for instance, continues to assert that, "after receiving more than US$ 100 million for its stake in EEGSA," Claimant "reduced its original claim from US$ 285.6 million to US$ 243.6, i.e., by around 42 million dollars." Respondent's Post-Hearing Brief ¶ 10. This is demonstrably wrong; as Claimant explained in its submissions and at the Hearing, the sale of EEGSA to EPM had no effect on Claimant's damages claim. *See* Claimant's Post-Hearing Brief ¶¶ 56-59; Tr. (21 Jan. 2013) 339:15-341:3 (Claimant's Rebuttal). As long as a damaged asset is sold at its fair market value—and Respondent's expert agrees that EPM paid a fair price for EEGSA (*see* Tr. (5 Mar. 2013) 1575:15-16, 1577:3-5, 10-12)—a claim for damages for harm suffered is not affected by that sale and there is no threat of "double-recovery." Not surprisingly, Respondent's valuation expert has refused to endorse Respondent's baseless "double-recovery" theory, and has not repeated Respondent's misstatement that Claimant changed its damages claim post-sale. The change in damages claimed came about during the course of the arbitration, as the valuation experts submitted reports, and responded to one another's reports: as noted in Claimant's Post-Hearing Brief and as remarked by another investment tribunal, "it would be a sad day for investment arbitration if parties did not set out to confront in this way the counter-arguments of their opponents and the emerging facts, so that at the end of the day the tribunal is faced in a concrete form with the Claimant's final case and the Respondent's final answer to it." *Rompetrol v. Romania* ¶ 151 **(CL-109)**; *see also* Claimant's Post-Hearing Brief ¶ 59.

[611] *See* Kaczmarek I ¶ 126 **(CER-2)**; Abdala I ¶ 25 **(RER-1)**.

tariff period, and that its damages should amount to US$ 47.9 million.[612] In so arguing, Respondent falsely claims that Mr. Kaczmarek's model "contains projections for the 50 years of the contract," and that it "assumes that there will be automatic renewals of this contract in perpetuity."[613] Neither of these assertions is correct. As noted in Claimant's Post-Hearing Brief, Mr. Kaczmarek's DCF model forecasted EEGSA's cash flow for ten years, as is the norm.[614] After that ten year period, the model assigns a terminal value to EEGSA, as also is standard in valuations.[615] Dr. Abdala *uses this same model* to conduct his own DCF analysis to calculate EEGSA's value in the but-for scenario.[616] It is thus disingenuous for Respondent now to claim that Mr. Kaczmarek's model is faulty in this regard. Indeed, by raising this argument for the very first time in its Post-Hearing Brief, Respondent avoids having its own expert disavow its wrongheaded theory on cross-examination.

127. As Dr. Abdala recognized by adopting Mr. Kaczmarek's model, because Claimant's losses have crystallized, it is non-sensical to speak in terms of losses over a five-year period; the question is how much more would TECO have earned from its investment had Guatemala acted consistently with its international obligations. The fact that the tariffs may change over time does not matter: in determining EEGSA's fair market value, EPM forecasted EEGSA's future cash flow, taking into account the manner in which EEGSA's 2008-2013 tariff review had been conducted and the results of that review.[617] As described in Claimant's Post-Hearing Brief, EPM reasonably—and correctly—assumed that Respondent would continue to calculate EEGSA's return on an asset base that had been depreciated by 50 percent, and that its

[612] Respondent's Post-Hearing Brief ¶¶ 355-356.

[613] *Id*. ¶ 354 (internal citation omitted).

[614] Claimant's Post-Hearing Brief ¶¶ 169, 173; Kaczmarek I ¶ 197 **(CER-2)**.

[615] Kaczmarek I ¶ 197 **(CER-2)**; Claimant's Post-Hearing Brief ¶¶ 169, 173. Moreover, the portion of the value related to the period following the end of the Concession amounts to only approximately 6 percent of the total but-for value. *See* Kaczmarek II, Model, terminal value calculation **(CER-5)**.

[616] *See* NavigantSecondReportModel_24May2012 Corrected_24Sep2012 **(DAS-37**); Abdala I, App. A (referring to Respondent's model as the "Corrected NCI Model"). Notably, Respondent admits that Dr. Abdala's analysis cannot be restricted to this five-year period, because he only conducted a DCF valuation for EEGSA in the but-for scenario, but failed to do so in the actual scenario (where he instead relied exclusively on EPM's purchase price for DECA II). Respondent's Post-Hearing Brief n.498.

[617] Claimant's Post-Hearing Brief ¶¶ 169-170.

VAD would not materially increase.[618] Thus, although EEGSA's tariffs are set for five-year periods, EPM still had to place a value on EEGSA for the remaining 35-year concession—it did not purchase only the right to operate EEGSA through 2013. Thus, it is wrong to calculate TECO's damages as the difference between the value that TECO received for EEGSA during the five-year period from 2008-2013 and what it would have received during that period if Bates White's 28 July 2008 study, rather than the Sigla study, had been used to set EEGSA's VAD.

### B. Respondent's Criticisms Of Claimant's But-For Value For EEGSA Are Invalid

128. Respondent's argument that Mr. Kaczmarek's damages calculation should be "dismiss[ed] [in its] entirety," because in calculating EEGSA's but-for value, Mr. Kaczmarek did not verify the "validity" of Bates White's 28 July 2008 VAD study or whether that study incorporated all of the Expert Commission's rulings,[619] is preposterous. So too is Respondent's baseless assertion that Claimant "attempted to bolster its case by asking Mr. Kaczmarek to confirm that the 28 July study incorporated all the Expert Commission's pronouncements."[620] As is clear from both of Mr. Kaczmarek's expert reports, as well as his oral testimony, Mr. Kaczmarek was asked to calculate TECO's damages assuming that Respondent was liable for breaching its obligation to accord Claimant's investment FET.[621] Mr. Kaczmarek thus *assumed* for the purposes of his analysis that Guatemala had breached the Treaty by failing to use the 28 July 2008 Bates White study to set EEGSA's VAD.[622] Respondent's baseless attacks on Mr. Kaczmarek are all the more disingenuous considering that its own valuation expert, Dr. Abdala, relied on Mr. Damonte's model (containing Mr. Damonte's VNR and FRC) to calculate damages

[618] Claimant's Post-Hearing Brief ¶¶ 170-171.

[619] Respondent's Post-Hearing Brief ¶¶ 335-336.

[620] *Id*. ¶ 215.

[621] *See* Kaczmarek I ¶¶ 3-7 (Scope of Work) **(CER-2)**; Kaczmarek II ¶¶ 1-3 (Scope of Work) **(CER-5)**.

