INTERNATIONAL CENTRE FOR THE SETTLEMENT

OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/10/23

TECO GUATEMALA HOLDINGS, LLC

CLAIMANT

REPUBLIC OF GUATEMALA

RESPONDENT

RESPONDENT'S REPLY POST HEARING BRIEF

8 JULY 2013

The official text of of the *Respondent's Reply Post Hearing Brief* is its version in the Spanish language. Any discrepancy between the English and Spanish versions should be resolved in favor of its official version in the Spanish language.

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I. INTRODUCTION

1. In accordance with the Tribunal's orders dated 11 and 22 March 2013 and the agreement of the parties dated 25 June 2013, the Republic of Guatemala (***Guatemala***) submits its Reply to the Post Hearing Brief from Teco Guatemala Holdings, LLC (***TGH***).[1] In order to avoid repeating the arguments previously presented in this arbitration, Guatemala has limited itself in this brief to responding to the most relevant issues raised in TGH's Post Hearing Brief. With respect to the rest of its arguments, Guatemala respectfully refers the Tribunal to its prior submissions and, in particular, to its Post Hearing Brief dated 10 June 2013.

2. In its Post Hearing Brief, TGH continues to describe allegedly arbitrary actions and bad faith on the part of the CNEE during EEGSA's tariff review process for the period of 2008–2013, but does so without submitting any concrete evidence. It continues to follow the strategy of characterizing facts in an attempt to convince this Tribunal that there is a genuine dispute under the Treaty. Those characterizations attempt to conceal the purely regulatory nature of the dispute that TGH has submitted to this Tribunal. TGH merely disagrees with the CNEE with respect to how the regulatory framework should have been interpreted and applied in the 2008 tariff review. But the CNEE, the regulator, performed its duties in accordance with its obligation to comply with and enforce the regulation (RGLE), justifying its decisions and assuming its responsibilities before the Guatemalan courts. And the most important court, the Constitutional Court of Guatemala, ultimately agreed with its actions.

3. Knowing all of this (and taking into account the precedent of the *Iberdrola* award), TGH attempts to present another scenario in these proceedings. It asserts that the CNEE was acting arbitrarily by trying to interfere with the Expert Commission. It asserts that the amendment of Article 98 of the RLGE in 2007 was a fundamental change in the regulatory framework, but this assertion does nothing more than make evident this same regulatory dispute: the debate is over whether or not the powers and responsibilities exercised by the CNEE had been previously contemplated in the original regulatory framework, as was recognized by the Constitutional Court. That is confirmed by the fact that EEGSA and TGH

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[1] Any capitalized word that is not expressly defined in this brief has the same meaning as the one given in Guatemala's previous briefs.

never objected to the amendment to the RLGE prior to this arbitration. In fact, TGH did not even mention the amendment of Article 98 in its detailed Notice of Intent under the Treaty. TGH even attempts to bring up Article 98 *bis*, another irrelevant element in this dispute given that it was never applicable. The claim of violation of legitimate expectations, which in any event does not apply in the context of the international minimum standard, also depends on the debate about the correct interpretation and application of the RLGE.

4. With respect to the technical and financial issues, Mr. Barrera, TGH's expert, confirmed at the Hearing that the discrepancy between the parties basically lies in the choice of the optimal construction units to be used in constructing the model company that would serve as the basis for setting the tariffs for the five-year period of 2008–2013.[2] In other words, what materials and what quantity of facilities should be used to calculate EEGSA's VNR and VAD. The other dispute is over the level of depreciation that should be applied in the tariff review for the purposes of calculating EEGSA's return.

5. It is not the task of this Tribunal to decide what the optimal construction units are or what the appropriate level of depreciation is for EEGSA, nor is it incumbent upon the Tribunal to settle issues that derive from those disagreements. These are regulatory and technical issues under Guatemalan law to be resolved by the proper regulatory agency and (in the event of any discrepancy) by its courts. Those issues have already been resolved by the highest legal authority in Guatemala, with full respect for the guarantees of due process, something which TGH has admitted given that it does not complain of any denial of justice.

6. The weakness of TGH's arguments becomes apparent when the strategy used in its Post Hearing Brief is analyzed: (i) repeated references to extensive quotations from its own direct examinations of its own witnesses and experts;[3] (ii) limited references to quotations from the cross-examinations of Guatemala's witnesses and experts (which were isolated and generally taken out of context); and (iii) a battery of irrelevant, inappropriate and untimely procedural arguments.

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[2] Tr. (English), Day Six, 1466:4-7, Barrera.

[3] The Claimant cited its direct examination of Mr. Kaczmarek 47 times, its direct examination of Mr. Barrera 19 times and its direct examination of Mr. Alegría 15 times.

7. For example, TGH complains extensively that Guatemala had not presented certain witnesses "who have real and personal knowledge of the disputed facts".[4] In particular, TGH complains that Guatemala had not presented as witnesses the members of the CNEE board of directors in 2003. But that tariff review did not form any part of the dispute raised by TGH. TGH also complains that certain members of the CNEE's technical teams in 2008 were not called as witnesses. Guatemala has presented as witnesses the persons who made the decisions questioned by TGH in this arbitration. And beyond its complaints, TGH has not been able to indicate any specific and relevant issue that has not been addressed by Messrs. Moller and Colom at the Hearing.

8. TGH also objects that Guatemala did not present any testimony from its technical consultant, Mercados Energéticos. This Tribunal will recall that three witnesses from Mercados Energéticos were presented at this arbitration but refused to cooperate shortly after they were hired as consultants by EEGSA itself on the on-going tariff review. In any event, it is surprising that TGH makes these assertions when it has avoided (without even attempting to give an explanation) presenting as a witness the president of EEGSA, Mr. Gonzalo Pérez, whose testimony would have been key. Mr. Pérez could have answered, for example, how it is possible that the failure to adopt the Bates White study (which required a 58% increase in EEGSA's VAD) could affect the value of EEGSA, when he had voluntarily offered as a starting point for his "negotiation" only a 10% increase in the VAD. Without hearing from Mr. Pérez (who continues to work for TGH's partner, Iberdrola), the only possible answer is that the Bates White study reflected an over-valued VAD and, as was determined by the CNEE, it could not be used to set the tariffs that would be applied to millions of Guatemalans for five years.

9. In another of its procedural arguments, TGH accuses Guatemala of having held back documents requested by the Tribunal or documents that Guatemala has agreed to deliver to it.[5] In particular, TGH complains of the failure to deliver "minutes of meetings of the CNEE." Although the CNEE's initial internal regulations of 1998 stipulated that this type of minutes would be prepared (and the book itself exists, as confirmed by Mr. Moller[6]), in practice, that

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4 Claimant's Post-Hearing Brief, para. 6.

5 Post-Hearing Brief, para. 7.

6 Tr. (English), Day Five, 993:5-10, Moller.

has not happened. The Directors have historically maintained that since the CNEE approves its decisions in the form of resolutions and all the resolutions of the CNEE are public, they could not justify the added resources necessary for the preparation of minutes for each meeting. Mr. Moller also said that he had not been asked for those minutes,[7] which is also correct given that the contact at the CNEE for this matter was not Mr. Moller but the CNEE's Legal Department.

10. TGH also incorrectly accuses Guatemala of having failed to deliver certain promotional material used for the privatization of EEGSA.[8] That accusation is surprising, to say the least, because Guatemala submitted all the relevant documents that were in its possession (eight).[9] Moreover, it is EEGSA itself that should have been in possession of those documents. As TGH is well aware, EEGSA was appointed as the entity in charge of the share sale process in the privatization.[10] EEGSA, in turn, chose Salomon Smith Barney as its financial advisor for this assignment.[11] Consequently, all the information relating to promotional materials, presentations and other documents with respect to the privatization of EEGSA—including the presentation given by the CNEE before the High-Level Committee on 13 March 1998—was collected and centralized at EEGSA and not at other governmental entities, institutions or ministries, as TGH claims. It is also curious that TGH, which claims to have relied on certain "expectations" supposedly created in the minds of the Teco group (but not TGH) during the bidding process, has not been able to provide any document relating to that stage that would show what representations it had supposedly received from Guatemala.[12]

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7 Tr. (English), Day Five, 993:17-19, Moller.

8 Post-Hearing Brief, para. 7, Request B.1.

9 Memo from Freshfields Bruckhaus Deringer LLP dated 11 April 2012, **Exhibit R-251**.

10 Service Agreement between EEGSA and the Guatemalan state, 10 September 1998, **Exhibit R-19**, Clauses One, Two and Three; Government Contract No. 865-97, 17 December 1997, **Exhibit C-23**, Articles 3, 4 and 5.

11 Memorial, para. 47.

12 TGH cannot seriously allege bad faith on the part of Guatemala in the submission of documents, when Guatemala submitted around 300 documents while TGH provided only 50.

11. In reality, TGH seeks to convince this Tribunal that it is correct by relying on supposed witnesses who did not appear or documents that it did not obtain. What TGH should have done from the beginning is focus on presenting arguments and concrete evidence (and not simply characterizations) that would establish whether Guatemala's international state responsibility was implicated. It has not done so. Its inability to prove the existence of an international claim and, even less so, that there was liability on the part of Guatemala, must lead to the rejection of its claim.

II. THE TRIBUNAL'S LACK OF JURISDICTION

A. TGH'S POSITION WITH RESPECT TO THE APPLICABLE LAW CONFIRMS THE PURELY REGULATORY NATURE OF ITS CLAIM

12. In its Post Hearing Brief, TGH reiterates several times that "a State may not rely upon the provisions of its own internal law to avoid its international obligations."[13] This is, in fact, a widely recognized principle of international law: in the context of a genuine international claim, it is international law, rather than national law, that determines whether the State's conduct has violated an international standard. However, that principle is not applicable in this case because TGH has not submitted a genuine international claim.

13. TGH's claim hinges upon whether the CNEE has acted in accordance with the Guatemalan regulatory framework. TGH cannot argue that Guatemalan law is irrelevant when it is specifically asking this Tribunal to decide whether: (i) the CNEE should have considered the Expert Commission's report to be binding, (ii) the Expert Commission had the power to approve the Bates White study, (iii) the CNEE could have adopted the Sigla study, and (iv) the CNEE correctly calculated the VAD when it took into account the depreciation, among other things. All of these relate to nothing more than the interpretation of the regulatory framework. Therefore, the Guatemalan regulations play a central role in resolving this dispute.

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[13] Claimant's Post Hearing Brief, para. 9. See also *ibid*., paras. 84, 145.

14. As the tribunal explained in *Iberdrola*, "[i]t is true, as the Claimant pointed out, that the legality of a State's conduct in light of its domestic law does not necessarily mean that this conduct was also legal under international law,"[14] but:

> The Claimant cannot validly maintain that the national law of Guatemala must be taken as a fact in the dispute that it submitted to the Tribunal. The Claimant initiated this process for the resolution of an issue of "law," a series of disagreements regarding standards of the Guatemalan legal system with respect to which there was, in its opinion, a mistaken interpretation by the regulatory body and the Guatemalan legal system, which it now asks this Tribunal to review.[15]

15. Therefore, as much as the principle of international law invoked by TGH is indisputable, that principle is inapplicable in this case as TGH claims, because we are not faced with a truly autonomous international claim, with its own standing, separate from the domestic regulatory dispute. The unacceptable result to which the application of the principle invoked by TGH would lead, according to which Guatemala could be found liable even if the CNEE had acted according to its domestic law, demonstrates the purely regulatory nature of its claim.

B. TGH'S DESCRIPTION OF THE DISPUTE IN ITS POST HEARING BRIEF CONFIRMS THE PURELY REGULATORY NATURE OF THE CLAIM

16. As Guatemala has already demonstrated in previous briefs,[16] TGH cannot hide the fact that its claim is purely regulatory in nature and subject to Guatemalan Law. This is confirmed in its Post Hearing Brief.

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[14] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 367.

[15] *Ibid.*, para. 365.

[16] See Counter-memorial, sections II, paras. 47-131, and IV.B, paras. 495-540; Rejoinder, sections III, paras. 31-78, and IV.B, paras. 96-164; Respondent's Post Hearing Brief, section II, paras. 33-80.

1. The supposed arbitrariness alleged by TGH is in reality a mere disagreement over the interpretation of the regulatory framework

17. The first sentence in the section of the Post Hearing Brief on arbitrariness demonstrates the regulatory nature of the dispute.[17] TGH alleges: "The CNEE's refusal to accept the Expert Commission's resolution […], and its decision to impose […] its own VAD on EEGSA that was calculated on the basis of an undervalued and depreciated VNR, constitute manifestly arbitrary treatment by Guatemala."[18] Leaving aside the characterizations and conceptual and factual errors of these allegations, all of these issues are solely concerned with the correct interpretation of the regulatory framework.

18. TGH attempts to color its claim by arguing, for example, that the CNEE supposedly attempted to manipulate the Terms of Reference,[19] and "to influence the Expert Commission."[20] However, its real claim concerns only the scope of the responsibilities and powers of the CNEE and the Expert Commission in the tariff review. In the words of TGH:

> After the CNEE first attempted […] to manipulate the tariff review process through EEGSA's ToR and then through the Expert Commission when the tariff review process did not provide the CNEE with the predetermined result that it wanted, the CNEE simply disavowed the central tenets of its regulatory regime and unilaterally imposed its own, substantially reduced VAD on EEGSA.[21]

19. Therefore, TGH's own words reveal that behind its accusations of arbitrariness, there is nothing more than a dispute over the correct interpretation of the regulatory framework: its complaint is that the CNEE, after having supposedly failed to manipulate the Terms of Reference and the Expert Commission, "ignored the fundamental principles of its regulatory system and unilaterally imposed its own, considerably reduced VAD on EEGSA." The dispute,

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[17] The section of the Claimant's Post Hearing Brief on the supposed arbitrariness of the CNEE is III.C ("Guatemala Manipulated The Outcome Of EEGSA's 2008-2013 Tariff Review Through A Series Of Arbitrary And Unjustified Actions"), paras. 117-164.

[18] Claimant's Post Hearing Brief, para. 117.

[19] *Ibid*., paras. 118-129.

[20] *Ibid*., Section III.C.4, and paras. 148-152.

[21] *Ibid*., para. 159 (Emphasis added).

therefore, concerns the powers of the CNEE according to the regulatory framework and, in particular, over whether the CNEE could set the tariffs on the basis of an independent study prepared by its own consultant.

20. These issues were dealt with by the Constitutional Court, the highest court in the Guatemalan legal system, which upheld the CNEE's interpretation. The Constitutional Court established that the CNEE has the responsibility to enforce the law,[22] to set the Terms of Reference and the methodology for the tariff reviews,[23] to approve the tariff studies,[24] to approve the VAD,[25] and to determine the tariffs.[26] The Constitutional Court also confirmed that those functions cannot be delegated to a body whose existence is temporary and which cannot be held accountable. It is worth citing some passages from the decisions in this regard:

Decision of 18 November 2009:

> Article 4 of the General Electricity Law created the National Electricity Commission as the system's regulatory entity, empowering it to: "Determine the transmission and distribution tariffs, subject to regulation in accordance with this law, as well as the methodology for their calculation" […] Thus, pursuant to Articles 4, subparagraph c), and 71 of the cited law, the National Electricity Commission calculates the tariffs, and it does so after receiving the report from the Expert Commission, which, as has been mentioned, concludes with that report its advisory role in the decision by the competent authority to set the tariff schedules […] The authority of the National Electricity Commission to establish the tariff schedules is a legitimate power assigned by the General Electricity Law, by which it carries out a function of the State, and for the exercise thereof, it is guided by Articles 60, 61, 71 and 73 of the cited law, which tame any excess of its discretional authority […].[27]

Decision of 24 February 2010:

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22 LGE, **Exhibit R-8,** Art. 4(a); RLGE, **Exhibit R-36**, Art. 3.

23 LGE, **Exhibit R-8**, Arts. 4(c), 74 and 77; RLGE, **Exhibit R-36**, Art. 97.

24 RLGE, **Exhibit R-36**, Arts. 92, 98 and 99.

25 LGE, **Exhibit R-8,** Arts. 60, 61, 71 and 76; RLGE, **Exhibit R-36**, Arts. 82 and 83.

26 LGE, **Exhibit R-8,** Art. 4(c), 61, 71 and 76; RLGE, **Exhibit R-36**, Art. 99.

27 Decision of the Constitutional Court (Consolidated cases 1836-1846-2009) Direct Appeal of the Constitutional Relief Judgment, 18 November 2009, **Exhibit R-105**, pp. 30-32 (Emphasis added).