[622] *See* Kaczmarek I ¶ 13 (defining the "Measures" as the CNEE's failure to set EEGSA's VAD on the basis of the 28 July 2008 Bates White study) **(CER-2)**; *id.* ¶ 15 (describing his methodology for calculating damages [s]hould the Tribunal determine that the Measures are a breach of the DR-CAFTA as alleged by Claimant"); Kaczmarek II ¶ 60 (explaining that he "relied upon the VNR determined in the Bates White July 2008 Study because it is Claimant's legal case that the CNEE was bound to use the VNR in Bates White July 2008 Study" and that "even if the determination [that the Bates White study fully incorporated all of the Expert Commission's decisions] was wrong (which it is not in our view), Claimant claims that it is entitled to damages that compensate it for the financial harm caused by the Government's refusal to use the VNRs and VADs established in Bates White's July 2008 Study to set EEGSA's tariffs.") **(CER-5)**.

without himself verifying that Mr. Damonte's model had incorporated all of the Expert Commission's rulings (which it admittedly did not).[623]

129. Furthermore, as Claimant has demonstrated and as the evidence makes clear, Respondent did not reject Bates White's 28 July 2008 study for failure to incorporate the Expert Commission's rulings: it set EEGSA's VAD on the basis of Sigla's study, because it determined that abiding by the Expert Commission's rulings would result in a VAD that was higher than it wanted, and it did not even review the Bates White's 28 July 2008 study until one year after the tariffs were set in anticipation of arbitration.[624] Respondent's baseless arguments regarding the alleged failure of Bates White's 28 July 2008 study to fully incorporate the Expert Commission's rulings thus is nothing more than a *post-hoc* argument and has no effect on the validity of Mr. Kaczmarek's damages calculation.

130. For this same reason, Respondent's assertion that Mr. Damonte's but-for value should be used, because Mr. Damonte "incorporated the pronouncements of the Expert Commission into the Bates White 5 May study, with the exception of the FRC,"[625] is wrong. As Claimant has observed, it makes no sense to use Mr. Damonte's VNR or FRC to calculate EEGSA's but-for value, because, in the absence of a breach, Guatemala would have used Bates White's 28 July 2008 VAD study to set EEGSA's VAD, as it was required to do. Under no circumstance would it have set EEGSA's VAD on the basis of an analysis that did not even exist at the time. Furthermore, as Respondent finally acknowledges, Mr. Damonte did not incorporate the Expert Commission's FRC ruling;[626] this failure cannot be disregarded, as this has a significant impact on the resulting VAD and, consequently, on EEGSA's but-for value.[627] Moreover, Respondent's contention that Mr. Damonte's FRC formula was "technically correct"

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[623] *See* Tr. (5 Mar. 2013) 1570:9-10 (Abdala Cross) (testifying, "I'm not sure whether [Mr. Damonte incorporated all of the Expert Commission's decisions into his VNR] or not. I don't know."); *id.* 1571:12-14 (testifying that he was "aware that Mr. Damonte in his report has stated that there were some recommendations that were – he was unable to fully implement.").

[624] Analysis of the Expert Commission Opinion (undated), at 9 **(C-547)**; Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross); Claimant's Post-Hearing Brief ¶ 155.

[625] Respondent's Post-Hearing Brief ¶ 338.

[626] *Id*.

[627] Claimant's Post-Hearing Brief ¶¶ 156, 179; Analysis of the Expert Commission Opinion (undated), at 9 **(C-547)**.

and "conservative,"[628] is legally irrelevant and wrong, in any event. It is legally irrelevant, because, even if it were correct (which it is not), the Expert Commission ruled on this very issue, and Respondent expressly represented and its law makes clear that the Expert Commission's decision is binding.[629] Respondent's assertion also is wrong, because, as Claimant has explained, the VNR method adopted in Guatemala requires that the distributor's return be calculated off of an undepreciated asset base.[630] Furthermore, as set forth in Claimant's Post-Hearing Brief, Mr. Damonte did *not* incorporate all of the other rulings of the Expert Commission.[631] Notably, he did not abide by the Expert Commission's determination on reference prices, and wrongly testified that this had no impact on his damages analysis.[632]

131. Finally, in its Post-Hearing Brief, Respondent resurrects the argument that Mr. Kaczmarek's model projects capital expenditures in the but-for scenario that are too low, and argues that "the projections are lower than those included in the Bates White model (US$76.5 million per year)."[633] As Mr. Kaczmarek explained in his Second Expert Report, Dr. Abdala's assumption that the Bates White model projected average annual capital expenditures of US$ 81.9 million (the figure used in Dr. Abdala's first report) was erroneously based on his adding EEGSA's return of capital to its capital expenditure amounts.[634] Had Dr. Abdala sourced his estimated capital expenditure figure from Bates White, as he claims, he would have cited to Bates White's study or model. This figure, however, is not in the Bates White model. As Mr. Kaczmarek has explained, Dr. Abdala's assumption that total capital expenditures should equal the expansion capital expenditures plus the return of capital is incorrect, because "[t]he return of capital portion of the VAD is just the opposite of a capital expenditure."[635] In his report, Mr. Kaczmarek showed that the Bates White model forecasted average annual capital expenditures of

[628] Respondent's Post-Hearing Brief ¶ 338.

[629] *See supra* Section IV.A.2.

[630] *See supra* Section IV.B.1.

[631] Claimant's Post-Hearing Brief ¶¶ 156, 179.

[632] Barrera Direct Presentation, Slide 33; Tr. (5 Mar. 2013) 1315:1-10 (Barrera Direct); Claimant's Post-Hearing Brief ¶¶ 156, 179.

[633] Respondent's Post-Hearing Brief ¶ 337.

[634] Kaczmarek II ¶ 39 **(CER-5)**.

[635] *Id*.

approximately US$ 37.1 million, and also explained that this was consistent with the median ratio of capital expenditures to enterprise value of comparable Latin American electricity distribution companies,[636] and was nearly double EEGSA's historical capital expenditures of US$ 20 million per year,[637] so was not undervalued. In his Second Expert Report, Dr. Abdala *conceded* that his criticism was misplaced: Dr. Abdala acknowledged that the capital expenditures amount used by Mr. Kaczmarek was "virtually identical to those estimated in the Bates White study of May 2008 corrected by Damonte and used by us in our valuation exercise."[638] Dr. Abdala thus concluded that, "[a]s a consequence, there are no longer any significant differences between the parties as to the amount of investments [*i.e.*, capital expenditures] EEGSA would have made in such [*i.e.*, but-for] scenario."[639] For Respondent now to assert that the Bates White model forecasted annual capital expenditures of US$ 76.5 million and to criticize Mr. Kaczmarek's damages analysis on this ground, while simply ignoring this history, is a blatant attempt by Respondent to mislead this Tribunal.

### C. Respondent's Arguments That The Sigla VAD Is Reasonable, And That The Bates White VAD Is Not, Are Meritless

132. The vast majority of Respondent's arguments concerning TECO's damages claim focus not on the validity of Mr. Kaczmarek's valuation—which Respondent has been unable to undermine—but instead on the alleged reasonableness of Sigla's VAD and the purported excessive profit that would have resulted had EEGSA's VAD been set on the basis of Bates White's 28 July 2008 VAD study. Respondent's reasonableness checks, however, are gravely flawed.

133. In reiterating its claim that Dr. Abdala's damages calculation is reasonable, because to calculate EEGSA's but-for value Dr. Abdala relies on a VNR for EEGSA that

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[636] Kaczmarek II Figure 2 **(CER-5)**; Kaczmarek Direct Presentation, Slide 37; *see also* Claimant's Post-Hearing Brief ¶ 183.

[637] Kaczmarek II ¶ 40 **(CER-5)**; Kaczmarek I, Figure 9 **(CER-2)**.

[638] Abdala II ¶ 2 **(RER-4)**.

[639] *Id.* For the avoidance of any doubt, Dr. Abdala then proceeded to state the following: "However, two relevant differences remain with NCI concerning two determinants of the value in the *but-for* scenario: the . . . VNR, and the . . . capital recovery factor ('CRF')." *Id.* ¶ 3.

approximates EEGSA's accounting tariff base,[640] Respondent simply ignores Mr. Kaczmarek's written and oral testimony explaining why this so-called reasonableness test is fundamentally flawed.[641] Respondent's failure to even acknowledge, let alone refute, these points underscores the weakness of its argument.

134. Critically, Respondent concedes that "*the Guatemalan regulatory system is not based on the accounting tariff base*."[642] Rather, the Guatemalan regulatory system is based upon the VNR method, which values EEGSA's asset base as new each tariff period, whereas if the accounting tariff base method were used, EEGSA's asset base would be valued on the basis of the book value of its depreciated assets.[643] Indeed, as the Tribunal is aware, when EEGSA was privatized, the book value of its asset base was approximately US$ 78 million,[644] while Guatemala received US$ 520 million for 80 percent of EEGSA.[645] Guatemala thus acknowledges that "[t]he value of the company was calculated on the basis of anticipated cash flow, and not on the physical assets,"[646] and that "the 1991 *book value* cannot be compared with the privatization price since the book value was not taken into account in calculating the purchase price . . . ."[647] Nor does Respondent's assertion that "no regulator would remunerate

[640] Respondent's Post-Hearing Brief ¶ 339.

[641] *See* Kaczmarek II ¶¶ 166-171 **(CER-5)**; Tr. (5 Mar. 2013) 1503:18-1504:7 (Kaczmarek Direct).

[642] Respondent's Post-Hearing Brief ¶ 340 (emphasis added).

[643] Kaczmarek I ¶ 54 **(CER-2)**.

[644] Price WaterhouseCoppers, Limited Scope Analysis to Estimate the Fair Market Value of Certain Intangible Assets, as of September 10, 1998 dated 13 Apr. 1999, Exh. 1 (calculating the book value of EEGSA's assets in 1998 at US$ 78.3 million) **(C-43)**.

[645] Stock Purchase Agreement between Distribucion Eléctrica Centroamericano, S.A. and the Government of Guatemala dated 11 Sept. 1998, at 7-8, 10 (**C-38**); EEGSA Notarized Minutes of the Award dated 30 July 1998, at 2 **(C-36)**; *see also* Guatemalan Bid Results Summary dated 31 July 1998 **(C-37)**.

[646] Respondent's Post-Hearing Brief ¶ 320 (internal citation omitted).

[647] *Id*. ¶ 325 (emphasis in original). Respondent's arguments concerning the changes that occurred in EEGSA between 1991 and 1998 are irrelevant. *See* Respondent's Post-Hearing Brief ¶ 326. Price Waterhouse calculated the book value of EEGSA's assets in 1991 at US$ 59.6 million, and concluded that a more appropriate valuation based upon earnings was US$ 13.9 million and, thus, recommended against privatizing EEGSA before adopting a new regulatory regime and making other significant changes. Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, at 26-27 **(C-7)**. In 1998, Price Waterhouse calculated the book value of EEGSA's assets to be US$ 78.3 million. PriceWaterhouseCoppers, "Limited Scope Analysis to Estimate the Fair Market Value of Certain Intangible Assets, as of Sept. 10, 1998" dated 13 Apr. 1999, Exh. 1 **(C-43)**. Thus, regardless of the changes that may have occurred between 1991 and 1998, the book value of EEGSA's asset base did not increase substantially. Respondent's assertion that "it is no[t] possible to determine whether this value reflects the real value of the infrastructure at that time," because

the investor for a regulatory base which substantially deviates from the amounts actually invested"[648] assist it. The amounts actually invested are the amounts that were *paid to Guatemala* for the 50-year concession, that is, US$ 520 million for 80 percent of EEGSA, implying a value of 17 times EEGSA's book value at that time.[649] It is therefore fundamentally misguided for Dr. Abdala to conclude that his but-for valuation of EEGSA is reasonable because the VNR he used approximates EEGSA's accounting base.

135. Furthermore, as Mr. Kaczmarek has explained, the fact that there was a correlation between Dr. Abdala's VNR and EEGSA's accounting base as of 2012 was a coincidence of timing. When EEGSA was privatized, the large difference between the value of its asset base and its purchase price was accounted for as goodwill. The fundamental flaw in Dr. Abdala's reasonableness test is that there would have been no goodwill if the regulatory asset base was based upon EEGSA's accounting book value (essentially a cost-of-service model). EEGSA's goodwill was going to be amortized over 30 years. At privatization, Price Waterhouse calculated that 83 percent of EEGSA's asset value was goodwill.[650] By 2008, as Dr. Abdala recognizes, approximately one-third of this original book value had been amortized, leaving 54 percent of the book value in his calculation as goodwill.[651] Similarly, ten years from now, more than two-thirds of the goodwill will have been amortized. In summary, Dr. Abdala does not explain, nor could he explain, why goodwill should be part of his reasonableness test, why it makes economic sense that the regulatory asset base should erode over time, and how the accounting book value could serve as a proxy for the new replacement value of a model efficient

"it is possible that the accounting practices of a state-owned company in Guatemala in 1991 did not follow standard accounting practices," is erroneous. Respondent's Post-Hearing Brief ¶ 325 n.449. As the 1991 Price Waterhouse Report reflects, when conducting its valuation, Price Waterhouse did not simply rely on EEGSA's financial statements, but rather "revalued" the assets. Price Waterhouse, *Estudio de la Empresa Electrica de Guatemala* dated 11 Jan. 1991, at 19 **(C-7)**.The undisputed point remains, that if Guatemala had adopted a cost-of-service approach for calculating the VAD, where the regulatory asset base is based upon the distributor's actual asset base and therefore reflects the depreciated state of the actual assets, rather than the model efficient company approach using the VNR method, where the regulatory asset base is based upon the new replacement value of a model efficient company's asset base, the proceeds that Guatemala received for EEGSA's privatization (*i.e.*, US$ 520 million for 80.1 percent) would not have been so high. *See* Claimant's Post-Hearing Brief ¶¶ 66, 69; Tr. (5 Mar. 2013) 1490:4-1494:10 (Kaczmarek Direct).

[648] Respondent's Post-Hearing Brief ¶ 340.

[649] Kaczmarek II ¶ 187 **(CER-5)**.

[650] In 1999, EEGSA's goodwill amounted to US$ 403 million. Kaczmarek II ¶ 171 & Appendix 3 **(CER-5)**.

[651] Abdalla II ¶ 50.

company.

136. Respondent in its Post-Hearing Brief also continues to rely on Dr. Abdala's so-called "prospective IRR" analysis without acknowledging or responding to any of the criticisms of that analysis made by Mr. Kaczmarek.[652] As Claimant has explained, Dr. Abdala's newly-invented test cannot prove or disprove the reasonableness of any VAD, as it does not even purport to measure the return to TECO or to EEGSA under either the Sigla or Bates White's VADs.[653] With regard to Mr. Kaczmarek's IRR analysis, showing that Claimant obtained merely a 0.6 percent IRR in real terms and, with damages in the amount sought, still only would obtain a 7.81 percent IRR in real terms (below its cost of equity),[654] Respondent continues to criticize Mr. Kaczmarek for having calculated an IRR for TECO, and not for EEGSA. Despite doing so, *and* despite the Tribunal's request that the parties calculate EEGSA's IRR,[655] in its Post-Hearing Brief, Respondent does not calculate EEGSA's IRR. As Claimant observed in its Post-Hearing Brief, this is not surprising, because it is clear that calculating an IRR for EEGSA serves to further validate Claimant's damages analysis.[656] To the extent that Respondent belatedly presents an IRR calculation for EEGSA in its Reply Post-Hearing Brief, that calculation should be disregarded by the Tribunal, as Claimant will be denied its due process right to respond, since no further substantive pleadings are scheduled.