> [O]ne does not find, either in the Law that regulates the matter, or in its respective Regulations—the only set of rules applicable to the case in the Guatemalan legal system—any provision that assigns to the Expert Commission a responsibility other than that of pronouncing itself on the discrepancies previously referenced. […] [W]ith the issuance of its respective opinion, the Expert Commission fulfilled the responsibilities that the Law in the matter and its respective Regulations entrusted to it for that purpose. Therefore, having fulfilled its legal responsibilities, not being a permanent body, but rather one of a temporary nature, with the responsibility to issue a report, pursuant to the law, that should assist in the determination of the tariffs by the authority with power to do so, no longer having any other involvement in the proceeding, according to the law, no harm could be caused to the person seeking constitutional relief from the dissolution thereof, inasmuch as the actions of the challenged authority adhered to the procedure established in the Law and Regulations governing the matter. […] [A]ssigning to the Expert Commission in question the responsibility to resolve the conflict existing between the person seeking constitutional relief and the authority appealed against and recognizing its competence to issue a binding decision, and even more, to recognizing its responsibility to approve the tariff studies, as the Court might decide in due course, would be contrary to the laudable principle of legality […] because according to the provisions of the General Electricity Law, and its respective RLGE, […] the responsibility to set the distribution tariffs and approve the tariff studies is within the authority of the National Electricity Commission, as the solely responsible entity.[28]

21. The decisions of the Constitutional Court are dispositive of questions of Guatemalan law, as illustrated by the *Mobil v. Canada* award:

> The question of consistency […] was fully addressed by the Canadian courts, and resolved as a matter of Canadian law by the judgment of September 4, 2008 of the Newfoundland and Labrador Court of Appeal. In that case the majority rejected an appeal from a decision that found that the Board had acted lawfully under Canadian law. […] the Court of Appeal's ruling on Canadian law is dispositive. Although this Tribunal has a different task from that of the Court of Appeal, namely to determine whether there has been a violation of the law of NAFTA, it is not for us to express a view as to whether the Court of Appeal got its decision on Canadian law wrong. That decision is dispositive of the issues that arise as a matter of Canadian law. The conclusions reached by the Court of Appeal are relevant to and underpin our ruling that no violation of Article 1105 has occurred.

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[28] Decision of the Constitutional Court (Case 3831-2009) Appeal for Constitutional Relief, 24 February 2010, **Exhibit R-110**, pp. 31-34 (Emphasis added).

> The Court of Appeal concluded that as a matter of Canadian law the Board had acted reasonably and lawfully in exercising its authority […]. In reaching that conclusion, the Court of Appeal considered the regulatory framework within which the Claimants made their investment.[29]

22. TGH cannot stand before this Tribunal and again assert that its interpretation of the regulatory framework is the correct one—rather than that of the CNEE, as confirmed by the Constitutional Court—and that this constitutes arbitrariness. If this were so, the decisions of the Constitutional Court that upheld the CNEE's interpretation would also be vitiated by arbitrariness and, therefore, TGH should have challenged those decisions for constituting denial of justice. However, TGH has not submitted such a claim.

2. The alleged fundamental changes to the regulatory framework are also mere disagreements over the interpretation of the regulatory framework

23. The same applies with respect to the claim regarding changes to the regulatory framework, which is based, according to TGH, on the allegation that the amendment of Article 98 of the RLGE in 2007 "fundamentally changed the regulatory framework."[30] TGH, however, does not explain why that amendment was neither challenged locally as unconstitutional (by EEGSA or by any other distributor), nor presented as constituting a violation of the Treaty in the Notice of Intent of January 2009. The latter means that such a claim is time-barred under the Treaty and is outside the jurisdiction of the Tribunal.[31]

24. TGH tries to defend itself by arguing that at that time (in January 2009) "the CNEE had not invoked amended RLGE Article 98 as the legal basis for approving its own VAD study."[32] However, it contradicts itself when it asserts that the CNEE, during the tariff review process, allegedly "arbitrarily invoked [the] newly-amended RLGE Article 98 […] in a bad faith attempt to derail the tariff review process and to grant itself unfettered discretion to set

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29 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB (AF)/07/4) Decision on Liability and *Quantum* (public version), 22 May 2012, **Exhibit RL-37**, paras. 167-168.

30 *Ibid*., title of Section III.B.1.

31 Article 98 was amended on 5 March 2007, but TGH did not submit a claim against it under the Treaty until 20 October 2010 when it submitted the Notice of Arbitration. Under Article 10.18.1 of the Treaty, "[n]o claim may be submitted to arbitration pursuant to this Section, if more than three years have elapsed since the date on which the claimant had or should have had knowledge of the alleged violation […]." In other words, TGH's claim against the amendment of Article 98 was time-barred at the moment when TGH submitted it.

32 Claimant's Post Hearing Brief, para. 116.

EEGSA's VAD."[33] The contradiction is obvious, and demonstrates how difficult it is for TGH to rely on the amendment of Article 98 in support of its case: if TGH complains that the CNEE arbitrarily invoked Article 98, then the amendment *per se* cannot be the problem, but rather the interpretation given to that provision by the CNEE.

25. It is clear that the CNEE's power to approve tariff studies and the VAD was not affected by the amendment to Article 98 of the RLGE. That power already existed. For example, the CNEE's supposed obligation to base the VAD solely and exclusively on the distributor's tariff study was provided for in the draft LGE,[34] but was expressly eliminated from the draft during the legislative proceedings.[35] TGH refers to Article 74 of the LGE,[36] but Article 74 simply provides that a tariff study by the distributor is necessary to start the tariff review process; it does not provide that such study is the one that the CNEE must approve at the conclusion of the process. There is no country in the world in which the determination of the VAD is assigned to the distributor's tariff study or an Expert Commission. In Chile it is the VNR (not the VAD) that is determined by a permanent and regulated Panel of Experts. The binding nature of the decision of such panel is, moreover, expressly established in the law.[37] Notably, Article 76 of the LGE, which regulates the conclusion of the tariff review process, states that the CNEE "shall use the VADs," not the distributor's tariff study, "to structure a set of tariffs."

26. In any event, TGH's theory that Article 98 of the RLGE introduced a fundamental change to the regulatory framework would first require TGH to show that its interpretation of the regulatory framework is the correct one. That is to say, this definitively concerns a regulatory dispute regarding the scope of the powers of the CNEE and the Expert Commission according to the regulatory framework.

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33 *Ibid*., Section III.C.2 and para. 130.

34 LGE, final draft, **Exhibit C-13**, Art. 54.

35 LGE, **Exhibit R-8,** Art. 60.

36 Claimant's Post Hearing Brief, para. 107.

37 General Electric Services Law (Chile), approved by Decree 4/20018, 2 May 2007, **Exhibit C-482**, Articles 208-211.

27. That Article 98 of the RLGE did not change the regulatory framework is proven by the fact that in its decisions of 18 November 2009 and 24 February 2010—as the passages from these decisions quoted above demonstrate—the Constitutional Court ruled in favor of the CNEE not on the basis of Article 98 of the RLGE, but rather on the basis of the responsibilities of the CNEE as the regulator in charge of setting the tariffs and approving the VAD.

28. Therefore, the amendment of Article 98 of the RLGE could not have been the cause of any harm to TGH. TGH admits as much when it states that the problem is that the CNEE allegedly "arbitrarily invoked [the] newly-amended RLGE Article 98."[38] Therefore, TGH's complaint regards nothing more than the CNEE's interpretation of its powers pursuant to the regulatory framework. Moreover, this interpretation is correct, as the decisions of the Constitutional Court demonstrate.

29. With a view to showing that the amendment of Article 98 of the RLGE did have a "fundamental" impact in this case, TGH distorts a passage of the decision of 24 February 2010 (as it had already done at the Hearing[39]) in its Post Hearing Brief. TGH states:

> And in its 24 February 2010 decision, the Court ruled that "[RLGE Article 98 provides] that, if the Distributor fails to send the studies or corrections to those studies, the [CNEE] (governmental agency of public law) may issue and publish the related tariff scheme based on the tariff study prepared independently by the commission or making the necessary corrections to the studies prepared by the distributor" and that, "[i]n view of the above, *the [CNEE] caused no damage to the petitioner when it dissolved the Expert Commission and when it followed the procedure to devise the tariff schemes* . . . [40]

30. TGH suggests that the Court's conclusion, emphasized in italics by TGH in the passage above, is based on the reference to Article 98 of the RLGE in the initial part of the passage (notably, the only reference to Article 98 contained in the two Court decisions), but that is not so. The correct quotation of the decision is as follows:

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[38] Claimant's Post Hearing Brief, title of Section III.C.2 and para. 130.

[39] Respondent's Post Hearing Brief, para. 62, citing the Claimant's Opening Statement at the Hearing: Tr. (English), Day One, 108:17-20, and, for example, also in 130:20-131:3, 159:3-11, and 343:8-11.

[40] Claimant's Post Hearing Brief, para. 115 (Emphasis in original).

> [T]he National Electricity Commission has not injured the person seeking constitutional relief in any way by resolving to dissolve the Expert Commission and in having continued with the proceeding in question for the setting of the tariff schedules, given that such competence, which constitutes a state responsibility as has been previously stated, is a legitimate power assigned to that entity by the General Electricity Law, in accordance with what has been established in that regard by Articles 60, 61, 71 and 73 thereof.[41]

31. It is clear that the point, as the Court explains, is that the LGE provides (and has always provided) a basis for the power of the CNEE to decide on the VAD, and the amendment to Article 98 of the RLGE did not change this. TGH disagrees with this point, which it can legitimately do, but such disagreement is no more than a disagreement regarding the interpretation of the regulatory framework; it is not a dispute under the Treaty based on a fundamental change to the regulatory framework.

3. The alleged violation of TGH's legitimate expectations is also a mere dispute regarding the correct interpretation and application of the regulatory framework

32. The doctrine of legitimate expectations does not apply in the context of the international minimum standard, which is the standard invoked by TGH in this case.[42] Nevertheless, the reality is that the allegations of violation of legitimate expectations are simply another way in which TGH seeks to conceal the fact that the present dispute concerns nothing more than the interpretation of the regulatory framework.

33. In this regard, it is interesting that TGH has "discovered" during these proceedings its legitimate expectations, their importance, and that those expectations were generated by the EEGSA Sales Memorandum. In its Notice of Arbitration of October 2010, neither the phrase "legitimate expectations" nor the Sales Memorandum were mentioned. In the Memorial, TGH mentions the Sales Memorandum only in order to support its interpretation of the regulatory framework;[43] that framework alone is mentioned as a source of its supposed expectations. The

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41 Decision of the Constitutional Court (Case 3831-2009) Appeal for Constitutional Relief, 24 February 2010, **Exhibit R-110**, p. 36.

42 Respondent's Post Hearing Brief, paras. 284-291.

43 Memorial, paras. 261, 264, 278.

same structure is followed in the Reply.[44] In the Reply, TGH "recalls,"[45] as it also does in its Post Hearing Brief,[46] that the Sales Memorandum could have generated expectations apart from the regulatory framework (in spite of the fact that TGH did not even exist when the Memorandum was issued). It goes on to say, in an attempt to distance this argument from the issue of the correct interpretation of the regulatory framework, that "even if [the] Respondent had repeatedly misinterpreted and misrepresented its own law" in the Sales Memorandum, "that would not absolve [the] Respondent from liability for acting contrary to those specific representations."[47]

34. In the light of this argument, one would imagine that the Sales Memorandum contains clear and abundant statements to the effect that, for example, the Expert Commission's opinion is binding, that the CNEE must always approve the VAD based on the distributor's tariff study, that in the calculation of the VAD depreciation should never be taken into account for determining the income to which the distributor is entitled, etc.

35. The reality, however, is that there is nothing to this effect in the Sales Memorandum. As TGH has stated, the Memorandum establishes that the VAD must be set on the basis of the model company criterion and the VNR, according to market prices in the distribution business,[48] and that:

> The VADs must be calculated by the distributors through a study entrusted to an engineering firm […]. The [CNEE] will review the studies and may make comments, but in the event of discrepancy, a Commission of three experts will be appointed to resolve the differences.[49]

36. That is all. Where in this document are legitimate expectations created on the issue of depreciation, on the CNEE's duty to approve the VAD based on the distributor's study, on the binding nature of the Expert Commission's opinion? It is preposterous to argue that the use of the word "resolve" in the Memorandum instead of "pronounce itself" (the verb used in Article

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44 Reply, paras. 59, 61, 244.

45 *Ibid*., paras. 264-266.

46 Claimant's Post Hearing Brief, paras. 60-64, 70.

47 *Ibid*., para. 84.

48 *Ibid*., Sections III.A.1 and 2.

49 Salomon Smith Barney, "EEGSA: Sales Memorandum," May 1998, **Exhibit R-16**, p. 63; Reply, para. 264; Tr. (English), Day Five, 1172:19-1173:19, Alegría.

75 of the LGE) in connection with the Expert Commission is the basis for all of TGH's expectations. As explained in Guatemala's Post Hearing Brief, the word "to resolve" is not incompatible with an advisory function.[50] To resolve a dispute, according to the Dictionary of the Spanish Language of the Royal Spanish Academy, is to "[f]ind the solution to a problem" or dispute,[51] which can be in a binding manner or otherwise. Likewise, the roadshow presentation, on which TGH also places repeated emphasis, contains nothing to support TGH's supposed expectations. The section on the regulatory framework is limited to an explanation that the VAD is part of the tariff, that the VAD reflects international standard costs, that the CNEE is the regulator and that the tariff methodology is reviewed every five years by the CNEE.[52]

37. If Teco (not TGH, which did not exist in 1998) did place so much importance on the role of the Expert Commission and the inability of the CNEE to ever deviate from the distributor's tariff study, it is difficult to believe that no documents analyzing the RLGE with respect to these issues were ever produced, either internally or by its outside counsel.[53] It should be noted that the Sales Memorandum itself says that "no responsibility for the accuracy and integrity of this information" is assumed, that the Memorandum only "contains summaries of certain documents," such as the LGE and the RLGE, but that "[t]hose summaries do not imply that they are complete," and that "[n]o information contained in this Memorandum is or should be considered as a promise or contemporaneous declaration that supports the position that it has adopted in this arbitration."

38. *Mobil v. Canada* addressed an allegation of legitimate expectations similar to that presented by TGH; the tribunal ruled as follows:

> If the Claimants identified ambiguities in relation to the regulatory framework […], provisions with which they were clearly familiar, then it was for them to seek clarifications and obtain specific assurances. If indeed the need to avoid future changes to the Benefits Plans was a matter of central concern, one assumes that the point would have been raised in the

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50 Respondent's Post Hearing Brief, para. 313.

51 Available on the Internet at http://lema.rae.es/drae/?val=resolver, fourth meaning.

52 Roadshow presentation, **Exhibit C-28,** slides 34-39 (presentation in Spanish) and 15-20 (presentation in English).

53 Respondent's Post Hearing Brief, para. 314.

> exchanges between the Claimants and the Board. There is no evidence before us that the point was so raised. Indeed, there is no evidence before us that any specific assurances were sought by the Claimants.[54]

39. The testimony of Mr. Gillette is illustrative. He is the individual from Teco who was responsible for Teco's participation in the privatization of EEGSA. He acknowledged that he never participated in any roadshow; that he knows nothing about which members of his team participated in any roadshow; he did not recall having seen any due diligence on the regulatory framework; he did not review any promotional material on the bidding process; he could not show any briefing of his team that participated in the bidding; he reported that the information gathering process took place through "casual inputs in […] informal ways;" he did not recall having held discussions with the legal team; he admitted that he never received legal advice from Guatemalan attorneys, even on key issues; he never saw the Authorization Agreement; and he affirmed that his understanding of the regulatory framework was based on his experience in the United States.[55]

40. The reality is that the supposed expectations of TGH are based on the interpretation of the regulatory framework that TGH has developed for this arbitration. This explains the relevance that TGH has attached in this arbitration to the opinion of its expert in Guatemalan law, Mr. Alegría,[56] and to that of its technical-financial expert, Mr. Barrera,[57] on the interpretation of the Guatemalan regulatory framework. Practically all the factual sections in TGH's Memorial and Reply are devoted to presenting its version of the CNEE's interpretation of specific legal, technical and financial aspects of the Guatemalan regulatory framework. Moreover, the section of the Reply criticizing the CNEE's conduct was entitled: "EEGSA's Tariff Review For The 2008–2013 Tariff Period Was Conducted In Violation Of The Regulatory Framework […]."[58] The relevant issue, therefore, is the determination of whether

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54 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB (AF)/07/4) Decision on Liability and *Quantum* (public version), 22 May 2012, **Exhibit RL-37**, para. 169.