137. Respondent's further assertion that computing an IRR for a shareholder is unreliable, because the IRR can be affected by dividend policies and corporate decisions,[657] is wrong. To the extent that EEGSA paid or withheld dividends, this is reflected in TECO's IRR: a dividend payment would increase EEGSA's IRR, and the withholding of dividends and the

[652] Respondent's Post-Hearing Brief ¶ 353.

[653] Claimant's Post-Hearing Brief ¶ 193; Tr. (5 Mar. 2013) 1503:3-9, 14-17 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slide 22.

[654] Kaczmarek II ¶ 146 & Table 15 **(CER5)**.

[655] Tr. (22 Jan. 2013) 404:7-9 (Tribunal Question) ("[W]hat would be, for these two figures [the Sigla VAD and the Bates White 28 July 2008 VAD] . . . the corresponding internal rate of return for EEGSA?"); *id.* at 404:14-21 (Tribunal Question) ("I'd like to know . . . what would be the result in terms of internal rate of return . . . for those two VAD figures, the Bates White and the Sigla . . . [a]nd what would be the effective return on capital and of capital based on those two figures per year for EEGSA?").

[656] Claimant's Post-Hearing Brief ¶¶ 191-192.

[657] Respondent's Post-Hearing Brief ¶ 342.

corresponding accumulation of cash for EEGSA would increase the sales value of EEGSA and likewise increase TECO's IRR. Corporate decisions regarding the level and timing of capital expenditures and dividend distributions thus are reflected in the IRR. In any event, the evidence shows that EEGSA held a reasonable amount of cash as working capital and distributed the remainder to its shareholders, as would be expected. If there was anything unusual in this regard, Respondent surely would have raised it, as Mr. Kaczmarek in his very first expert report showed the exact dates on which distributions were made and the amounts of those distributions.[658] Respondent's failure to raise any issues in this regard demonstrates the purely speculative nature of its assertions, and that it is seeking to cast doubt where none is warranted.

138. Respondent also continues to argue that Claimant's IRR analysis is flawed because the amount paid *by TECO* in the privatization was too high: it thus asserts that "*Teco* offered US$ 520 million," because it wanted to "integrate Teco's business in Guatemala and improve group positioning in the region."[659] As is clear, TECO did not pay US$ 520 million for EEGSA, DECA did. In making this "error," Respondent seeks to avoid the fact that TECO was a minority shareholder in the DECA Consortium, and that DECA would not have had any reason to—and in fact did not—overbid on account of any so-called synergies that TECO may have had with EEGSA.[660] As shown in Claimant's Post-Hearing Brief and at the Hearing, the evidence confirms this: (i) Respondent's own expert, Dr. Abdala, testified that the bid was a fair one;[661] (ii) DECA's bid was within 9 percent of the second highest bid;[662] and (iii) the DKB model shows that the bid price was based on forecasted cash flows, and that no value was assigned to any so-called synergies.[663] Nor is it correct that "the amount paid by Teco exceeded that recommended by its own financial advisors by almost US$ 100 million," as Respondent contends.[664] To the contrary, the model prepared by DKB clearly reflects the funds invested by

[658] Kaczmarek I, Tables 21 & 22 **(CER-2)**.

[659] Respondent's Post-Hearing Brief ¶ 344 & n.484 (emphasis added).

[660] *See supra* Section IV.A.1.

[661] Tr. (5 Mar. 2013) 1575:15-16, 1577:3-5, 10-12 (Abdala Cross).

[662] Guatemalan Bid Results Summary dated 31 July 1998 **(C-37)**; Kaczmarek Direct Presentation, Slide 8.

[663] Dresdner Kleinwort Benson Model **(R-160)**; Tr. (22 Jan. 2013) 484:12-17 (Gillette Cross); Tr. (5 Mar. 2013) 1580:5-17 (Abdala Cross).

[664] Respondent's Post-Hearing Brief ¶ 344.

the DECA Consortium for 80 percent of EEGSA of approximately US$ 527 million (whereas the Consortium paid US$ 520 million).[665]

139. Respondent's further argument that accepting Mr. Kaczmarek's traditional IRR analysis would lead to "perverse incentives"[666] is illogical. Respondent asserts that potential investors "would offer high values for the sole purpose of receiving a return on these amounts."[667] Not surprisingly, Respondent cites no authority in support of its unorthodox view. Respondent's speculation runs counter to the most basic business sense; an investor will have the ability to obtain higher returns if it pays less, as it needs to receive its purchase price back (its return of investment) before it can make any profit (its return on investment). In any event, Respondent's assertion is based upon the notion that the tariff base should not be based upon the purchase price, but Claimant never has advocated as much. Rather, Claimant simply has observed that the purchase price for EEGSA was based upon EEGSA's expected tariffs and the manner in which those tariffs were to be calculated under the regulatory framework, which explains why Claimant and its partners paid the amount that they did for EEGSA.

140. Respondent also intentionally misconstrues Mr. Kaczmarek's testimony and misleadingly argues that he committed an "error" in his IRR calculation by "includ[ing] an initial Teco investment amount that was higher than that set forth in the company's financial statements"[668] and, therefore, his IRR analysis lacks "precision," because he failed to "verif[y] the company's financial statements."[669] In support of its assertion, Respondent references an out-of-context statement from Mr. Kaczmarek's testimony,[670] where Mr. Kaczmarek stated that he did not recall offhand whether he had reviewed a particular paragraph in TECO's Annual

[665] Dresdner Kleinwort Benson Model at cover letter, at 6, 16 (showing capital contributions from shareholders of US$ 332 million and debt contributed by shareholders of US$ 195 million, to total US$ 527 million, as the bid price) **(R-160)**; *see also id*. at 7 (calculating a 13.5 percent IRR, using US$ 195 million in debt, and an acquisition price of US$ 524 million).

[666] Respondent's Post-Hearing Brief ¶ 345.

[667] *Id*. ¶ 345.

[668] *Id*. ¶¶ 346-347.

[669] *Id*. ¶¶ 346-347.

[670] *Id*. ¶ 346.

Report,[671] which information in any event was contained in TECO's financial statements, which Mr. Kaczmarek indisputably reviewed. As Claimant explained in its Post-Hearing Brief, through this line of questioning, Respondent attempted to leave the misimpression that TECO invested only US$ 100 million, instead of US$ 135 million in EEGSA.[672] As shown in Claimant's Post-Hearing Brief, that suggestion is entirely without merit.[673]

141. The evidence thus shows that TECO paid a fair price for its share of EEGSA in light of Guatemala's newly-established regulatory framework for electricity distribution; that EEGSA was managed efficiently and effectively by its partners (including TECO); and that TECO obtained a return on its investment well below its cost of equity and, even with damages, still would receive a return less than its cost of equity. Unable to refute Claimant's IRR analysis, Respondent argues that, had the Bates White 28 July 2008 VAD been used, EEGSA would have obtained excessive profit. Respondent thus contends that the Bates White VAD would have compensated Claimant beyond its expectations, as evidenced by the model that informed TECO's bid, and that financial information, as well as the actions of CAESS, DEOCSA and DEORSA, and EPM, all support its conclusion.[674] Each of Respondent's arguments is without merit.

142. Respondent claims that Claimant's "expectation (as reflected in its business plan) was that the tariff would only *increase* by 3% in real terms in 2002, and by 2.1% in real terms in 2008."[675] At the same time, it also alleges that "Teco expected a VAD *reduction* of between 2 and 3% in real terms during the first five-year period and also during subsequent five-year periods,"[676] and that these "VAD *reductions* at each tariff review were taken into account" by the

[671] Tr. (5 Mar. 2013) 1523:6-17 (Kaczmarek Cross) (referring Mr. Kaczmarek to page 19 of C-324, which is the definition section of TECO Energy's Annual Report, and contained a narrative description of TECO Guatemala ).

[672] Claimant's Post-Hearing Brief ¶ 190.

[673] *Id*. ¶ 190.

[674] Respondent's Post-Hearing Brief ¶¶ 245-246, 348-351, 362.

[675] *Id*. ¶ 5 (in Spanish version "*aumentaría*") (emphasis added).

[676] *Id*. ¶ 349 (in Spanish version "*reducción*") (emphasis added).

DKB model.[677] Respondent's assertions are both irrelevant and wrong (apart from being internally inconsistent). They are irrelevant because, even assuming that were true, it would not affect the validity of Claimant's damages calculation. Claimant and its partners indisputably managed EEGSA efficiently and grew the network considerably.[678] Claimant thus was entitled to a VAD that would allow it to earn a 7 percent return (equaling its cost of capital, as calculated by the CNEE and as provided for by the LGE)[679] on the VNR of the assets of a model efficient company, and was entitled to have that VAD calculated by Bates White and disputes concerning that study to be resolved by an Expert Commission. If the result of the tariff process was an increase beyond what TECO allegedly expected ten years earlier, that makes no difference. In fact, it would be usual to take a conservative approach in preparing a model to inform a bid and, certainly, DKB would not have foreseen a sharp increase in commodity prices ten years hence that would affect EEGSA's VAD.

143. Respondent's argument also is wrong, because it misreads the DKB model and wrongly implies that the two figures it references represent the only VAD increase from the start of the first tariff period until 2008. As noted at the Hearing, the model used a variety of inputs to forecast EEGSA's future cash flows.[680] Nowhere in the model does it forecast EEGSA's VAD for future tariff periods. On cross-examination, Respondent showed Mr. Gillette one page of the DKB model which contained a variety of inputs for the VAD, and specifically pointed to the forecasted changes for two of these inputs—the efficiency factor and the real adjustment to the

[677] *Id*. ¶ 320 (in Spanish version "*disminución*") (emphasis added); *see also id.* ¶ 226 (asserting that the DKB model shows that TECO expected that the "VAD would go down in real terms at each tariff review, once the efficiency factors were included in the calculation") (emphasis removed).

[678] Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 256 (noting that during the first five years after EEGSA's privatization, EEGSA dramatically reduced the average waiting time for new service, increased the number of bill payment locations, reduced the number of unread meters, reduced billing errors, increased customer calls, reduced complaint response time, and decreased average time and frequency of disrupted service) (**C-61**); DECA II Management Presentation dated Sept. 2010, at 2 (showing that EEGSA substantially reduced energy losses from 10 percent to 7 percent between 2004 to 2010) **(C-350)**; Kaczmarek I ¶¶ 174-175 (noting that "[s]ince privatization, [ ] EEGSA has been able to substantially reduce its energy losses" and that "in 2008 EEGSA had one of the lowest energy loss percentages in Latin America") **(CER-2)**.

[679] Resolution No. CNEE-04-2008 dated 17 Jan. 2008, at 2 **(C-152)**; LGE Art. 79 **(C-17)**.

[680] Tr. (22 Jan. 2013) 490:11-491:3, 501:1-13 (Gillette Cross); Tr. (22 Jan. 2013) 552:11-553:3 (Tribunal Question); Gillette I ¶ 12 **(CWS-5)**.

VAD factor.[681] Contrary to Respondent's suggestion, Mr. Gillette did not confirm that this showed that EEGSA's VAD was expected to increase by these same percentages. Rather, Mr. Gillette testified that "it would appear that" the figures he was shown by Respondent indicated the represented values,[682] but then made clear in response to further questioning that he was "not sure how in the model those were being applied," to which counsel for Respondent replied, "Yeah. And probably we have the same confusion."[683]

144. As Mr. Gillette testified at the Hearing, TECO expected that EEGSA would become more efficient over time (as indeed it did )[684] and, thus, while the VAD per customer might have been expected to decrease, given the increase in the size of the network, among other things, the overall VAD was expected to increase. This is borne out by the DKB model. While that model does not forecast EEGSA's VAD, it does forecast income from fixed charges and income from capacity charges, which are two of the main components of the VAD.[685] Between 1998 and 2002 the combined fixed charges and capacity charges increased by 219 percent in real terms, and between 2002 and 2008 they increased 12 percent in real terms.[686] In nominal US dollar terms, the DKB model shows this proxy for the VAD increasing 33 percent between 2002

[681] DKB Model, at 45 **(R-160)**.

[682] Tr. (22 Jan. 2013) 497:11 (Gillette Cross).

[683] *Id*. at 498:6-9.

[684] *Id*. at 486:19-22; Gillette I ¶ 12 **(CWS-5)**.

[685] DKB Model at 30 **(R-160)**; Kaczmarek I ¶¶ 71-75 (explaining that the operating costs of the VAD consist of consumer costs (capacity charges), maintenance/administrative costs (fixed charges), and energy losses) **(CER-2)**.

[686] DKB Model at 28, 30, 38, 40 **(R-160)**.

| *in Quetzales* | **1998** | **1999** | **2002** | **2008** |
|---|---|---|---|---|
| Income from Fixed Charge Component | 18,885,499 | 41,554,517 | 56,468,478 | 97,855,659 |
| Income from Capacity Component | 140,862,025 | 318,607,765 | 428,603,524 | 721,735,866 |
| Total | 159,747,524 | 360,162,282 | 485,072,002 | 819,591,525 |
| *Q/US$ Exchange Rate* | *6.26* | *6.59* | *7.70* | *9.81* |
| *US$ Total* | *25,518,774* | *54,652,850* | *62,996,364* | *83,546,537* |
| Inflation Factor | 102.49 | 111.71 | 142.03 | 215.14 |
| Total (adjusted for inflation 1998 Qs) | 159,747,524 | 330,436,239 | 350,031,891 | 390,443,132 |
| | | | Real Change 1998-2002 | 219% |
| | | | Real Change 1999-2002 | 6% |
| | | | Real Change 2002-2008 | 12% |

and 2008.[687] Thus, the DKB model shows that TECO did not expect EEGSA's VAD to decrease and, in fact, expected it to increase by a considerable percentage between tariff periods, significantly in excess of the 2 percent to 3 percent in 2002 and 2008, wrongly referenced by Respondent. As the VAD is the only source of return to the investor from the regulated utility, Respondent's assertion that TECO expected the VAD, in real terms, to decline over successive tariff periods is not only belied by the evidence, but also is unrealistic: if that were the case, an investor's return on its investment would decline over time, particularly where the network was expected to continue to grow.