55 Tr. (English), Day Two 443:5-474:2, Gillette.

56 Cited continuously in the Reply, paras. 14, 15, 17, 18, 20, 21, 23, 26-30, 32-35, 39, 42-46, 48-50, 53, 58, 75, 85-88, 91, 93-98, 100-102, 105, 109, 110, 123-124, 136, 137, 142-144, 148, 158, 160, 165, 167, 181, 184-190, 208-210, 213-215, 224, 225, 245, 249-251.

57 Cited in the Reply, paras. 55-57, 66, 72, 112, 113, 116, 130, 132, 161, 163, 177, 179, 180, 191-202, 204, 205, 207, 305, 313, 314.

58 *Ibid.*, title of Section II.E.

the CNEE correctly interpreted and applied the local regulatory framework or, on the contrary, did so incorrectly in violation of that framework.

4. The *Iberdrola* award confirms that this dispute is purely regulatory in nature

41. The tribunal in *Iberdrola* found that the controversy, which is identical to that which TGH submits to this Tribunal, did not constitute "a genuine claim" that Guatemala violated the Treaty,[59] except for the allegation of denial of justice (which has not been pleaded in this case).

42. TGH insists that its claim is different from Iberdrola's because it expressly requests that the Tribunal "review Guatemala's actions […] not in light of Guatemalan law, but in light of […] Article 10.5 of the DR-CAFTA to accord [the] Claimant's investment in EEGSA fair and equitable treatment."[60] Naturally, Iberdrola did exactly the same thing with respect to the guarantees set forth in the Guatemala-Spain Treaty. However, that is not sufficient.

43. What is relevant, as explained in the *Iberdrola* award, is the real substance of the claim, not how it was disguised:

> As affirmed by the Tribunal and documented in the case records, beyond the characterization of the disputed issues that was given by the Claimant, the substantive part of those issues and, especially, of the disputes that the Claimant asks the Tribunal to resolve relate to Guatemalan law.[61]

C. A DISPUTE OF THIS NATURE, WHICH HAS BEEN PREVIOUSLY RESOLVED BY THE LOCAL COURTS, IS NOT A SUBJECT FOR THIS TRIBUNAL

44. As stated already many times, in *Iberdrola* the tribunal unanimously denied that it had jurisdiction, ordering the claimant to pay all the costs of the proceeding, due to the purely regulatory nature of the claim, which had already been reviewed by the local courts. That claim is the same as that brought by TGH before this Tribunal:

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[59] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 368.

[60] Claimant's Post Hearing Brief, para. 48.

[61] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 351.

> [T]he Claimant, although it again cites the Treaty standards and refers to decisions by other international tribunals, continued to focus on the differences of interpretation, according to Guatemalan law, of the issues mentioned so often in this award. […] [T]he Claimant asks the Tribunal to act as court of instance to decide in accordance with Guatemalan law on the arguments that were made and to accept its interpretation of each of the debated matters, so that, based on that decision by this Arbitral Tribunal, the Claimant may construct and claim a violation of the Treaty standards […][A]n ICSID tribunal, set up within the scope of the Treaty, cannot determine that it has jurisdiction to judge, under international law, the interpretation that the State has given to its domestic laws and regulations […] What the Claimant is asking of this Tribunal is that it review the decision of the Constitutional Court and replace it with a new one, based on different interpretation criteria; […] Obviously, that is not a responsibility of this Tribunal.[62]

45. Contrary to TGH's repeated assertions in its Post Hearing Brief (assertions likewise made previously at the hearing),[63] the *Iberdrola* case is not the only example in this regard.[64] *Azinian v. México* is another well-known example.[65] Furthermore, it is a well-established principle that a domestic law dispute, or even a violation of that law by a government authority, cannot give rise to a valid international claim; rather "something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1);"[66] such matters are for the local courts, over which the Tribunal "do[es] not sit as a court with appellate jurisdiction."[67] In fact, there is no example of a case in which the mere interpretation and application of a regulation by a regulatory authority—however debatable or even wrong and, therefore, in violation of domestic law (which is not the case here)—has been the basis alone for a finding of violation of an investment protection treaty. This is the same with respect to purely contractual disputes which, by definition, are governed by local law and fall,

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62 *Ibid*., paras. 353, 355, 367, 503.

63 Tr. (English), Day One, 156:4-8, Claimant's Opening Statement.

64 Claimant's Post Hearing Brief, paras. 48-49.

65 *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB (AF)/97/2) Award, 1 November 1999, **Exhibit RL-2** (Spanish version), para. 83.

66 *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190; *Saluka Investments B.V. v. Czech Republic* (UNCITRAL Case) Partial Award, 17 March 2006, **Exhibit CL-42**, para. 442; *Marvin Feldman v. Mexico* (ICSID Case No. ARB(AF)/99/1) Final Award, 16 December 2002, **Exhibit RL-5**, paras. 113, 134, 140; *GAMI Investments, Inc v. Mexico* (UNCITRAL Case) Final Award, 15 November 2004, **Exhibit RL-7**, paras. 100, 103.

67 *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190.

therefore, within the jurisdiction of domestic courts or the contractually-agreed jurisdiction, not within the jurisdiction of an international tribunal constituted pursuant to a BIT.[68]

46. As the United States explained in the *Apotex* case: "whether characterized as admissibility or ripeness or jurisdiction, the question whether Apotex can properly state a claim that […] acts violated the NAFTA is a threshold issue."[69] The Tribunal also held that: "the Tribunal proceeds on the basis that this objection concerns the Tribunal's jurisdiction *ratione materiae*."[70] This same conclusion arises from the Treaty given that Article 10.16.1(a)(i)(A) establishes that the Tribunal only has jurisdiction when a genuine claim can be properly made for a violation of one of the investment protection standards established by the Treaty. It is a question of establishing the jurisdiction *ratione materiae* of this Tribunal.

47. In its Post Hearing Brief, TGH once again objects to Guatemala's position that the only valid claim in this case would have been a claim for denial of justice. According to TGH, this would restrict the international minimum standard to denial of justice.[71] This is incorrect. As noted in Guatemala's Post Hearing Brief, denial of justice is not always the only possible claim; this will be the case only when an analysis of the nature of the claim reveals that what is at issue is a regulatory dispute under national law that has already been considered and resolved by local courts. In the words of the Tribunal in *Azinian*, "[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."[72] As the tribunal in the recent case *Apotex* stated: "as a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court. This has been repeatedly emphasized in previous decisions."[73] The Tribunal cited the precedents of *Mondev*, *Azinian* and *Waste Management*, to which Guatemala has referred in this arbitration. Otherwise, a state could be faulted at the

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68 Respondent's Post Hearing Brief, para. 38.

69 *Apotex Inc. v. United States of America* (UNCITRAL Case) Award on Jurisdiction and Admissibility, 14 June 2013, para. 259.

70 *Ibid*., para. 260.

71 Claimant's Post Hearing Brief, para. 49.

72 *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB (AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 371.

73 *Apotex Inc. v. United States of America* (UNCITRAL Case) Award on Jurisdiction and Admissibility, 14 June 2013, para. 278.

international level for the conduct of a regulatory authority that supposedly violated a domestic regulation, even when the conduct of the state courts in considering the claim and ultimately upholding the position of the regulatory authority was beyond reproach. Such an outcome would be absurd, and there are naturally no precedents in support of such position.

48. The award in *Vivendi II* and the annulment decision in *Helnan*, once again cited by TGH in its Post Hearing Brief,[74] do not support its position. Setting aside the fact that they do not refer to the minimum standard of treatment, they do not contradict Guatemala's position. The decision in *Helnan* annulled a paragraph of the award which, due to its generic nature, suggested that any measure by the state must be locally appealed first in order to give rise to a valid international claim. This is correct, the claim for denial of justice is not the only possible claim in all cases, but it is in a scenario such as this, in which the debate focuses exclusively on the proper interpretation of the regulatory framework, which has already been addressed by the local courts.

49. In *Vivendi II* the tribunal found that Argentina could not validly hold that the undue, unjustified and proven "illegitimate 'campaign' against the Concession, the Concession Agreement and the 'foreign' concession corporation as of the moment it commenced operations, with a view to reversing the privatization,"[75] should first be attacked locally. This scenario of essentially political measures which seek to reverse a concession is one of the typical cases in which a valid international claim exists. But this is entirely different from the case at hand, which in essence submits to the consideration of the Tribunal the same controversy of local law on which the domestic courts have already ruled, denying the claim, as though this Tribunal were a Guatemalan high court of appeals.

50. Obviously, the matter is also different from that of *res judicata*, contrary to what TGH suggests:[76] the Tribunal does not have jurisdiction, not only because the matter has been heard

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74 Claimant's Post Hearing Brief, paras. 49, 51.

75 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case No. ARB/97/3) Award, 20 August 2007, **Exhibit CL-18**, para. 7.4.19.

76 Claimant's Post Hearing Brief, para. 53, incorrectly citing once again *EDF International S.A., SAUR International, León Participaciones Argentinas v. Republic of Argentina* (ICSID Case No. ARB/02/23) Award, 11 June 2012, **Exhibit RL-30**.

by another court, but also due to the purely local nature of the claim, which cannot be internationalized unless a denial of justice is alleged.

51. Curiously, TGH cites the matter of *Chemtura v. Canada*,[77] a case in which the tribunal rejected that certain purely regulatory matters violated the minimum international standard, and to draw this conclusion, referred to the deference which should be afforded to state regulatory authorities dealing with technically complex matters, as is the case of the CNEE: "[i]n assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account […] the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations."[78]

52. In summary, the essence of the controversy lies in simple disagreements between EEGSA and TGH on the one hand, and the CNEE on the other, with respect to the interpretation and application of the regulatory framework, both in matters of procedure and in technical and financial questions regarding EEGSA's 2008 tariff review. The allegations of arbitrariness and modification or destruction of the regulatory framework, as well as those regarding legitimate expectations, are no more than characterizations which do not withstand even superficial analysis, as the *Iberdrola* award explains. For example, there is nothing in the regulation which shows that the Expert Commission's decision is binding (as prescribed in Chile), or that it is responsible for approving the calculation of the VAD instead of the CNEE which is the regulator, or that the CNEE should base said VAD on the distributor's study (which was expressly eliminated from the LGE draft). Although the CNEE could have erred (which it did not), these matters should have been resolved before the local justice, as they were. Guatemala's obligation under the Treaty was that there was no denial of justice in those proceedings, and TGH does not allege that there was.

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[77] Claimant's Post Hearing Brief, para. 54, citing *Chemtura Corporation v. Government of Canada* (UNCITRAL), Award, 2 August 2010, **Exhibit CL-14**.

[78] *Ibid.*, para. 123.

III. IN ITS POST HEARING BRIEF, TGH INSISTS ON ITS ERRONEOUS AND OPPORTUNISTIC PRESENTATION OF THE FUNDAMENTAL FACTS OF THE CASE

53. Instead of focusing on the topics discussed during the Hearing, as expressly requested by the Tribunal, TGH's Post Hearing Brief contains a description of the facts and arguments already presented by TGH in this proceeding. Guatemala has provided a comprehensive response to these arguments in its memorials, to which it refers the Tribunal for reasons of brevity. In this section, Guatemala will limit itself to responding to certain specific issues which TGH continues to distort in its Post Hearing Brief.

A. TGH CONTINUES TO DISREGARD THE LEGAL FRAMEWORK AND THE ADMISSIONS OF ITS OWN WITNESSES WHEN INTERPRETING THE TERMS OF REFERENCE OF THE 2008–2013 TARIFF REVIEW

54. In its Post Hearing Brief, TGH insists on its interpretation that Article 1.10 of the Terms of Reference was a tool for the EEGSA consultant to freely ignore those provisions of the Terms of Reference with which EEGSA and/or its consultant did not agree.[79]

55. The problem for TGH is the actual text of said Article 1.10 and in particular the final part of the text, which reserves to CNEE the exclusive power to verify the consistency of the variations proposed by the consultant. The text reads:[80]

> "[…] la CNEE will issue the observations it considers necessary regarding the variations, *verifying their consistency with the Study guidelines.*"

56. TGH's Post Hearing Brief is the first time in this proceeding that TGH has attempted to carry out an analysis (although erroneous) of the language of this provision.[81] According to TGH, this phrase should be interpreted as "a requirement that the CNEE observations follow the [Terms of Reference], that is, that the CNEE observations could not be used as an opportunity to introduce new and different criteria."[82] In other words, the consistency with the Terms of Reference to be verified by the CNEE referred to the observations made by the

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79 Claimant's Post Hearing Brief, paras. 121-127.

80 Terms of Reference for the Performance of the Distribution Value Added Study for Empresa Eléctrica de Guatemala, S.A., CNEE Resolution 124-2007, January 2008, **Exhibit R-53**.

81 Claimant's Post Hearing Brief, para. 124.

82 *Ibid.*, para. 126.

CNEE itself, not the variations introduced by the consultant. This explanation is at least novel. It should be noted that TGH's interpretation would lead to the conclusion that the consultant could freely alter the Terms of Reference. Unfortunately, TGH does not provide anything other than the statements of Mr. Giacchino in the Hearing in support of this interpretation.[83] Moreover, these statements were made by Mr. Giacchino five years after the discussion and approval of the clause in question, regarding a process in which he did not even participate.

57. As the President of the CNEE clearly explained during the Hearing, this Article sought to give the consultant the opportunity to make technical proposals to modify the Terms of Reference, but reserved to the CNEE the power assigned to it by the LGE.[84] That is, the power to verify that said proposals conform to principles established by the LGE such that the proposed methodology is consistent with them. This is entirely consistent with the history of the negotiation of that Article—which TGH continues to disregard completely. A comparison of the text proposed by EEGSA and that approved by the CNEE speaks for itself.[85] EEGSA wanted "carte blanche" to modify the Terms of Reference. However, the final version of Article 1.10 reflected the position of the CNEE: it was obligated to verify that the study was in compliance with the LGE. Otherwise, there would have been a violation of the legal framework with respect to the responsibility of the CNEE to determine the methodology in the Terms of Reference, as well as the role of the latter in the context of the tariff review.[86] The TGH witnesses themselves, during the Hearing, recognized that, in accordance with the LGE text, it is the CNEE's responsibility to "determine the methodology"[87] and that this principle is embodied in the "Terms of Reference."[88]

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83 *Ibid.*

84 Tr. (English), Day Five, 1150:2-8, Colom.

85 Respondent's Post Hearing Brief, paras. 88-89.

86 Respondent's Post Hearing Brief, paras. 42 and 86-95.

87 Tr. (English), Day Two, 625:8-626:18, Calleja.

88 Tr. (English), Day Five, 838:15-17, Giacchino

58. In this context, whether or not the text of Article 1.10 as interpreted by the CNEE granted some "benefit" (in the words of Mr. Calleja) to EEGSA which would justify its withdrawing its motion for constitutional relief is totally irrelevant.[89] In any event, the assertion by Mr. Calleja is false. The fact is that, as a result of the motion for constitutional relief filed by EEGSA, several of the provisions about which it complained—those which were not in conflict with the exclusive powers set forth in the LGE for the CNEE—were removed[90] and others were modified.[91] In particular, Article 1.10 expressly granted to the distributor's consultant the opportunity to propose changes to the Terms of Reference which the CNEE would analyze and eventually approve. And this is not an opportunistic interpretation on the part of Guatemala: this is exactly what happened in the case of the Deorsa and Deocsa tariff review, where the FRC was modified by the CNEE when the distributors' consultant justified the request for modification.[92]

59. Likewise, TGH's reference to the Expert Commission's interpretation of Article 1.10 in its pronouncement contributes nothing to the discussion.[93] The purpose of the pronouncement was not to interpret the Terms of Reference but rather to establish whether or not the consultant's tariff study was in accordance with the Terms of Reference.[94] The CNEE did not participate in the drafting of the pronouncement and the Expert Commission, and the expert designated by the CNEE was not involved in the negotiation of Article 1.10 or in its application during the tariff review, and as such its opinion on the matter is totally irrelevant.

60. Finally, it is equally incorrect to indicate that the Terms of Reference gave "unilateral discretion" to the CNEE to issue Terms of Reference which are "inconsistent" with the LGE,

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89 Claimant's Post Hearing Brief, para. 127.