145. Respondent's argument that its chart plotting EBITDA shows that EEGSA would have obtained excessive profits under the Bates White VAD[688] is equally unavailing. The correct measure of an investor's return or profitability is cash flow to the investor, which is shown through an IRR analysis, and not the company's EBITDA, which is derived from the company's income statement and does not include capital expenditures. It thus is wrong to equate EEGSA's EBITDA with its profitability, as the amounts shown in Respondent's chart are not available to EEGSA's shareholders, because a large portion of that amount never was distributed, but was reinvested in the company as capital expenditures.

146. Likewise, Respondent's argument that Claimant's damages claim is unreasonable, because if EEGSA's VAD were set on the basis of the Bates White study, it would be far in excess of that of CAESS, an El Salvador company,[689] is without merit and is irrelevant to the calculation of EEGSA's but-for value. As an initial matter, the chart that Respondent uses in support of its assertion shows only the VAD for low voltage, and not the VAD for medium

[687] *Id*.

[688] Respondent's Post-Hearing Brief ¶ 348. The chart, moreover, is misleading, because it indicates that the CNEE calculated EEGSA's cost of capital (and, thus, its rate of return on the VNR) to be 11.5 percent during EEGSA's 2003-2007 tariff review period, thereby suggesting that EEGSA's profitability should have been less in its 2008-2013 third tariff review period, when its cost of capital was calculated as 7 percent. *See* Respondent's Post-Hearing Brief ¶ 348. The 11.5 percent figure, however, is pre-tax, where the 7 percent for the 2008-2013 period is post-tax. *See* NERA, Report Stage E, Distribution Added Value and Energy and Power Balance, at 11 **(C-75)**. Converting the 11.5 percent pre-tax rate to a post-tax rate, given Guatemala's 31 percent corporate tax rate (*see* Kaczmarek I ¶ 117 **(CER-2)**), results in a cost of capital of approximately 7.9 percent for the second tariff period.

[689] Respondent's Post-Hearing Brief ¶ 351.

voltage,[690] which represents approximately half of EEGSA's total VAD.[691] Respondent also focuses on only one distribution company in El Salvador; as Mr. Kaczmarek has observed, however, some potentially comparable distribution companies in El Salvador had VADs in 2011 that were double to triple the VAD per kilowatt hour imposed on EEGSA.[692] In addition, El Salvador was used as a benchmark for setting EEGSA's VAD in the first tariff period, immediately before privatization, because there was insufficient data and knowledge to conduct a full tariff review in accordance with the procedure set forth in the newly-adopted LGE, and this also would soften the impact of tariff increases post-privatization.[693] As Dr. Giacchino explained, however, El Salvador proved to be a poor benchmark for several reasons, including the fact that the countries' densities, an important factor in determining an asset base, are not the same in Guatemala and El Salvador.[694] In any event, just because El Salvador was used as a benchmark for EEGSA's VAD in the first tariff period does not in any way mean that EEGSA's VAD was supposed to track CAESS's VAD (or that any damages analysis should depend upon CAESS's VAD). If that had been the intention, there would have been no need to adopt the detailed regulatory regime in the LGE and RLGE requiring that the VAD be calculated every five years by an independent consultant; instead, EEGSA would have been instructed to adopt CAESS's VAD with whatever modifications the CNEE deemed appropriate. Respondent's argument thus turns the LGE on its head by making its transitory provision, which set EEGSA's VAD for the first period by reference to CAESS's VAD, the rule, rather than the exception.

147. Respondent's argument that the Sigla tariffs were reasonable, because DEOCSA and DEORSA were able to earn a profit under the Quantum tariffs, which used the same FRC formula as Sigla, also is wrong. The economics of the companies are very different. DEOCSA and DEORSA, for instance, operate in the large, rural areas of Guatemala, whereas EEGSA

[690] *Id*.

[691] *See* Kaczmarek II, Appendix 3 (showing that the MT VAD is approximately 46% of EEGSA's total VAD) **(CER-5)**.

[692] Kaczmarek I ¶ 124 (noting that these potentially comparable distribution companies in El Salvador had VADs in 2011 ranging from US$ 8.90 kWh to US$ 13.90 kWh) **(CER-2)**.

[693] *Id*. ¶ 86; Giacchino I ¶ 5 **(CWS-4)**; Calleja I ¶ 6 **(CWS-3)**; Memorial ¶ 66.

[694] Giacchino I ¶ 5 & n.4 **(CWS-4)**; *see also id.* (explaining that according to its own data, Synex, the consultant that prepared the report upon which EEGSA's first-period tariffs were set, mischaracterized EEGSA's density and wrongly concluded that EEGSA's VAD should be equivalent to a company in El Salvador with density indicators between a typical sector 2 and 3, instead of between 1 and 2).

distributes electricity in Guatemala's main urban areas, and, thus, their networks are structurally very different.[695] Moreover, the Government continues to subsidize DEOCSA and DEORSA,[696] and those companies obtain a significant part of their revenues from subsidized social tariffs and network expansion funded by government subsidies, such as Guatemala's Rural Electrification Plan. Those companies thus are less reliant than EEGSA on the VAD for their financial success.[697] Tellingly, while 80 percent of EEGSA was privatized for US$ 520 million, that same year, Respondent received only US$ 101 million for 80 percent of both DEOCSA and DEORSA,[698] highlighting the very different expectations of the investors and the economic structures of the companies.

148. Furthermore, as can be seen from the following charts, which were prepared by the CNEE, the Sigla tariffs had a much more severe impact on EEGSA, as compared with the Quantum tariffs that were imposed on DEOCSA and DEORSA in its 2008-2013 tariff period.[699]

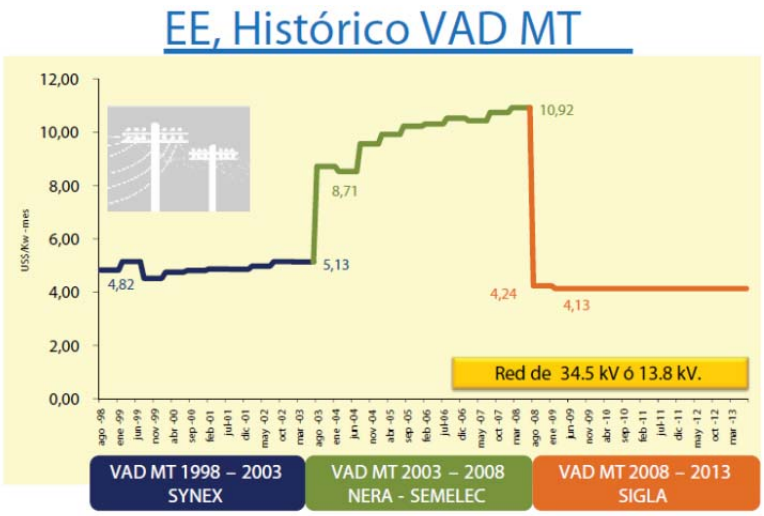
[695] Sales Memorandum at 18 **(C-29)**; *see also* Kaczmarek I ¶ 39 **(CER-2)**.

[696] Economic Consulting Associates, Emerging Lessons in Private Provision of Rural Infrastructure, dated Aug. 2002, at 1-2 **(C-57)**; *see also* Kaczmarek I ¶ 41 **(CER-2)**.

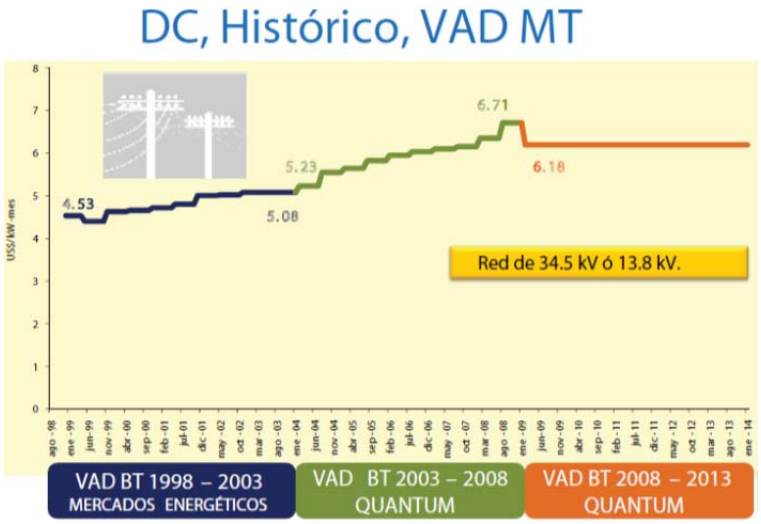
[697] *See, e.g.*, Economic Consulting Associates, Emerging Lessons in Private Provision of Rural Infrastructure, dated Aug. 2002, at 36 (stating that DEOCSA and DEORSA "expect to earn a rate of return of over 20% based on INDE contract prices and present construction contracts") **(C-57)**; *id.* at 38 ("It is believed that DEOCSA/DEORSA earn a healthy profit from the US$650 fee for connecting new rural consumers. It is less clear whether they earn a reasonable profit from selling electricity to those consumers," which is the VAD upon which EEGSA relies for its profits).

[698] InterAmerican Development Bank, *Keeping the Lights on: Power Sector Reform in Latin America*, dated 2003, at 224 **(C-61)**; Central America Report, Guatemala, dated 8 Jan. 1999, at 2 **(C-42)**; *see also* Kaczmarek I ¶ 40 **(CER-2)**.

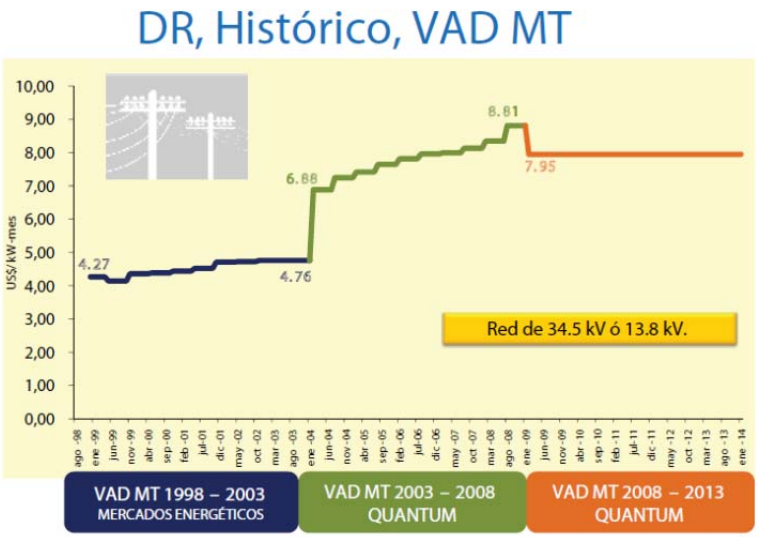
[699] CNEE Annual Report, May 2008-Apr. 2009 term, at 29-31, graphs 5, 7 & 9 **(C-327)**.




Gráfica 5. Evolución VAD EEGSA (media tensión)




Gráfica 7. Evolución VAD DEOCSA (media tensión)




Gráfica 9. Evolución VAD DEORSA (media tensión)

149. As these charts show, EEGSA's medium-tension ("MT") VAD, which represents approximately half of EEGSA's VAD,[700] was decreased by the Sigla tariffs to 4.13 US$/Kw/month.[701] This was a decrease from the rate at the end of the second tariff period of 10.92 and *less than* the rate in place at the beginning of the first tariff period of 4.82.[702] As Mr. Kaczmarek has observed, it defies economic sense for EEGSA's VAD to have decreased to levels below that which was in place at the time of its privatization.[703] Neither DEOCSA's nor DEORSA's 2008-2013 VAD was decreased to such an extent. DEOCSA's MT VAD was decreased just slightly from 6.71 at the end of the second tariff period to 6.18, which remained well above its first period MT VAD of 4.53.[704] Likewise, DEORSA's third-period MT VAD decreased only slightly from 8.81 to 7.95, also well above its first period rate of 4.27.[705] Respondent's contention that DEOCSA and DEORSA were similarly affected by their 2008-2013 tariff reviews and, yet, managed to earn a rate of return within the LGE's benchmark thus is wrong.

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[700] *See* Kaczmarek II, Appendix 3 (showing that the MT VAD is approximately 46% of EEGSA's total VAD) **(CER-5)**.

[701] CNEE Annual Report, May 2008-Apr. 2009 term, at 29, graph 5 **(C-327)**.

[702] *Id*.

[703] Kaczmarek I ¶ 14 **(CER-2)**; *see also* Kaczmarek II ¶ 57**(CER-5)**.

[704] CNEE Annual Report, May 2008-Apr. 2009 term, at 30, graph 7 **(C-327)**.

[705] *Id*., at 31, graph 9.

150. Respondent's continued reliance on Mr. Damonte's benchmarking analysis also is misplaced.[706] In both his expert report and at the Hearing, Dr. Barrera explained in detail why Mr. Damonte's analysis was severely flawed and completely unreliable.[707] Among other things, he explained that Mr. Damonte used an over-simplistic formula,[708] that his analysis improperly spanned several countries and years[709] and included non-comparable companies, including many that were not operating under a VNR regulatory regime,[710] that his approach introduced biases against companies with low capital costs,[711] and his analysis failed to reflect the fact that economies of scale in electricity distribution companies change depending on company size.[712] In its Reply Post-Hearing Brief, Respondent once again fails to even acknowledge, let alone refute, these far-reaching criticisms, and merely reiterates Mr. Damonte's findings from his earlier expert report.[713] For the reasons Dr. Barrera has explained, Mr. Damonte's analysis should be rejected.

151. Similarly misguided is Respondent's suggestion that the Bates White revised VAD study was unreasonable, because EPM in its VAD study for EEGSA's 2013-2018 tariff review "proposed a mere 15% increase,"[714] and that, because EPM stated that it expected "minimal change in the level of the VAD in the future," "the 2008 tariffs were sufficient for EEGSA to sustain profitable operations."[715] Notably, while Respondent characterizes EPM's VAD study as "reasonable," it fails to disclose that the CNEE made 108 observations, disagreeing with many aspects of EPM's VAD study.[716] As a recent press article on the subject

[706] *See* Respondent's Post-Hearing Brief ¶ 222.