90 Counter-memorial, para. 306-318; Rejoinder, paras. 282, 297-304.

91 *Ibid.*

92 Respondent's Post Hearing Brief, para. 145.

93 Claimant's Post Hearing Brief, paras. 121-127.

94 Notarial Letter of Appointment of the Expert Commission, 6 June 2008, **Exhibit R-80**, Article one.

> The appearing parties state that the **Expert Commission** is organized in order to pronounce itself regarding the discrepancies with the [EEGSA] [VAD] study contained in CNEE Resolution – ninety-six – two thousand eight, as prescribed in Articles seventy-five (75) and ninety-eight (98) of the [LGE] and the RLGE, respectively, which provide that, in the event of discrepancies made in writing, the [CNEE] and the distributors shall agree to the appointment of an Expert Commission […]

as alleged by TGH. The limit of the Terms of Reference was precisely set forth in the LGE provisions and the RLGE, and the Guatemalan courts were available for EEGSA to question them—and in fact, EEGSA did so by means of its motion for constitutional relief. TGH is well aware of the result of EEGSA's decision to withdraw its motion for constitutional relief. As confirmed by Mr. Calleja during the Hearing, the Terms of Reference remained unchanged and subject to the LGE and the RLGE.[95] EEGSA and its consultant decided to disregard the Terms of Reference (to the point of excluding specific provisions as "typographical errors"),[96] on the basis of an interpretation of Article 1.10 which reduced the Terms of Reference to mere recommendations. The consequence of this abusive conduct was to render the EEGSA tariff study inapplicable.

B. TGH CONTINUES TO INSIST ON ITS DISTORTED VERSION OF CERTAIN FACTS SURROUNDING THE EXPERT COMMISSION

61. TGH's Post Hearing Brief reiterates its position with respect to specific topics surrounding the proceeding before the Expert Commission, in particular the discussion of operating rules prior to its establishment, the discussions between the parties' experts and the party that nominated them, as well as the functions of the commission. As explained below, neither the available evidence nor the analysis of the regulatory framework support the position presented by TGH with respect to each of these issues.

1. The drafts of the operating rules were discussed and circulated among the parties, but no agreement existed on the matter

62. In its efforts to prove alleged "legitimate" expectations, TGH's Post Hearing Brief erroneously characterizes the discussion of the draft operating rules between the CNEE and EEGSA in June 2008. In fact, in several sections of its brief, TGH refers to the draft operating rules as though they had been "accepted" by the CNEE due to the mere fact that they were circulated among the parties (drafts were circulated on 15, 21, 23 and 28 May 2008). For example, TGH indicates that its expectations were "confirmed" when, in the draft operating rules dated 15 June, the CNEE had agreed to eliminate the draft of the provisions stating that the Expert Commission's pronouncements would not be binding. Likewise, according to TGH

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[95] Tr. (English), Day Two, 634:8-22, Calleja.

[96] Respondent's Post Hearing Brief, paras. 120 and 145.

the fact that in this draft "the CNEE" referred to the experts as "arbitrators" made it clear that the pronouncements would be binding upon the parties.

63. As Guatemala has already explained in its briefs,[97] after the close of the meetings between the CNEE and EEGSA, during which the possibility of adopting rules to govern the operation of the Expert Commission was discussed, it was customary for Mr. Melvin Quijivix, as "secretary" of the meetings (as accepted by TGH[98]), to circulate a draft reflecting the status of the discussions which were taking place between the parties.[99] Both parties clearly understood that that document was a draft and not an agreement. This was confirmed by Mr. Calleja himself during the Hearing when he explained that the drafts circulated during the meetings were not "CNEE" drafts, but were rather "*work in progress*" documents which were circulated between the parties following the meetings and which reflected the status of the discussions at the end of each day, but were in no way an agreement on their contents:

> PRESIDENT MOURRE: And according to your testimony, that second version [of the Operating Rules, dated 15 June] corresponds to an agreement in principle reached at that meeting. That is what you have said.
>
> MR. CALLEJA: No, not an agreement. Evolution. The agreement was reached in the end of 28 June.
>
> PRESIDENT MOURRE: So at this stage there was no agreement?
>
> THE WITNESS: No, this was a working document. Not an agreement.[100]

64. It is therefore incorrect for TGH to refer to the drafts circulated as though they could have generated any expectations on the part of EEGSA or TGH. No expectation could be "confirmed" for TGH when the responsible EEGSA official himself who discussed the drafts noted that the documents circulated were "working documents" and that there "was no agreement."

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97 Counter-memorial, para. 358; Rejoinder, para. 405.

98 Memorial, para. 137.

99 Counter-memorial, para. 365; E-mail from Mr. Melvin Quijivix to Mr. Miguel Francisco Calleja, attaching the proposed Expert Commission operating rules, 15 May 2008, **Exhibit R-181;** E-mail from Melvin Quijivix to Miguel Francisco Calleja attaching the proposed Expert Commission operating rules, 21 May 2008, **Exhibit R-74**; E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the proposed Expert Commission operating rules, 23 May, 2008, **Exhibit R-75;** E-mail from Melvin Quijivix to Luis Maté and Miguel Francisco Calleja, attaching the proposed Expert Commission Operating Rules, 28 May 2008, **Exhibit R-76** (this e-mail was later resent by M. Calleja to G. Pérez).

100 Tr. (English), Day Two, 698:6-15, Calleja.

65. As Guatemala explained in its filings, the "lack of agreement" between EEGSA and the CNEE centered principally on the so-called rule 12, which would have granted the Expert Commission the power to revise the incorporation of the pronouncement by Bates White. As Guatemala has explained (and Mr. Colom clarified during the hearing[101]) the parties were "in agreement" with the rest of the operating rules that were purely procedural in nature.[102] In its Post Hearing Brief, TGH argues that Guatemala's argument in its Opening Statement that no agreement existed on "any" of the rules was contradicted by Mr. Colom's position that there was agreement regarding some rules.

66. Naturally, as a result of discussions regarding the operating rules (including after the first and second drafts exchanged between the parties), the CNEE and EEGSA in fact were effectively in agreement regarding some of the rules. However, as Mr. Calleja explains in the transcript cited above, "there was no agreement" in the strict sense, given that the parties understood that a final agreement would be formalized in writing and would include all the rules. It is this that Guatemala refers to in asserting that there was no agreement on any of the rules.

67. Therefore, the alleged contradiction which TGH attempts to present is nothing more than a game of semantics, based on partial quotes taken out of context, which TGH presents to create confusion. The alleged agreement regarding rule 12 would have changed the procedure set forth in the LGE. Once again, to confirm whether or not there was any agreement between the CNEE and EEGSA, it is sufficient to refer to the responses given by Mr. Calleja in the hearing:

> Q. I have a very specific question for you. Can you tell me if there is any document that has been signed between CNEE and EEGSA where the two parties agree on the Operating Rules? […] Is there any written document signed by the CNEE and EEGSA where the two parties agree on the Operating Rules?
>
> A. Is there such a document between EEGSA and the Commission?
>
> Q. Between CNEE and EEGSA.

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[101] Tr. (English), Day Five, 1120:2-18, Colom.

[102] Counter-memorial, para. 359.

A. Well, no.[103]

2. TGH presents a distorted version of the exchanges between the CNEE and its expert on the Expert Commission, an event which in no way caused any harm whatsoever to TGH

68. In its Post Hearing Brief, TGH again distorts the communications between Mr. Peláez and Mr. Riubrugent in his role of expert on the Expert Commission.[104] As Guatemala has already explained, this incident, when stripped of the "qualifiers" added to it by TGH, in no way helps TGH.[105]

69. Firstly, TGH fails to respond to the obvious issue that it was never agreed between the CNEE and EEGSA that the experts would not be in contact with the party which nominated them.[106] TGH does not prove the existence of said agreement and, to the contrary, merely asserts that "Guatemala continues to deny that such an agreement existed, [and] inexplicably has failed to submit evidentiary or factual testimony in support of its position."[107] It is obvious that it is TGH which must prove that such an agreement existed, and it is not for Guatemala to prove its non-existence.[108] TGH does not present (beyond isolated statements by Mr. Giacchino and Mr. Bastos who contradict themselves through their own conduct on the Expert Commission[109]) any proof of the alleged agreement, much less that it had been communicated or agreed to by the CNEE.

70. In any event, the reason behind the specific communications between Mr. Riubrugent and the CNEE, as already explained, is that Mr. Riubrugent had very limited involvement in the tariff review and it was reasonable that he needed information to carry out the task assigned to him, which in fact included communicating to the other members of the Expert Commission the position of the CNEE with respect to each discrepancy.[110] This is reflected in the exchanges

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[103] Tr. (English), Day Two, 666:14-667:3, Calleja.

[104] Claimant's Post Hearing Brief, paras. 144-152.

[105] Rejoinder, paras. 43, 326-330 and 385-399; Respondent's Post Hearing Brief, paras. 142-143.

[106] Rejoinder, paras. 388-389.

[107] TGH Post Hearing Brief, para. 148.

[108] That is, TGH seeks to reverse the elementary rule of burden of proof that the party alleging a fact must prove it.

[109] See para. 72 below.

[110] Rejoinder, para. 396.

in question, in which it is clear that Mr. Riubrugent's inquiries are of a technical nature.[111] TGH likewise fails to mention that the "information" that Mr. Peláez provided to Mr. Riubrugent included nothing more than copies of Financial Statements – information prepared by EEGSA, which in no way could be inappropriate or harmful to it.[112]

71. Secondly, TGH complains in its Post Hearing Brief that the CNEE "provided information [to Riubrugent] for the express purpose of defending its position within the Expert Commission."[113] This questioning once again disregards the fact that the "experts" on the Expert Commission were in fact "technical" experts on behalf of the parties (not arbitrators in the strict sense of the word.)[114] The most remarkable aspect of this accusation is that it disregards the conduct of EEGSA itself with respect to its own expert: the consulting contract subscribed by EEGSA with Mr. Giacchino clearly provided that the consultant should "set forth, defend and in general ensure the approval of the Tariff Study"[115] even within the Expert Commission.[116] This does indeed imply clear interference by EEGSA with the work of the Expert Commission.

72. Finally, TGH criticizes the existence of certain communications between Mr. Riubrugent and Mr. Quijivix, in which the former had given advance notice to the CNEE of

[111] Chain of e-mails between M. Peláez and J. Riubrugent 9 January 2008, **Exhibit C-567;** E-mail from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez and A. Garcia, 13 December 2007, **Exhibit C-490**; Exchange of e-mails between M. Peláez and J. Riubrugent, 18 June 2008, **Exhibit C-498**; Exchange of e-mails between M. Peláez and J. Riubrugent, 13 June 2008, **Exhibit C-496**; E-mail from J. Riubrugent to M. Quijivix, 11 June 2008, **Exhibit C-501**; E-mail from J. Riubrugent to M. Quijivix, 7 July 2008, **Exhibit C-500**; Exchange of e-mails between M. Quijivix, A. Brabatti and J. Riubrugent, 23 June 2008, **Exhibit C-499**; E-mail from J. Riubrugent to M. Quijivix, A. Arnau, R. Sanz, resending a letter from EGAS to J. Riubrugent dated 1 August 2008, 2 August 2008, **Exhibit C-505**; E-mail from J. Riubrugent to M. Quijivix, A. Brabatti and J. Riubrugent, 31 July 2008, **Exhibit C-504**.

[112] Tr. (English), Day Five, 1031:5-19, Moller.

[113] Claimant's Post Hearing Brief, para. 149.

[114] Rejoinder, paras. 144-145; Respondent's Post Hearing Brief, paras. 159, 163-165.

[115] Contract between EEGSA and Bates White LLC for the preparation of the 2008–2013 Tariff Study, Empresa Eléctrica de Guatemala, Sociedad Anónima EEGSA – Bates White LLC, 23 January 2008, **Exhibit R-55,** Clause Five (Consulting Firm Obligations), point 5.1, paragraph 12.

[116] As Giacchino himself has agreed, his obligation to defend the EEGSA position before the CNEE applied both to his work in the tariff studies preparation phase and his work on the Expert Commission. Transcripts of hearing regarding jurisdiction and foundation, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, **Exhibit R-202**; Tr., Day Two, 539:22-540:6, Giacchino:

> Q. So, your activities—there was no separate contract, as though separate contracts existed with Mr. Bates. You, your role on the Expert Commission was governed by the terms of this contract. Right?
>
> R. I believe so […].

certain decisions which had been taken within the Expert Commission up to that time.[117] It is surprising that TGH would dare to insist on this argument when Mr. Giacchino himself recognized during the Hearing that he had maintained the same unilateral communications with Bates White and EEGSA during his activities as expert. As explained by Mr. Colom during the Hearing, the CNEE neither consented to, nor was it consulted or even informed of these unilateral communications nor of certain meetings between the members of the Expert Commission and EEGSA, of which the CNEE recently learned during this arbitration proceeding.[118]

73. Finally, it should be noted that, as TGH agrees,[119] there is no specific claim of any harmful effect to EEGSA which these communications could have had with respect to the pronouncement of the Expert commission, which TGH (incorrectly) alleges was "favorable" to EEGSA.[120]

3. The role of the Expert Commission is set forth in the LGE, was accepted by EEGSA and the CNEE, and could not be expanded by the Expert Commission itself nor by TGH in this arbitration

74. In another attempt to demonstrate the alleged arbitrariness of the CNEE, in its Post Hearing Brief, TGH strives to present a menu of roles for the Expert Commission and in particular seeks to transfer to itself certain powers which the LGE assigns exclusively to the CNEE.[121] TGH specifically maintains that the Expert Commission is responsible for reviewing the study submitted by EEGSA on 28 July, and to do so, it cites to the comments made by the Expert Commission itself in the pronouncement.[122] There, the Expert Commission indicated that "it did [not] consider that the pronouncement regarding the discrepancies is reduced to determining whether, in each one of them, the Consultant departed from the [Terms of Reference] and whether or not it did so justifiably" and that "[i]t is about determining whether the Consultant in preparing the Tariff Study, considering the [Terms of Reference] as

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[117] Claimant's Post Hearing Brief, para. 150.

[118] Tr. (English), Day Five, 1147:16-1148:10, Colom.

[119] Claimant's Post Hearing Brief, para. 152.

[120] *Ibid.*, para. 123.

[121] *Ibid.*, para. 119 *et seq*.

[122] *Ibid.*, para. 122.

guidelines, has performed a task which is in accordance with the requirements of the [LGE] and the RLGE or, if applicable, determining whether, in the face of justifications for departures, the CNEE held and demonstrated that the requirements of the [Terms of Reference] better reflect the requirements of the [LGE]."[123]

75. A legal analysis by the Expert Commission expansively interpreting its roles is not supported by the LGE, and does not serve to justify TGH's arguments. The LGE,[124] the Resolution ordering the appointment of the Expert Commission[125] and the Notarial Letter signed by the parties, through which it was appointed,[126] make it clear that the Expert Commission should make pronouncements regarding the discrepancies and nothing more. This did not include validating changes to the Terms of Reference or proposing "third avenues" between the CNEE and EEGSA. Nor did it include issuing a second pronouncement, reviewing a "corrected" study and, much less, approving it.

76. TGH also considers it insufficient that the only role of the Expert Commission is to issue a pronouncement. However, this is what the LGE provides and what the parties agreed to when appointing the Expert Commission.[127] Furthermore, the governing body in the interpretation of the law in Guatemala, the Constitutional Court, has confirmed this specific role for the Expert Commission, stating that said agency cannot assume powers assigned by the LGE to the CNEE.[128]

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[123] *Ibid.*

[124] LGE, **Exhibit R-8**, Article 75, which indicates that: "[…] The Expert commission shall pronounce itself regarding the discrepancies within a period of 60 days from its appointment."

[125] CNEE Resolution 96-2008, 15 May 2008, **Exhibit R-71**, which indicates:

> That the Expert Commission referred to in Article 75 of the [LGE] be appointed, which shall pronounce itself regarding the discrepancies […].

[126] Notarial Letter of Appointment of the Expert Commission, 6 June 2008, **Exhibit R-80**, point one, which states that:

> The appearing parties state that the **Expert Commission** is organized in order to pronounce itself regarding the discrepancies with the [EEGSA] [VAD] study contained in CNEE Resolution – ninety-six – two thousand eight, as prescribed in Articles seventy-five (75) and ninety-eight (98) of the [LGE] and the RGLE, respectively, which provide that, in the event of discrepancies made in writing, the [CNEE] and the distributors shall agree to the appointment of an Expert Commission […]

[127] Notarial Letter of Appointment of the Expert Commission, 6 June 2008, **Exhibit R-80**, point one.

[128] Constitutional Court Judgment (joindered files 1836-1846-2009) Direct Appeal of Judgment for Constitutional Relief, 18 November 2009, **Exhibit R-105**, pp. 24, 29.

77. In short, the Expert Commission had neither the legal nor the contractual authority to unilaterally broaden its mission. Therefore, TGH cannot rely on an alleged interpretation of the Guatemalan regulation by the Expert Commission which would be clearly erroneous.

4. Article 3 of the Administrative Law is fully applicable in the context of the Expert Commission

78. In response to a specific question by the Tribunal, Guatemala explained in its Post Hearing Brief the reasons that support the application of Article 3 of the Administrative Law (the ***LCA***).[129] As indicated at that time, in accordance with Article 3 of the LCA, because the Expert Commission is a "technical advisory body" which, being comprised of experts, makes pronouncements by means of a "decision," such decision cannot be binding on the CNEE.[130]

79. In its brief response on this same issue in its Post Hearing Brief, TGH indicates that the process before the Expert Commission set forth in Article 75 of the LGE would be a "special provision" which "departs from the general provisions of Guatemalan law, including [Article 3 of] the Administrative Law." Therefore, according to TGH, the prohibition set forth in Article 3 of the LCA – that an administrative agency cannot adopt as a resolution the decisions issued by a technical or legal advisory body – would not apply.[131] The obvious problem with this argument (for which TGH does not provide any support) is that in the civil system when a "special provision" departs from the generally established principle in the legal system, said departure must be expressly indicated in the regulation in question. In the case of the procedure before the Expert Commission, Article 75 of the LGE (the "special provision," as TGH understands) should have indicated an express delegation of powers.

80. In that context, it is clear that such a delegation of powers cannot be implicit in the phrase "The Expert Commission shall pronounce itself with regard to the discrepancies" in Article 75 of the LGE (which is the only text in the law regarding the role of the Expert Commission). As already indicated, this not only is inconsistent with the meaning of the verb

[129] Article 3 of the Administrative Law (Decree No. 119-96, Administrative Law, 20 December 1996 **Exhibit C-425**, Article 3) prescribes:

> Article 3. Form. Administrative resolutions shall be issued by the competent authority, citing the legal or regulatory standards on which they are based. The acceptance as a resolution of decisions issued by a technical or legal advisory body is prohibited. […].

[130] Respondent's Post Hearing Brief, paras. 161-166.

[131] Claimant's Post Hearing Brief, para. 85.

to pronounce oneself and the reading of the entire article in question; in addition, there is no country in the world which would delegate the establishment of the VAD to a temporary expert commission (as is accepted by TGH[132]) and which has no accountability.[133] Therefore, it is clear that, contrary to the statements by TGH, Article 3 of the LCA is fully applicable in the context of the Expert Commission.

C. TGH CONTINUES TO BE UNABLE TO PROVE THAT THE BATES WHITE STUDY COMPLIED WITH THE LEGAL REQUIREMENT FOR AN EFFICIENT VNR AND VAD

81. TGH and Guatemala concur in that the Guatemalan regulatory system, based on the price cap system, promotes efficiency and remunerates the investor on the basis of an "efficient company" model.[134] The principal disagreement between the parties lies, however, in how to construct and remunerate the efficient company model.

1. TGH has been unable to demonstrate the reasonableness of the VNR proposed by Bates White

82. In its Post Hearing Brief, TGH does not make further efforts to justify the VNR values presented by Bates White. This is hardly surprising. As Guatemala has explained in all its submissions, the VNR values requested by Bates White, including the one dated 28 July 2008, are inexplicably high when compared to the values established in 2003.[135] More importantly, they are inexplicably high when compared to the average of the VNR of over 60 companies in Latin America.[136] By way of example, the VNR from the Bates White study dated 28 July was no less than 124% higher than said average.[137] TGH also does not explain how the values claimed in its study dated 28 July can be compatible with the request for an increase of only 10% offered by the President of EEGSA, Mr. Pérez, in May 2008.[138]

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132 Claimant's Post Hearing Brief, para. 85.

133 Respondent's Post Hearing Brief, para. 47.

134 *Ibid.*, para. 101; Claimant's Post Hearing Brief, paras. 63-65.

135 Counter-memorial, para. 331; Rejoinder, 374-377.

136 Direct examination of Mario Damonte, slides 25-26.

137 *Ibid*.

138 Presentation on the Tariff Study Revenues Requirements, 22 April 2008, **Exhibit R-65**.

83. The only justification presented by TGH is an alleged increase in the price of materials between 2003 and 2008, the growth of the grid and the increase in the cost of electricity.[139] However, this does not help to sustain its position.

84. *First,* it should be clarified that the EEGSA tariffs applied between 2003 and 2008 were updated in accordance with the applicable regulation to reflect the impact of inflation and growth of the grid which took place between the two tariff reviews.[140] As such, at the start of the tariff review, EEGSA's tariffs *already reflected* the impact of inflation of the price the materials and of growth.

85. *Second*, as Mr. Damonte explained, the prices of the materials did not differ significantly between the Bates White, Sigla and even the Deorsa and Deocsa studies.[141] The real difference lay in the optimal design of the construction units and not in the prices of the materials for those units, as TGH incorrectly alleges. This was confirmed during the hearing, when the president of the Tribunal questioned the TGH expert, Mr. Barrera, with respect to the principal difference between the Sigla and Bates White studies. In his response, Mr. Barrera indicated that said difference resided in the construction units and not in the prices.[142]

86. *Finally,* with respect to the need to include thicker cables to meet the increase in the price of electricity alleged by TGH, one need only refer to Mr. Damonte's report, in which he explains that the values of the cables required by Bates White was not driven by an increase in the value of energy, but rather by their lengths and gauges being greater than necessary. By way of example, for low voltage clients, Bates White proposed 247 ampere cables, when the maximum current for these clients is 10.[143]

87. The reality is that the VNR values requested by Bates White have no justification. The most reliable proof of this is that TGH, when requesting that its expert, Mr. Barrera, analyze the 28 July study, only asked him to analyze whether it contained the Expert Commission pronouncements. As the latter confirmed at the hearing, he was not asked to give his opinion

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139 Claimant's Post Hearing Brief, para. 117.

140 Giacchino, **Exhibit CER-1**, para. 19.

141 Respondent's Post Hearing Brief, para. 236.

142 Tr. (English), Day Six, 1466:4-7, Barrera.

143 M. Damonte, **Exhibit RER-2**, para. 150.

with respect to the reasonableness of the full report.[144] Answering a question from the arbitrator von Wobeser, Mr. Barrera responded:

> Arbitrator von Wobeser: When you say that [the VNR and VAD of the 28 of July study] are reasonable, you reached the conclusion that they were reasonable. Based on what?
>
> Barrera: On the basis of what the CE was requesting.
>
> Arbitrator von Wobeser: So, they're reasonable because they included the recommendations, not because of the results obtained?
>
> Barrera: Yes, that's correct.[145]

88. That said, even the decision of Mr. Barrera with respect to the "reasonableness" of the Bates White study based on the inclusion of all the pronouncements by the Expert Commission on the VNR dated 28 July lacks foundation. As Guatemala demonstrated at the hearing and in its Post Hearing Brief, Mr. Barrera reviewed a modified version of the 28 July Bates White study. In its Post Hearing Brief, TGH does not deny this. In order to attempt to justify this irregularity, TGH alleged that this would not be relevant, given that the final values of the study would not have changed.[146] This is incorrect. Firstly, the manipulation of the study in itself calls into question its reliability. More importantly, however, as Guatemala explained, the study dated 28 July that Mr. Barrera reviewed included numerous files with documentary support, which were not included in the study which was submitted to the CNEE. That is, it was a different study. Therefore, Mr. Barrera's assertion that Bates White had correctly implemented the Expert Commission's pronouncements is simply lacking in any value whatsoever.[147]

2. TGH has not been able to prove the reasonability of the VAD proposed by Bates White

89. In its Post Hearing Brief, Guatemala comprehensively analyzed the abundant evidence in the case, which shows that it is incorrect to maintain—as TGH does—that an investor is

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144 Tr. (English), Day Six, 1376:9-1377-1, Barrera.

145 Tr. (English), Day Six, 1376:9-1377-1, Barrera.

146 Claimant's Post Hearing Brief, para. 158.

147 Respondent's Post Hearing Brief, para. 211-212. Barrera, **Exhibit CER-4**, para. 93, 100 and 176 (using as a basis the file "Baremo O&M Comercial para Informe final 28.07.08.xls"), and 164 (using as a basis the file "Costos_Contrata_y_Servicios.xls").

entitled to receive a return on the depreciated portion of his investment.[148] In this section we will limit ourselves to responding to some new arguments made by TGH in its Post Hearing Brief, and to point to the evidence—including the evidence submitted by TGH—which contradicts TGH's argument and renders it invalid.

a. The evidence presented in the case shows that TGH's alleged expectation to receive a return on the gross value of the base capital is an argument conveniently constructed for the purpose of this arbitration proceeding

90. In order to support its assertion that TGH expected the return from EEGSA to be calculated on the basis of the gross capital, TGH basically puts forward three arguments: (i) that the LGE refers to the "new" replacement value;[149] (ii) that the LGE does not mention depreciation;[150] and (iii) that the RLGE establishes that depreciation should not be recognized as an operating cost.[151] In its Post Hearing Brief, Guatemala thoroughly responded to each of these arguments and refers the Tribunal to its brief.[152] In this section, we will limit ourselves to showing that TGH's argument was constructed for the purpose of this arbitration proceeding, and that it is inconsistent with the available evidence.

91. *First*, TGH's argument that, at the time of investing, it expected to receive a return on the gross value of its base capital is inconsistent with its conduct and that of EEGSA in the 2003–2008 tariff review. In that review, the EEGSA return was calculated on the depreciated net value of the base capital. The implied depreciation used for the calculation of the return was approximately 30%.[153] Aware of this inconsistency, TGH denies in its Post Hearing Brief

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148 Respondent's Post Hearing Brief, Sections III.B.2., and III.D.2.

149 Claimant's Post Hearing Brief, para 65.

150 *Ibid.*, para 66. See also para 134 ("if the purpose of the LGE and the RLGE was that the capital base could be depreciated, […] they [would not have established] expressly that the *New Replacement Value* of the assets had to be used […]").

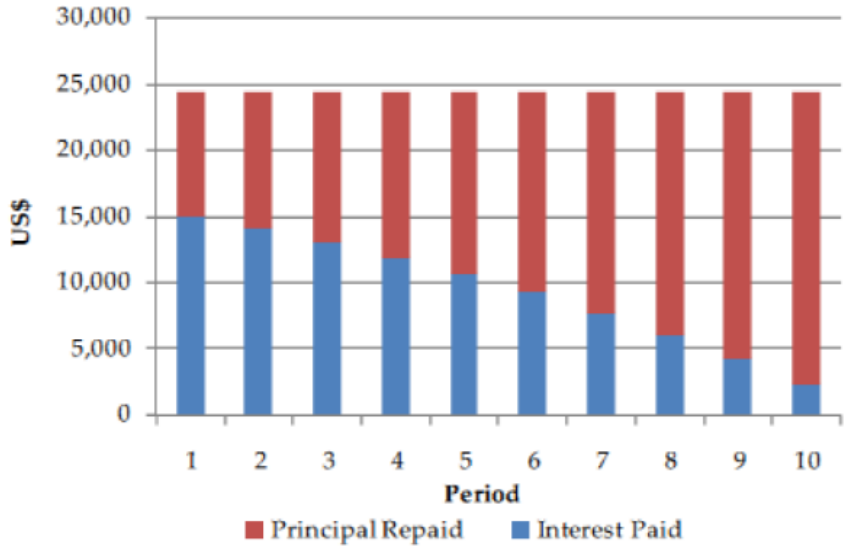
151 *Ibid.*, para 66-67. Regarding the new interpretation made by Messrs. Kaczmarek and Barrera of Article 83 of the RLGE, it is worth noting that it was mentioned for the first time at the TGH hearing. EEGSA never mentioned it in the tariff review, Iberdrola never mentioned it in its arbitration proceeding, nor did TGH mention it in its briefs. It is also worth noting that this interpretation is offered by two experts who, as opposed to Mr. Damonte who has been working on tariff reviews in Guatemala for more than ten years, have no experience in the Guatemalan regulatory system; and in the case of Mr. Kaczmarek, neither in the electrical distribution sector: Respondent's Post Hearing Brief, paras 22-28.

152 Respondent's Post Hearing Brief, paras 107; 121-130.

153 Tr. (English), Day Six, 1418:18-1419:17, Damonte; Direct examination of Mario Damonte, slide 17.

that this was the case and cites as support Mr. Kaczmarek's declaration that in 2003 "no adjustments had been made to the depreciation and same was applied as a mortgage."[154] However, one need only read Mr. Kaczmarek's report to understand that under the mortgage system a portion corresponding to the depreciation is paid (return of investment) and another portion paid for the return (return on investment). The latter decreases as the value of the investment depreciates over time. The following graph from Mr. Kaczmarek's report clearly illustrates this:[155]

Figure 8 – Example of a Constant Payment, Self-Amortizing Bond



92. If the TGH's position were correct, the graph would not show a reduction in interest (return) over time but would rather remain constant with respect to its initial value. The interest amount decreases because as time goes by more capital (principal) is reimbursed or "repaid" (depreciated). The application of this system in the 2003–2008 tariff review can also be corroborated in a study prepared by Nera in 2003, in which it was acknowledged that:

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[154] Claimant's Post Hearing Brief, para. 82.

[155] Kaczmarek, **Exhibit CER-2,** para 89.

> Note No. GT-NotaS-407 (Note 407) of the CNEE proposes a financial formula that calculates a fixed annuity with the capital return component that increases over time, while the interest is reduced.[156]

93. The reason that the interest amount (return) decreases over time is precisely because the interest is calculated using only the remaining value of the initial capital, that is, net of depreciation.

94. *Second*, the Terms of Reference of the 2008-2013 tariff review specifically established that the return would be calculated on the depreciated capital base and would include the FRC of which TGH now complains.[157] The fact that EEGSA did not challenge—or even state orally or in writing—that these elements were contrary to its expectations when investing and would destroy its investment, renders TGH's argument void of all credibility.

95. *Third*, the lack of merit of TGH's position is confirmed by the fact that none of the other distributors (also controlled by foreign shareholders) ever expected to obtain a return on the gross value of their capital base.

96. *Finally*, consistent with Guatemala's position, the Expert Commission confirmed—albeit with a depreciation level lower than that required under the Terms of Reference—that the return had to be calculated on the depreciated capital base.[158] Therefore, the statement made by Mr. Bastos during his direct examination, and cited by TGH as support for the claim that the Guatemalan regulatory system recognizes a return on the gross value of an investment,[159] does nothing but confirm the lack of credibility of Mr. Bastos' testimony. As

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[156] Mr. Leonardo Giacchino, National Economic Research Associates, "Report on Stage E: Distribution Value Added and Balance of Power and Energy." 27 June 2003, revised on 30 July 2003, 30 June 2003, **Exhibit R-170**, p. 7.

[157] Terms of Reference for the Performance of Study on Distribution Value Added for Empresa Eléctrica de Guatemala, S.A., Resolution CNEE 124- 2007, January 2008, **Exhibit R-53**, Article 8.3:

> To calculate the total cost to be recognized with respect to the capital, the criterion of recognizing a yield on the net value of the fixed capital in the service assets must be used (VNR less accrued depreciation) plus a current amortization proportionate to the gross value (VNR).

[158] Expert Commission's Report, 25 July 2008, **Exhibit R-87**, pp. 104-106, where the [Expert] Commission agrees that "*the yield must be calculated over the net value of the fixed capital (VNR minus accrued depreciation)*"—penultimate paragraph, p. 104—with the only discrepancy that the accrued depreciations corresponding to half the useful life could be used—penultimate paragraph, p. 105.

[159] Claimant's Post Hearing Brief, paras. 81-82. See also Tr. (English), Day Four, 791:5-20, Bastos: "Neither does the statute or the regulation deal with depreciation. For the regulation method used in Guatemala is what is known as valuing assets at the New Replacement Value. This is a school of regulation that emerged in

president of the Expert Commission and under examination at the Hearing, Mr. Bastos offered precisely the opposite opinion.[160]

97. Based on this convincing evidence, it is clear that EEGSA's return should have been calculated on the net value of the capital base.

b. At the end of the concession, the distributor recovers the entire amount invested and not amortized during the operation period

98. In its Post Hearing Brief, TGH proposes an additional argument, based on Mr. Kaczmarek's opinion, to try to justify its position that the return must be paid on the gross capital base. According to TGH, Guatemalan regulations do not recognize a company's maintenance expenses in the VNR, and therefore, if an investor has to use a part of the depreciation (return of investment) to cover maintenance investments, that investor "would never recover his investment."[161] That is incorrect.

99. *First,* all new investments are recognized in the VNR at the time a tariff calculation is made. If an asset that formed part of the tariff base is found obsolete and thus deleted, the tariff base must be reduced by the value of that asset. Likewise, if the aforementioned asset is replaced by a new one, the value of the new asset must be added to the tariff base. All new assets, both those to replace obsolete assets and all other assets necessary to provide future services, are 100% recovered at the end of their useful life. The only exceptions are those investments that are not necessary to provide service, which will not be recognized by the application of the efficient company model.