[707] Tr. (5 Mar. 2013) 1289:22-1290:2, 1309:9-1313:17 (Barrera Direct); Barrera Direct Presentation, Slides 28-29; Barrera ¶¶ 223-245**(CER-4)**.

[708] Barrera ¶¶ 230-232**(CER-4)**; Tr. (5 Mar. 2013) 1311:10-12 (Barrera Direct); *id.* at 1311:18-1312:22 (Barrera Tribunal Question).

[709] Barrera ¶¶ 231, 236 **(CER-4)**; Tr. (5 Mar. 2013) 1310:9-1311:2 (Barrera Direct).

[710] Barrera ¶¶ 237-239 **(CER-4)**; Tr. (5 Mar. 2013) 1310:10-21 (Barrera Direct).

[711] Barrera ¶¶ 225-227 **(CER-4)**; Tr. (5 Mar. 2013) 1309:22-1310:8 (Barrera Direct).

[712] Barrera ¶ 234 **(CER-4)**; Tr. (5 Mar. 2013) 1312:4-22 (Barrera Tribunal Question).

[713] Respondent's Post-Hearing Brief ¶ 222.

[714] *Id*. ¶ 15.

[715] *Id*. ¶ 362.

[716] El Periódico, *CNEE y EEGSA discrepan por VAD*, 30 May 2013 **(C-635)**.

reports, "speculation is beginning as to how [the CNEE] will resolve the issues of the CAT [*i.e.*, the setting of the transmission rates] and the VAD *as well as the shadow of political interference over the technical decisions that it should issue*."[717] Furthermore, as Claimant observed in its Post-Hearing Brief, EPM paid less for EEGSA than it would have paid had Respondent not violated its Treaty obligations by setting EEGSA's VAD unilaterally based upon Sigla's VAD study, and thus, EPM can operate profitably with a lower VAD.[718] Guatemala thus obtained the benefit of a high privatization price without allowing Claimant and its partners to recover and make an economic return on their investment.

152. None of Respondent's arguments concerning the alleged unreasonableness of Bates White's VNR and VAD thus withstands scrutiny. By contrast, both Dr. Barrera and Mr. Kaczmarek have demonstrated that the 28 July 2008 Bates White VAD was reasonable, while the Sigla VAD was unreasonable from both a technical and economic perspective, respectively. Respondent's remark that "Dr. Barrera's opinion that the 28 July VNR was reasonable was not based on a complete analysis of the study, but rather an analysis of the latest modifications," distorts his testimony.[719] Dr. Barrera clearly explained that he had been asked to "analyse the reasonableness" of the Bates White 28 July 2008 VNR and VAD, "particularly in light of the Expert Commission's decisions."[720] He concluded that, because several of the Expert Commission's decisions that were made in favor of the CNEE, in whole or in part, could have reasonably been made in favor of EEGSA, because each of the Expert Commission's decisions that favored EEGSA was proper, and because all of the Expert Commission's decisions had been incorporated into the revised study, "the VNR and VAD calculated in that study were lower than they otherwise reasonably could have been."[721] And as Mr. Kaczmarek repeatedly has shown,

[717] El Periódico, *CNEE con adjustado plazo para fijar peaje y costos de distribución*, 4 July 2013 (emphasis added) **(C-636)**.

[718] Claimant's Post-Hearing Brief ¶ 172.

[719] Respondent's Post-Hearing Brief ¶ 209.

[720] Barrera ¶ 208; *see also* Barrera, Direct Presentation Slide 2.

[721] Barrera ¶ 208; *see also* Tr. (5 Mar. 2013) 1289:6-9 (testifying that "[w]e looked at the VAD and the VNR that came out of the July 28 study, and we find those two values to be reasonable and conservative.") (Barrera Direct); *id*. at 1290:11-12 (testifying that the Sigla study is "economically and technically flawed"); *id.* at 1308:12-1309:8 (stating that the "Expert Commission's standards that were applied in this case perhaps were very conservative, and they could have been made in favor of EEGSA," and providing examples); Barrera, Direct Presentation Slides 26, 33-34.

"it defies economic logic that [EEGSA's] VNR could actually decrease by approximately 20 percent" between 2003 and 2008, as it did with the imposition of the Sigla tariffs,[722] and a "decrease in [EEGSA's] VAD to a level below that established in the transitional First Rate Period [as happened with the imposition of the Sigla VAD] does not make economic sense given the expansion in the network and inflation that occurred over the intervening 10-year period."[723]

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. Claimant, however, has demonstrated that the capital expenditure assumptions that Respondent urges Claimant to adopt (which it itself does not even use in its own calculation), are unrealistically high and serve only to diminish EEGSA's value in the but-for scenario and allow Respondent to reach the unrealistic conclusion that TECO has sustained essentially no damages. The record demonstrates, however, that the CNEE decreased EEGSA's VAD by more than 45 percent by unilaterally adopting the Sigla study, and EEGSA's revenue decreased by approximately 40 percent, causing both leading rating agencies to downgrade EEGSA's credit rating.[724] While Respondent goes to great lengths to argue that Claimant's investment was not harmed by the Sigla tariffs, it notably ignores these central facts, which expose the unreliability of Respondent's defense in this case.

[722] Kaczmarek I ¶ 114; *see also* Kaczmarek II ¶ 57 (noting that, in his first report, he had "explained how SIGLA had reached the completely illogical conclusion that the VNR should have decreased from 2003 to 2008) **(CER-5)**; Tr. (5 Mar. 2013) 1511:8-1512:13 (explaining the factors that should have caused EEGSA's VNR to increase between 2003 and 2008, and stating that Sigla's VNR "cannot be rationally explained given those factors") (Kaczmarek Direct); Kaczmarek, Direct Presentation Slides 33-36.

[723] Kaczmarek I ¶ 14 **(CER-2).**

[724] TECO Energy's Form 10-K dated 26 Feb. 2009, at 49 **(C-324)**; TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, at 2 **(C-326)**; TECO Guatemala, Inc., Operations Summary for Periods Ended Sept. 30, Board Book Write-up dated Oct. 2008, at 2 **(C-303)**; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**; Moody's Investor Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**; Tr. (22 Jan. 2013) 573:10-21 (Callahan Direct); Callahan II ¶ 3 **(CWS-8)**; Callahan I ¶ 6 **(CWS-2)**; Gillette I ¶ 24-25 **(CWS-5)**.

## VI. CONCLUSION

154. For all the reasons set forth above and in Claimant's previous submissions, Claimant respectfully requests that the Tribunal issue an Award:

1. Finding that the Tribunal has jurisdiction *ratione materiae* over Claimant's claim arising under Article 10.5 of the DR-CAFTA;

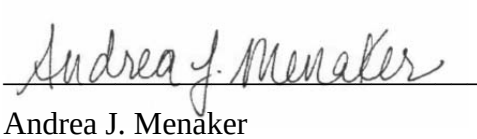
2. Finding that Respondent has breached its obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment;

3. Ordering Respondent to pay compensation to Claimant in the amount of US$ 243.6 million;

4. Ordering Respondent to pay interest on the above amount at 8.8 percent, compounded from 1 August 2008 until full payment has been made; and

5. Ordering Respondent to pay Claimant's legal fees and costs incurred in these proceedings.

Respectfully submitted,



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8 July 2013