100. *Second*, under Guatemalan regulations, in the event that a distributor is unable to recover the amounts invested during the concession, the state will return the fixed capital to

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Chile and that seeks to avoid a discussion about the old company and the seniority of the assets, and so it uses a hypothetical or ideal firm supplying the demand in the Concession area, and the New Replacement Value is what is used; that is to say, you take a company, you undertake engineering and technical calculations as to what the necessary equipment is, and that equipment is valued as if it was going to be new equipment. Therefore, neither the statute nor the regulation makes any reference to any--makes any reference to depreciation."

[160] At the hearing, Mr. Bastos even accepted the fact that accounting depreciations were used in the calculation of capital costs: Tr. (English), Day Four, 792:18-20, Bastos ("[W]hen depreciation criteria are used, one uses an accounting bases, historical bases, and then one sees real depreciation"). (Emphasis added.)

[161] Claimant's Post Hearing Brief, para. 135.

that distributor at the end of the underlying contract.[162] Therefore, even if EEGSA had invested amounts higher than the depreciation values recovered through the VAD, EEGSA would have been compensated for the surplus at the end of the agreement. In any event, as fully explained in Guatemala's Post Hearing Brief, EEGSA's historical policy has been to invest amounts much lower than those claimed as depreciation in the 2008–2013 tariff review.[163] Therefore, this explanation also fails to justify giving EEGSA a return on the gross capital base.

c. The real dispute in this case regarding the VAD is limited to the depreciation value to be taken into account for calculating EEGSA's return

101. As explained in the preceding sections, it is clear that the return must be calculated on the depreciated capital base. Not only because this is the only correct approach from the viewpoint of the regulatory economics,[164] but also because it is the only approach consistent with the conduct of the CNEE in prior reviews and accepted by EEGSA, and even by the Expert Commission itself.[165] Given this evidence, it is curious that TGH continues to insist that EEGSA's return should have been calculated on the gross value of the capital base. It is obvious that what is in dispute in this arbitration proceeding is the value of the depreciations to be applied, not whether they should or should not be applied. For the benefit of the Tribunal, the relevant depreciation levels in this arbitration proceeding are reproduced below:[166]

• **Bates White:**	**0%**
• Expert Commission:	8.3%
• Damonte:	29.6% (very similar to 2003)
• Deorsa-Deocsa:	42.2%
• EEGSA, actual:	43.5%
• **Terms of Reference:**	**50%**

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[162] LGE, **Exhibit R-8**, Article 57. See also Authorization Agreement entered into by the Ministry of Energy and Mines and Empresa Eléctrica de Guatemala S.A, 15 May 1998, **Exhibit C-31**, Clause Nineteen.

[163] Respondent's Post Hearing Brief, paras. 138-141.

[164] L Giacchino and others: "Main regulatory concerns in the energy, telecommunications and water sectors in Latin America" *International Privatization: Utility Regulation 2000 Series*, Volume 2, Latin America, **Exhibit R-21**; Counter-memorial, para. 252; Rejoinder, para. 277; JA Lesser and LR Giacchino, Fundamentals of Energy Regulation (1st Edition, 2007), **Exhibit R-34**; Counter-memorial, paras. 187, 190 and 299; Rejoinder, paras. 253, 307, 315.

[165] See Section III.C.2(a) above.

[166] Direct examination of Mr. Mario Damonte, slide 17.

102. As explained in the Post Hearing Brief, the 50% depreciation level established in the Terms of Reference was estimated by an external consultant hired by the CNEE on the basis of technical criteria and without any interference by or instruction from the CNEE.[167] Furthermore, the fact that the directors of the CNEE asked Mr. Riubrugent to explain the methodology used demonstrates the total lack of influence on the part of the CNEE in the construction of the FRC.[168] Let us remember that at the hearing, Mr. Bastos himself admitted the technical validity of the formula proposed by Mr. Riubrugent.[169] As TGH rightly notes in its Post Hearing Brief, Mr. Bastos also admitted that 50% of the depreciation is "used mainly in Australia and […] New Zealand."[170] Thus, the only discrepancy between the criteria used by Mr. Bastos and Mr. Riubrugent is whether the EEGSA network was sufficiently mature to have 50% of its assets depreciated. In view of the above, TGH's attempt to portray the FRC established in the Terms of Reference as an arbitrary or bad-faith action is completely baseless.

103. In its Post Hearing Brief, Guatemala clearly stated that if EEGSA disagreed with the depreciation amounts set forth in the Terms of Reference, it could have objected to them in court.[171] EEGSA did not use its right to object in court to the FRC included in the Terms of Reference, nor did it even make any written or oral comments regarding this point. On the contrary, EEGSA and its consultant decided to interpret the formula as a "typographical error" by the CNEE.[172] EEGSA could have even presented the alternate depreciation amount that it deemed to be correct—as was done by the other distributors, Deorsa and Deocsa. However, EEGSA opted to insist that its return be (incorrectly) calculated over the gross value of its capital base. Such an attitude cannot be validated by this Tribunal.

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[167] Respondent's Post Hearing Brief, para. 142.

[168] Chain of e-mail mail messages between M. Peláez and J. Riubrugent, 9 January 2008, **Exhibit C-567.**

[169] Respondent's Post Hearing Brief, para. 143; Tr. (English), Day Four, 792:20-795:2, Bastos:

> [The] formula that the [CNEE] was applying answers to a company that is not growing. It's used mainly in Australia, and I think in New Zealand as well […]The formula used was correct […].

[170] *Ibid.*, para. 76; Tr. (English), Day Four, 792:20-793:3, Bastos.

[171] Respondent's Post Hearing Brief, paras. 84, 92.

[172] Rejoinder, para. 330; Respondent's Post Hearing Brief, paras. 120 and 145.

d. The FRC proposed by the Expert Commission is incorrect and is not consistent with that provided under Chile's regulations as TGH claims

104. In its Post Hearing Brief, TGH attempts to defend the position taken by the Expert Comission's that certain depreciation must be taken into consideration to calculate the return.[173] *First,* it is worth noting that it is curious that TGH does not even try to explain how this argument can be reconciled with EEGSA's position in the tariff review and the current position of TGH that the return must be calculated without taking the depreciation into account. *Second*, as previously explained by Guatemala and its experts, the formula applied by the Expert Commission contained serious technical errors[174] and did not comply with the LGE because it failed to take into account the facilities' "typical useful life" (25 or 30 years) and depreciate the assets only during the tariff's five-year period.[175] As very well explained by Mr. Damonte in his reports, this exercise leads to an approximately 19% over-remuneration of EEGSA's investment.[176]

105. In its Post Hearing Brief, TGH supports its defense of the formula proposed by the Expert Commission by arguing that it would be consistent with the one applied in Chile, the country that served as a benchmark for the Guatemalan regulation.[177] That, however, is incorrect. Under the Chilean regulation, assets are not depreciated at five-year intervals as in the Expert Commission's formula, but rather uses a useful life of 30 years,[178] as the CNEE had proposed.

106. Since the FRC of the Expert Commission did not comply with the LGE, the CNEE could not apply it to the Sigla study either, contrary to TGH's claim in its Post Hearing

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173 Claimant's Post Hearing Brief, para. 77.

174 Counter-memorial, para. 401; Rejoinder, para. 449. Damonte, **Appendix RER-2**, para. 163.

175 Respondent's Post Hearing Brief, para. 187.

176 *Ibid.*, para. 186.

177 Claimant's Post Hearing Brief, para. 77.

178 National Energy Commission of Chile, Technical Documents for the Preparation of a "Study for the Calculation of Distribution Value Added Components; Quadrennium November 2008–November 2012" and of the "Study of Service Costs Associated with the Supply of Electrical Distribution," March 2008, **Exhibit R-250**, point 7.1.3 ("[…] capital recovery factor for a 30-year period and an actual updating rate of 10% (0.10608)" […]).

Brief.[179] The CNEE never accepted the application of a depreciation level of only 8.3%, which was substantially lower than that applied in 2003. It was clear that if that depreciation level had been applied, it would have resulted in a VAD value for EEGSA higher than the one derived from the Sigla study, as TGH correctly claims.[180] The CNEE limited itself to verifying, as any responsible regulator reasonably does, the impact that the pronouncement of the Expert Commission had, and arrived at the conclusion that if the Expert Commission's FRC was applied to the Sigla study, the VAD would increase by 25%.

e. In order to determine the effect of applying the FRC of Sigla or the Expert Commission FRC, it is first necessary to determine the optimum VNR

107. In its Post Hearing Brief, and in response to a question by the Tribunal, Guatemala explained the impact of applying Sigla's FRC (established in the Terms of Reference) versus that established by the Expert Commission was USD 32 million (that is, 24%).[181] In its Post Hearing Brief, TGH criticized this approach because Mr. Damonte calculated it by first changing the VNR and then the FRC.[182] This is precisely the correct exercise.

108. As explained by Guatemala in its Post Hearing Brief, the major difference between the parties arises with respect to the VNR values.[183] That was confirmed by Messrs. Barrera and Damonte, who stated that the main difference between the values of the Sigla and Bates White studies stemmed from the design of the construction units, that is, the way the grid of a model company is built. Mr. Barrera explained:

> So, I think that there are a number of reasons why the two VNRs are different, <u>but mostly they have to do with the construction units</u>.[184]

Mr. Damonte confirmed:

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179 Claimant's Post Hearing Brief, paras. 78, 153, 156.

180 *Ibid.*, paras. 78, 153, 156.

181 Respondent's Post Hearing Brief, paras. 238-239, Direct Examination of Mario Damonte, slides 22 and 23.

182 Claimant's Post Hearing Brief, footnote 589.

183 Respondent's Post Hearing Brief, paras. 238-239.

184 Tr. (English), Day Six, 1466:4-7, Barrera.

> So, the significant differences that you're going to see in calculation are going to be not in the prices, rather in the design of the construction units.[185]

109. Given that the VNR value must be multiplied by the FRC value, before deciding which FRC should be applied, this Tribunal will have to decide (if it finds it has jurisdiction to do so, which Guatemala denies) which is the optimum VNR. In other words, the effect of the FRC cannot be calculated in the abstract, it must be calculated on the basis of a specific VNR.

110. In order to provide the Tribunal some guideline, listed below are the VAD values (in millions of USD) resulting from applying the various VNRs under discussion in this arbitration proceeding ((i) Sigla's, (ii) the one calculated by Mr. Damonte and used by Guatemala's damages expert,[186] and (iii) Bates White's of 28 July) to the various FRCs ((i) Terms of Reference (50% depreciation), Damonte (20.6% depreciation) and Expert Commission (8.3% depreciation)):[187]

Concept		FRC		
		ToR	Damonte	Expert Commission
VNR	SIGLA	127.33	137.51	149.61
	BW 5-5-08 corrected MD per EC	152.75	165.60	186.82
	BW 28-7-08	207.38	229.52	261.22

111. As shown in the chart above, if the Sigla VNR is multiplied by the FRC of the Terms of Reference (50% of accrued depreciation), a VAD of USD 127.33 million is obtained. If that same VNR is instead multiplied by the FRC proposed by Mr. Damonte, which reflects an accrued depreciation very similar to the one applied in 2003 and yet much lower than EEGSA's actual accounting FRC and that of Deorsa and Deocsa, the resulting VAD is USD 137.51 million. Lastly, if this VNR is multiplied by the Expert Commission's FRC

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185 Tr. (English), Day Six, 1469:1-4, Damonte.

186 This value reflects the incorporation of all possible pronouncements made by the Expert Commission regarding the Bates White study of May 5 by Mr. Damonte.

187 Direct Examination of Mario Damonte, slide 28; Preparation based on Model-BW-5-5-08, corrected by MD, per EC [Expert Commission] C-568, Sigla data: C-589, Stage E.

which, as previously explained, contains serious technical errors, the resulting VAD is USD 149.61 million.

112. Now, if the VNR of the 5 May study corrected by Mr. Damonte to reflect the Expert Commission's pronouncements is multiplied by the FRC of the Terms of Reference, the resulting VAD is USD 152.75 million. Meanwhile, if it is multiplied by the FRC proposed by Mr. Damonte, the resulting VAD is USD 165.6 million. This is the VAD that Guatemala's damages experts use to calculate the amount of alleged damages. Finally, if that VNR is multiplied by the FRC proposed by the Expert Commission, the resulting VAD is USD 186.82 million. The same exercise can be done with the VNR resulting from the Bates White study of 28 July and the various FRCs (Terms of Reference, that proposed by Mr. Damonte, and that proposed by the Expert Commission). The resulting VAD values are USD 207.38 million, USD 229.52 million and USD 261.22 million, respectively.

* * *

113. Based on the foregoing considerations, it is clear that TGH's claims that the CNEE acted in an arbitrary manner or in bad faith during the tariff review process lack any factual or technical basis. The reality is that, as shown by the evidence presented in the case, it was precisely EEGSA and its consultant who tried arbitrarily and in bad faith to manipulate the tariff review procedure in order to obtain an extraordinary VAD increase.

IV. GUATEMALA HAS NOT VIOLATED THE INTERNATIONAL MINIMUM STANDARD

114. Contrary to what TGH asserts in its Post Hearing Brief, Guatemala has not based "its legal defense mainly" on the "very limited" character of the protection offered by the international minimum standard with respect to the autonomous fair and equitable treatment standard.[188] Guatemala's position is that TGH's claim is not even a valid international claim, since a controversy about the mere interpretation and application of a regulating entity's regulation supported by local justice can never be in violation of an international standard applicable to the treatment of foreign investment, unless there is denial of justice. This is true even where said interpretation and application is incorrect—which is not the case here. This

[188] Claimant's Post-Hearing Brief, para. 12.

includes not only the autonomous fair and equitable treatment standard, as the *Iberdrola* case shows, but also, of course, a more limited standard such as the international minimum standard of treatment under customary international law, which is applicable in this case.

115. In any event, what Guatemala does consider important is that the international minimum standard be properly defined and differentiated from the autonomous fair and equitable treatment standard. This is important because it is a matter of trying to examine the content of the obligation which, according to TGH, Guatemala has violated. It is also important because the States party to the DR-CAFTA have made it a point to confine that obligation within precise limits, not only in the text of Article 10.5 of the Treaty but also in their submissions to this Tribunal. None of this can be avoided or embellished as if all were one and the same, as TGH claims.

A. TGH SEEKS TO IGNORE NOT ONLY THE TEXT OF ARTICLE 10.5 OF THE TREATY BUT ALSO THE NON-DISPUTING PARTIES' SUBMISSIONS, AND EQUATE THE INTERNATIONAL MINIMUM STANDARD TO THE FAIR AND EQUITABLE TREATMENT STANDARD

116. The entire legal thesis of TGH is based on equating the customary international law minimum standard of treatment to the autonomous fair and equitable treatment standard of general international law. It is symptomatic that TGH starts its arguments by citing (although incorrectly and out of context) a large amount of case law on this subject, forgetting the text of Article 10.5 of the Treaty and the submissions of the DR-CAFTA member States as non-disputing parties. Regarding Article 10.5, TGH only mentions one sentence in a footnote after more than 30 pages of a purported legal analysis.[189] As for the written and verbal submissions of the non-disputing parties, they are mentioned 9 pages in.[190]

117. In particular, an issue so fundamental as the interpretation by the very States party to the Treaty regarding the contents of the obligation they committed to is only worth a few mentions in two paragraphs of the nearly 170 pages and over 200 paragraphs of TGH's brief,

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[189] The legal section of the Claimant's Post-Hearing Brief starts on p. 8, para. 11, and the contents of Article 10.5 are only cited as a footnote on p. 170, corresponding to p. 39, para. 49.

[190] Claimant's Post-Hearing Brief, p. 17, para. 21.

including only one reference to the position of its own government.[191] Note that before the United States made their submission as a non-disputing party, TGH did consider it important to refer to its government's position regarding the contents of the DR-CAFTA: it started its legal analysis by referring to the United States Trade Representative, who participated in the negotiation of the Treaty, as no less than legal authority number 1, that is, Exhibit CL-1.[192] But it is obvious that now TGH wants to escape the language of the Treaty as well as its true contents, as defined by the States party to the Treaty, including the United States.

118. As previously explained in Guatemala's Post Hearing Brief, the starting point must be the text of Article 10.5 of the Treaty and the non-disputing parties' submissions. It is not difficult to see that the States negotiated and agreed to the text of Article 10.5 with a very clear intent: to limit the obligation they assumed solely and exclusively to the customary law international minimum standard, and to exclude any broad interpretation of the autonomous principle of fair and equitable treatment, such as seen in the case law. The language of Article 10.5 is clear evidence of that: it guarantees only "treatment in accordance with customary international law," it clarifies that "[f]or greater certainty […] the customary international law minimum standard of treatment of aliens [is] the minimum standard of treatment to be afforded to covered investments," and that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." To that we must add the text of Addendum 10-B, which confirms that "'customary international law' […] as specifically referenced […] results from a general and consistent practice of States that they follow from a sense of legal obligation."

119. In the light of the foregoing, it is difficult to doubt the intention of the States party to the DR-CAFTA. The States themselves have so corroborated in their submissions before this Tribunal:

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[191] Besides the passing reference at para. 21, the submissions of the non-disputing parties are limited to two references at para. 26, where the United States' submission is mentioned, and at para. 41 of the Claimant's Post-Hearing Brief.

[192] Memorial, para. 230, note 870; and Counter-Memorial, para. 231, note 1195, in both cases, referring to the United States Trade Representative, Free Trade Agreement between the Dominican Republic, Central America and the United States of America: Summary of the Agreement available on the Internet at http://www.ustraderepáginagov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file74_7284.pdf, **Exhibit CL-1**.

(a) The United States, for example, said that "[t]hese provisions demonstrate the States Parties' intention that Article 10.5 articulate a standard found in customary international law — *i.e.*, the law that develops from State practice and *opinio juris* — rather than an autonomous, treaty-based standard," that "[a]rbitral decisions interpreting 'autonomous' fair and equitable treatment […] do not constitute evidence of the content of the customary international law standard," and that "[t]he burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*";[193]

(b) El Salvador declared that "customary international law must be established through state practice, not through the decisions of arbitral tribunals," that "[t]he terms of Article 10.5 of the Treaty clearly reflect the State Parties' intention to adopt the most limited concept possible of 'fair and equitable treatment' as part of the Minimum Standard of Treatment under customary international law, not as an autonomous concept," and that "[t]he party that alleges the existence of a norm of customary international law has the burden to prove the existence of state practice followed from a sense of legal obligation that has given rise to the alleged norm."[194] El Salvador went even further and objected to the equivalence ascribed by TGH between the two standards in this case: "Given the text of Article 10.5 and the inapplicability of arbitral decisions, El Salvador rejects any argument that the concept of 'fair and equitable treatment' included in the DR-CAFTA as part of the Minimum Standard of Treatment, is equivalent to or has converged with the autonomous standard of 'fair and equitable treatment', as the Claimant argues in this arbitration";[195]

(c) The Dominican Republic explained that the Treaty refers to the "'minimum standard of treatment afforded to aliens under customary international law' and this concept is very different from the 'fair and equitable treatment'

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193 Non-Disputing Party Submission of the United States of America, 23 November 2012, paras. 4, 7.

194 Non-Disputing Party Submission of the Republic of El Salvador, 5 October 2012, paras. 7, 9, 10 (Emphasis in original.)

195 *Ibid.*, para. 11.

incorporated as an autonomous standard in many […] treaties," and that "[t]he current state of customary international law cannot be established through tribunal decisions";[196]

(d) As for Honduras, it stated that the reference to the concept of "fair and equitable treatment" in the Treaty "is made with reference to the minimum standard of treatment under customary international law, and is a very limited concept," that "the terms of Article 10.5 of the Treaty clearly reflect the State Parties' intention to adopt the most limited concept possible of 'fair and equitable treatment' as part of the minimum standard of treatment under customary international law," and that "[i]n order to determine the current status of customary international law it is necessary to refer to State practice, not to decisions of arbitration tribunals […]. [T]he party alleging the existence of a customary international law standard has the burden to prove [it]". [197]

120. The States decided to intervene in this arbitration precisely in reaction to TGH's interpretation, which was very broad and not based on the practice of the states, but rather only on case law (which was, moreover, cited out of context and incorrectly). As the United States stated during the Hearing:

> [T]he United States exercises its right as a non-disputing party to make submissions on questions of treaty interpretation, whether or not the investor is a United States investor. […][W]e exercised our right under the Treaty to draw the Tribunal's attention to the Treaty Parties' shared understanding that the customary international law Minimum Standard of Treatment in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. The burden, we noted, rests with the Claimant to establish the existence and applicability of a relevant obligation.[198]

121. In its Post Hearing Brief, TGH completely disregards this and insists on its erroneous approach. On the one hand, it states that regardless of States' attempts to differentiate the

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[196] Non-Disputing Party Submission of the Dominican Republic, 2 October 2012, paras. 3, 5 (Emphasis added.)

[197] Non-Disputing Party Submission of the Republic of Honduras, undated, paras. 3, 6, 8 (Emphasis added.)

[198] Tr. (English), Day Five, 822:12-16 and 822:21-823:7, United States. (Emphasis added.)

standard applicable to fair and equitable treatment, today everything is the same ("[T]he minimum standard of treatment […] has converged in substance with the FET standard, such that the standards essentially are the same."[199]), and therefore, the States failed in their intent and they should simply give up.[200] On the other hand, TGH laments the difficulty of proving international custom,[201] as if Guatemala has no right to demand such an effort in the face of a claim for more than USD 243 million.

122. The cases cited by TGH do not support its thesis that the international minimum standard can be reduced today to fair and equitable treatment. Many of the cases cited hold precisely the opposite, that is, that the fair and equitable treatment standard should not be interpreted too broadly but rather in a limited fashion, using the international minimum standard as a reference. For example, in *Biwater v. Tanzania* the tribunal stated that "statements made in the context of Article 1105(1) of NAFTA [minimum standard] […] [are] appropriate in the context of Article 2(2) of the BIT [fair and equitable treatment]," and that "certain expressions of a lower threshold [to establish a violation] have been the subject to some criticism," referring for example to the interpretation in *Tecmed*.[202] Likewise, in *El Paso v. Argentina*, also cited by TGH, the tribunal said that "fair and equitable treatment […] has to be interpreted with reference to international law […]. [T]he fair and equitable treatment of the BIT is the international minimum standard required by international law."[203] This is exactly the opposite of what TGH claims. It is also the position that Guatemala took in the *Iberdrola* case, that is, that in reality the fair and equitable treatment standard must not be interpreted in a broad sense as suggested by Iberdrola (and TGH here), but in a limited manner in light of the international minimum standard.[204] Other cases cited by TGH in reality conclude that the

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199 Claimant's Post-Hearing Brief, para. 13.

200 *Ibid.*, paras. 12-16.

201 *Ibid.*, para. 21.

202 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, **Exhibit CL-10**, paras. 599-600, cited by TGH in its Post-Hearing Brief, para. 13.

203 *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, **Exhibit CL-102**, para. 337, cited by TGH in its Post-Hearing Brief, para. 13.

204 Respondent's Post-Hearing Brief, para. 16.

protection offered by both standards may look alike, but only in concrete instances in light of the specific facts of a case.[205]

123. TGH's complaint that establishing the international custom means "impos[ing] an impossible burden upon a claimant to establish a treaty breach"[206] is no excuse. The Treaty is abundantly clear in Addendum 10-B, that any reference to "customary international law" in Article 10.5 of the Treaty refers to "a general and consistent practice of States that they follow from a sense of legal obligation." The States have emphasized that such general practice and *opinio juris* must be established, that the burden of proof rests with TGH and that citing arbitral decisions does not suffice.[207] TGH has not made any effort to investigate and make submissions on the practice of states in the region, for example: the interventions by the United States, or Canada and Mexico, in matters relating to NAFTA as non-disputing parties, or even as disputing parties;[208] the Notes of Interpretation of the NAFTA Commission regarding the international minimum standard;[209] the Model BIT developed by the United States and the comments published in that regard by official and academic sources;[210] Canada's Model Foreign Investment Protection and Promotion Agreement (FIPA);[211] the practice of BITs signed by Mexico or Canada;[212] or the studies of interstate organizations such as the

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[205] For example in the following cases: *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005, **Exhibit CL-17**, para. 284; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Award, **Exhibit CL-8**, 14 July 2006, para. 361.

[206] Claimant's Post-Hearing Brief, para. 21.

[207] See para. 119 above.

[208] For example: *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), United States Counter-Memorial, 19 September 2006, pp. 218-262, available on the Internet at http://www.state.gov/documents/organization/73686.pdf.

[209] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (Washington D.C., 31 July 2001).

[210] 2004 United States Model Bilateral Investment Treaty, **Exhibit RL-19**, Article 5.

[211] Canada's Model Foreign Investment Protection and Promotion Agreement, available on the Internet at www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf.

[212] Canada-Colombia Free Trade Agreement (signed on 21 November 2008, in effect on 15 August 2011), Article 805; Agreement Between the United Mexican States and the Republic of Panama for the Reciprocal Promotion and Protection of Investments (Mexico City, Federal District, signed on 11 October 2005, in effect on 14 December 2006), Article 6.

UNCTAD,[213] the OECD,[214] the WTO Secretariat,[215] or the United Nations Centre on Transnational Corporations (UNCTC).[216]

124. All this material, and much more, regarding the practice of states on this matter was readily available to TGH. TGH's lead attorney is perfectly aware of all this, as she was a State Department specialist on these matters and expressed the opinion of the United States on numerous occasions; for instance, at a congress of the Asia-Pacific Economic Cooperation (APEC), where she said:

> The 'international minimum standard,' is a reference to a set of rules regarding the treatment of aliens and their property that over time have crystallized into customary international law. Customary international law standards may be established by a showing of a general and consistent practice of States followed by them from a sense of legal obligation.[217]

125. Therefore, it was not impossible for TGH to make reference to this material; if TGH has not done so and has based its arguments solely on arbitration decisions, most of them irrelevant and cited incorrectly, it is because it was not in its favor to do so.

B. THE MINIMUM STANDARD PROTECTS ONLY AGAINST DENIAL OF JUSTICE AND MANIFEST ARBITRARINESS, AND NOT THE EXPECTATIONS OF THE INVESTOR

126. The reality is that, as explained in previous briefs, the narrow position established under the Treaty, which guarantees only the international minimum standard and clearly differentiates it from the fair and equitable treatment, reflects the current trend, especially in the North and Central American region. As the tribunal stated in *Glamis Gold*:

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[213] United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5, 2012, **Exhibit RL-26.**

[214] OECD, "Fair and Equitable Treatment Standard in International Investment Law" in: *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives* (2005), Chapter 3, available on the Internet at http://www.oecd.org/daf/inv/internationalinvestmentagreements/40077877.pdf.

[215] See work carried out by the Working Group on the Relationship between Trade and Investment of the WTO, available on the Internet at http://www.wto.org/english/tratop_e/invest_e/invest_e.htm.

[216] United Nations Centre on Transnational Corporations and International Chamber of Commerce, *Bilateral Investment Treaties 1959-1991* (1992), available on the Internet at http://unctc.unctad.org/data/e92iia16a.pdf.

[217] Andrea Menaker, "Standards of Treatment: National Treatment, Most Favoured Nation Treatment and Minimum Standard of Treatment", *APEC Workshop on Bilateral and Regional Investment Rules and Agreements*, APEC Committee on Trade and Investment Experts Group, 17-18 May 2002, p. 109. Available on the Internet at http://publications.apec.org/publication-detail.php?pub_id=531.

> The State Parties to the NAFTA can always choose to negotiate a higher standard against which their behavior will be judged. It is very clear, however, that they have not yet done so and therefore a breach of Article 1105 still requires acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination.[218]

127. The case law shows this trend. Again, the *Glamis* tribunal explained:

> [T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1).[219]

128. As UNCTAD explains in its recent study on this topic:

> A high threshold has been emphasized in the context of application of the minimum standard of treatment under customary international law. The classic early tests of the MST required a violation to be "egregious" or "shocking" from the international perspective. Even though the world has moved on, and the understanding of what can be considered egregious or shocking has changed, these terms still convey a message that only very serious instances of unfair conduct can be held in breach of the MST.
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> […]
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> A second approach, using a somewhat lower threshold, has been taken by tribunals applying an unqualified FET standard (the one not linked to the customary law MST). These tribunals have – albeit to a lesser extent – also tended to express a significant degree of deference for the conduct of sovereign States.[220]

129. Furthermore, in its recommendations to States about how to write a fair and equitable treatment clause, UNCTAD explains:

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[218] *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, para. 829.

[219] *Ibid.*, para. 616 (Emphasis added).

[220] United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD/DIAE/IA/2011/5, 2012, **Exhibit RL-26,** pp. 86-87 (Emphasis added).

> A reference to the MST [minimum standard of treatment] assumes that tribunals examining FET claims will hold the claimant to this demanding standard. […] [T]he main feature of this approach remains a high liability threshold that outlaws only the very serious breaches.[221]

130. Another example is *Thunderbird v. Mexico*:

> Notwithstanding the evolution of customary law since decisions such as *Neer* Claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.[222]

131. The requirement of that the action in question be particularly grave for there to be a violation of the international minimum standard was identified as follows by the tribunal in the *Cargill v. Mexico* award, curiously cited favorably by TGH:[223]

> [T]he lack or denial must be "gross," "manifest," "complete," or such as to "offend judicial propriety." The Tribunal grants that these words are imprecise and thus leave a measure of discretion to tribunals. But this is not unusual. The Tribunal simultaneously emphasizes, however, that this standard is significantly narrower than that present in the *Tecmed* award where the same requirement of severity is not present.
>
> […] If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.
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> […]
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> To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic;

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221 *Ibid.*, pp. 105-106 (Emphasis added).

222 *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, 26 January 2006, **Exhibit CL-25**, para. 194 (Emphasis added, footnotes omitted).

223 Claimant's Post-Hearing Brief, para. 46.

> arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure […].[224]

132. Therefore, the international minimum standard is less demanding for States than fair and equitable treatment. It is violated only in the case of particularly egregious and severe conduct, and, specifically, requires an element of intent.

133. The States party to the DR-CAFTA have also explained to the Tribunal their common intent and mutual understanding regarding the content of the international minimum standard, the obligation by which they intended to be bound. This collective understanding of the States regarding the obligation to which they agreed is binding on the parties to this proceeding and the Tribunal:

(a) For example, the United States stated that "States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector. Regulatory action violates 'fair and equitable treatment' under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or manifest arbitrariness falling below the international minimum standard. […] Determining a breach of the minimum standard of treatment 'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders'";[225]

(b) El Salvador stated that "[d]ue to the origin of the Minimum Standard of Treatment in customary international law, as an absolute floor to the treatment States may provide, only State actions of an extreme nature can violate the

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[224] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB[AF]/05/2) Award, 18 September 2009, **Exhibit CL-12**, paras. 285, 286, 296 (Emphasis added).

[225] Non-Disputing Party Submission of the United States of America, 23 November 2012, paras. 6, 7 (Emphasis added, footnotes omitted).

Minimum Standard of Treatment. […] Because the focus must be on the conduct of the State, it is incorrect to make reference to the legitimate expectations of the investor to decide if the State has complied with the Minimum Standard of Treatment. State conduct is the only relevant factor for this purpose, because the Minimum Standard of Treatment must be an objective concept that evaluates the treatment a state accords to an investor";[226]

(c) The Dominican Republic stated that "[w]ith regard to the minimum standard of treatment granted to foreigners under customary international law, […] a violation of the standard consists of […] [a]n egregious and shocking denial of justice. […] A manifest arbitrariness […]. Due to the origin of the minimum standard of treatment in customary international law, as an absolute "floor," only egregious, outrageous and shocking State actions may violate the minimum standard of treatment. […] Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include investors' expectations";[227]

(d) Honduras explained that "only State actions of an extreme, excessive or injurious nature can violate the minimum standard of treatment, […] a gross denial of justice, manifest arbitrariness […]. [B]ecause the focus must be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to make reference to the expectations of investors for deciding whether the minimum standard of treatment has been violated.[228]

134. The States' interpretation coincides with that of the case law, which understands that, in a regulatory context such as the one being considered, it is manifest arbitrariness (and, if applicable, denial of justice, which TGH does not allege) that may result in a violation of the

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[226] Non-Disputing Party Submission of the Republic of El Salvador, 5 October 2012, paras. 13, 14 (Emphasis added).

[227] Non-Disputing Party Submission of the Dominican Republic, 2 October 2012, paras. 6, 7, 10.

[228] Non-Disputing Party Submission of the Republic of Honduras, undated, paras. 9, 10. Unofficial English translation. In its original Spanish version it reads: "solamente acciones de carácter chocante, excesivo, ultrajante, de parte de un Estado, pueden violar el nivel mínimo de trato, […] una grave denegación de justicia, una arbitrariedad manifiesta […]. [D]ebido a que el enfoque debe ser en la conducta del Estado, la República de Honduras no considera válido ni necesario hacer referencia a las expectativas de los inversionistas para decidir si se ha violado el nivel mínimo de trato."

international minimum standard. They also agree that the doctrine of legitimate expectations should be excluded as a valid criterion for judging the conduct of the State under this standard. This is confirmed by the cases that TGH itself cites.

135. For example, in the *Cargill v. Mexico* case the tribunal explained:

> The Tribunal notes that there are at least two BIT awards, both involving a clause viewed as possessing autonomous meaning, that have found an obligation to provide a predictable investment environment that does not affect the reasonable expectations of the investor at the time of the investment. No evidence, however, has been placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law, at least where such expectations do not arise from a contract or quasi-contractual basis.[229]

136. Another example is the case *Saur v. Argentina*. Although the applicable standard was fair and equitable treatment, the tribunal explained that "[t]he connection between FET [fair and equitable treatment] and FPS [full protection and security] standards and the concept of legitimate expectations becomes relevant when an investor alleges that the State has modified the existing legal framework in an arbitrary manner."[230] That is to say, it is the arbitrariness that in any event serves as the criterion for supporting a violation, not the expectations themselves.

137. The same concept was recognized by the tribunal in *Mobil v. Canada*:

> This applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. Article 1105 may protect an investor from changes that give rise to an unstable legal and business environment, but only if those changes may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard. In a complex international and domestic environment, there is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if

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[229] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB[AF]/05/2) Award, 18 September 2009, **Exhibit CL-12**, para. 290 (Emphasis added, footnotes omitted).

[230] *SAUR International S.A. v. Republic of Argentina* (ICSID Case No. ARB/04/4) Decision on Jurisdiction and Liability, 6 June 2012, **Exhibit CL-107**, para. 496 (Emphasis added). Unofficial English translation. In its original Spanish version it reads: "[l]a conexión entre los estándares de TJE [trato justo y equitativo] y PPS [plena protección y seguridad] y la noción de expectativas legítimas, deviene relevante cuando un inversor alega que el Estado ha modificado arbitrariamente el marco legal existente."

> some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor. Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behavior. It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete.[231]

138. In summary, legitimate expectations are not the proper instrument for judging whether the State's conduct falls within the confines of the international minimum standard. The concept of legitimate expectations does not eliminate the need to examine how severe the State's conduct must be to violate international law. Specifically, the changes to the regulatory framework subject to sanction are those that may result in manifest arbitrariness, because the commitments clearly assumed with respect to the investor are deliberately, and through the use of government or legislative instruments, disregarded.

C. GUATEMALA HAS NOT COMMITTED ANY MANIFESTLY ARBITRARY ACT

139. As explained above, TGH's Post Hearing Brief confirms that the dispute concerns whether, once the opinion of the Expert Commission was issued, the CNEE was responsible for determining on its own if the distributor's tariff study could be used to establish the tariffs, or if these had to be established on the basis of another independent tariff study. As is now well known,[232] the LGE and RLGE clearly state that it is the CNEE that approves the tariff review methodology, the tariff studies, the VAD that complies with the law and, ultimately, the tariffs. These also state that the CNEE can order its own tariff studies from independent consultants,

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[231] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB (AF)/07/4) Decision on Liability and *Quantum* (public version), 22 May 2012, **Exhibit RL-37**, para. 153 (Emphasis added).

[232] See Section II.B.1 above.

as was always advised by the father of the LGE, Mr. Bernstein.[233] On the contrary, there is nothing in the LGE and RLGE that states that there would be a new tariff study from the distributor after the pronouncement of the Expert Commission, much less that it would be approved by the Expert Commission. Nor is it stated that tariffs must be determined on the basis of that tariff study. In fact, as previously explained, the provision to that effect that existed in the draft was eliminated in the final version. Therefore, it was not unusual that the CNEE would consider itself to be ultimately responsible for determining the consequences resulting from the Expert Commission's pronouncement. Consequently, the CNEE had not only the authority, but also the obligation, to determine if the Bates White study complied with the regulatory framework. No other authority could assume that duty. This was categorically recognized by the Constitutional Court in its two decisions in this case, and TGH does not accuse the Court of manifest arbitrariness (which would amount to a denial of justice).[234]

140. This scenario is in no way an example of arbitrariness, much less manifest arbitrariness, that violates the international minimum standard. Even if the CNEE had been mistaken in its interpretation of the regulatory framework (which was not the case, as confirmed by the decisions of the Constitutional Court), at most it would be a question of a domestic administrative offense or regulatory irregularity, to be judged, as it was, by the local courts. The very cases cited by TGH prove this.

141. *Saur v. Argentina*, for example, dealt with Argentina's breach of an agreement establishing the terms for the tariff system of a water treatment concession. The tribunal deemed that the possible violation of domestic or contractual regulations did not constitute a violation of fair and equitable treatment (a protection much broader than that which is applicable here):

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[233] JS Bernstein "Some Methodological Aspects to Consider in Terms of Reference for Distribution Value Added Studies," May 2002, **Exhibit R-23**, p. 2. ("To exercise its control authority, the CNEE must be able to perform a critical analysis of each step in the study carried out by Distributors, which, in practice, implies carrying out an independent study, but using the same methodology.")

[234] Decision of the Constitutional Court (Consolidated Case Files 1836-1846-2009) Appeal of Amparo Decision, 18 November 2009, **Exhibit R-105**, Sections I and II; and Decision of the Constitutional Court (Case File 3831-2009) Amparo Appeal, 24 February 2010, **Exhibit R-110**, Sections I and II.

> The FET [fair and equitable treatment] and FPS [full protection and security] standard is different from the duty of States to adhere to their own legislation […]. The fact that a State is violating its own laws or contracts does not constitute a necessary or sufficient condition to understand that the international FET or FPS standard has been violated. International Law does not cover every regulatory or contractual breach of a State under all circumstances − in these cases the injured party should seek protection through the domestic judicial system […].[235]

142. The tribunal understood that the determining factor for this violation of fair and equitable treatment was that Argentina had acted intentionally against the concession:

> The facts described evidence that the Provincial Authorities—the Executive Branch and the EPAS—decided to postpone the tariff increases to which OSM was entitled, consciously accepting its financial strangulation and the deterioration of the service collapse situation, so as to thus precipitate an intervention that would lead to rescinding the Concession and renationalizing the service. This type of conduct is obviously incompatible with the FET standard required by the APRI.[236]

143. In *Cargill v. Mexico*, the tribunal found that there was a violation of the international minimum standard because "[b]y far, the Tribunal finds most determinative the fact that the import permit was put into effect by Mexico with the express intention of damaging Claimant's HFCS investment to the greatest extent possible. For this reason, the Tribunal finds this action to surpass the standard of gross misconduct and be more akin to an action in bad faith."[237] TGH admits that "mere negligence by a regulatory agency, without more, may not violate the minimum standard." [238] However, and contradictorily, it opines that "intentionality […] is not required for a finding of arbitrariness."[239] If negligence does not violate the international

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235 *SAUR International S.A. v. Republic of Argentina* (ICSID Case No. ARB/04/4) Decision on Jurisdiction and Liability, 6 June 2012, **Exhibit CL-107**, para. 483. Unofficial English translation. In its original Spanish version it reads: "El estándar de TJE [trato justo y equitativo] y PPS [plena protección y seguridad] es diferente del deber de los Estados de atenerse a su propia legislación […]. Que un Estado esté incurriendo en incumplimiento de sus propias leyes o contratos no constituye ni condición necesaria ni suficiente para que se entienda violado el estándar iusinternacional de TJE o de PPS. El Derecho internacional no cubre todo incumplimiento normativo o contractual de un Estado en todas las circunstancias – en estos casos el perjudicado debe buscar protección a través del sistema judicial interno […]."

236 *Ibid*., paragraph 506. Unofficial English translation. In its original Spanish version it reads: "Los hechos descritos prueban indiciariamente que las Autoridades Provinciales – el Poder Ejecutivo y el EPAS – decidieron posponer los aumentos de tarifa a los que OSM tenía derecho, aceptando conscientemente su estrangulamiento financiero y el agravamiento de la situación de colapso del servicio, para así precipitar una intervención que llevara a la rescisión de la Concesión y la renacionalización del servicio. Una conducta de este tipo a todas luces es incompatible con el estándar de TJE exigido por el APRI."

237 *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB[AF]/05/2) Award, 18 September 2009, **Exhibit CL-12**, para. 298.

238 Claimant's Post-Hearing Brief, para 46. Unofficial English translation. In its original Spanish version it reads: "la mera negligencia de un ente regulatorio no puede, sin más, importar la violación del estándar mínimo de trato."

239 *Ibid.* Unofficial English translation. In its original Spanish version it reads: "la intencionalidad tampoco es necesaria para que pueda determinarse que hubo arbitrariedad."

minimum standard, then intentionality or intentional misconduct is necessary for this violation to exist.

144. In any event, the scenarios in *Saur* and in *Cargill* are completely different from this case. Here, TGH submits a dispute regarding the scope of the regulation, and in spite of knowing full well that it is insufficient to support its claim, TGH speaks of politicization, abuses of power, fundamental alteration of the regulatory framework, etc. – none of which it can prove. The circumstances of the case are similar to those of the *Mobil v. Canada*. In that case, the claimant accused Canada of violating the international minimum standard with respect to how it had interpreted and applied the regulatory framework in regard to the amounts that oil companies had to invest to be guaranteed certain incentives and benefits. The Canadian courts had already found in favor of the regulator. The tribunal dismissed the complaint, specifically because the standard does not protect legitimate expectations based on the maintenance of an unaltered regulatory framework, and also because the Canadian judicial decisions, which are "dispositive of the issues that arise as a matter of Canadian law,"[240] contradicted (as here) the interpretation of the regulatory framework as the claimant presented it. Under these circumstances, "there is no evidence before the Tribunal that the Respondent, or any other bodies for which it is internationally responsible, acted in a manner that was intended to damage the Claimants' investments, whether to the maximum extent possible or even at all."[241] As can be seen, the element of intent is again relevant when it comes to applying the international minimum standard.

145. It is curious that TGH cites the case *Lemire v. Ukraine*,[242] in which the tribunal deemed that its role was not to judge whether or not the regulator acted correctly in awarding certain licenses:

> The Tribunal is not thereby suggesting that a breach occurs if the National Council makes a decision which is different from the one the arbitrators would have made if they were the regulators. The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies

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[240] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB (AF)/07/4) Decision on Liability and *Quantum* (public version), 22 May 2012, **Exhibit RL-37**, para. 167.

[241] *Ibid.*, para. 151.

[242] Claimant's Post-Hearing Brief, para. 43.

> applying national laws. […] A claim that a regulatory decision is materially wrong will not suffice.[243]

146. In *Lemire* the violation occurred because of evidence of the "secret awarding of licences, without transparency, with total disregard of the process of law and without any possibility of judicial review."[244] None of this is applicable here, where the dispute concerns the interpretation of the regulatory framework. It is true that TGH makes allegations of political motivation, but it makes no attempt to prove them. In addition, recourse to the local courts to settle the dispute existed at all times.

147. TGH once again cites the *ELSI* case from the International Court of Justice (***ICJ***), approving the definition of arbitrariness in that case, but it does not analyze the case in the slightest.[245] It should be recalled that the ICJ understood arbitrariness to be conduct that intentionally violates the legal system: "a wilful disregard of due process of law," and which therefore shows disdain for the principle of the "rule of law."[246] A mere domestic illegality (which in any case does not even exist here) does not give rise to arbitrariness:

> Yet it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. […][247]

148. What is required is that the violation be deliberate, intentional and willful, which is precisely what arises from the concept of "wilful disregard" mentioned by the ICJ. One must consider that one of the elements the ICJ considered to have ruled out arbitrariness was that the measure, though questionable or even obviously illegal, was taken in exercise of the duties of the authority in question, and "in the context of an operating system of law and of appropriate remedies of appeal."[248]

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243 *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 21 January 2010, **Exhibit CL-104,** para. 283.

244 *Ibid.*, para. 418.

245 Claimant's Post-Hearing Brief, para. 41.

246 *Elettronica Sicula S.p.A. (ELSI) (USA v. Italy)* [1989] ICJ Rep 15, 20 July 1989, **Exhibit RL-1**, para. 128.

247 *Ibid.*, para. 124.

248 *Ibid.*, para. 129.

149. Guatemala has illustrated precisely these concepts throughout this case, in which it has cited abundant case law showing how customary international law (and even fair and equitable treatment) never censures regulatory measures with regard to which the local courts have already passed judgment, as in this case.[249] As the tribunal stated in *Iberdrola*:

> It is not enough […] that the Claimant convinces the Tribunal that its interpretation of Guatemalan laws and of the technical and economic models is correct and that the one adopted by the CNEE is wrong […] for the Tribunal to consider that there is a genuine claim that Guatemala violated the standard of fair and equitable treatment […].[250]

150. It is also worth considering the irregularities that characterized the actions of EEGSA and its consultant Bates White during the tariff review process. This lack of good faith collaboration on the part of EEGSA led the CNEE to approve a tariff study that inspired confidence, and not that of Bates White. The CNEE not only had the capacity but also the duty to act in this manner, as TGH's own expert, Mr. Alegría, testified in his written statement and at the Hearing:

> Q. [Y]ou state […] "The law establishes that the consultant must prepare an independent Tariff Study based on objective information and reliable techniques." Is that correct? […]
>
> A. Yes. […] That is what is preferred. Well, this is what is stated in the law.
>
> Q. Therefore, if the study does not have objective information and is not based on reliable techniques, it means that it is not in accordance with the law; correct?
>
> […]
>
> A. Yes, that is correct.
>
> Q. And CNEE is the one that has to make sure that the law is implemented and also enforced?
>
> A. Yes. That the law is enforced.[251]

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[249] For example, Respondent's Rejoinder, paras. 97-100.

[250] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 368.

[251] Tr. (English), Day Five, 1207:9-1208:12, Paradell and Alegría.

151. Thus, the CNEE not only had the authority, but also the obligation, to decide whether the Bates White study complied with the regulatory framework. No other authority could assume that duty.

152. In summary, there was never any arbitrariness, much less manifest arbitrariness, a concept that the tribunal explained in *Glamis Gold* as follows:

> [T]he Tribunal notes the standard articulated above as to when an act is so manifestly arbitrary as to breach a State's obligations under Article 1105: this is not a mere appearance of arbitrariness—a tribunal's determination that an agency acted in way with which the tribunal disagrees or a State passed legislation that the tribunal does not find curative of all the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards." The act must, in other words, "exhibit a manifest lack of reasons." [252]

D. GUATEMALA HAS NOT VIOLATED ANY LEGITIMATE EXPECTATION OF TGH

153. As explained above, the doctrine of legitimate expectations does not apply in the scope of the international minimum standard.[253] In any event, the expectations that TGH claims to have, as has already been addressed above,[254] are merely that the regulatory framework should be interpreted and applied as TGH understands it. That is to say, this is a matter of once again stating its disagreement with the CNEE's interpretation of the regulation, but now cloaking that argument in the doctrine of legitimate expectations.

154. In any case, legitimate expectations require specific promises or commitments from the State to the investor, as evidenced in the *Glamis Gold* award:

> [A]s the Tribunal has explained in its discussion of the 1105 legal standard, a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.[255]

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[252] *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, para. 803.

[253] Respondent's Post-Hearing Brief, paras. 284-291.

[254] See Section II.B.3 above.

[255] *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, para. 766.

155. Another example is the award in *EDF v. Romania*, applying the broadest standard of fair and equitable treatment:

> The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.
>
> Further, in the Tribunal's view, the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors.[256]

156. The tribunal ruled the same way in *AES v. Hungary*:

> A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.
>
> [...]
>
> [N]o specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur.[257]

157. Other cases were previously cited by Guatemala in its Post Hearing Brief.[258] TGH refers to cases from the Argentine crisis, but in all of those cases expectations were contained, in addition to in the law and regulations, in the bidding rules and in the concession agreements themselves.[259]

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[256] *EDF Services Ltd v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, **Exhibit RL-13**, paras. 217-218 (Emphasis added).

[257] *AES Summit Generation Limited and AES-TISZA ERÖMÜ KFT v. Hungary* (ICSID Case No. ARB/07/22) Award, 23 September 2010, **Exhibit RL-24**, paras. 9.3.29, 9.3.31.

[258] Respondent's Post-Hearing Brief, paras. 297-304.

[259] *E.g., Enron Corporation & Ponderosa Assets, L.P. v. Republic of Argentina* (ICSID Case No. ARB/01/3) Award, 22 May 2007, **Exhibit CL-21**, para. 128; *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Republic of Argentina* (ICSID Case No. ARB/02/1) Decision on Liability, 3 October 2006, **Exhibit CL-27,** para. 119; *CMS Gas Transmission Co. v. Republic of Argentina* (ICSID Case No. ARB/01/8) Award, 12 May 2005, **Exhibit CL-17,** paras. 161-166. See also *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Republic of Argentina* (ICSID Case No. ARB/03/17) Decision on Liability, 30 July 2010, **Exhibit RL-17**, para. 212.

158. Guatemala reiterates that TGH cannot provide evidence of any alleged legitimate expectation that it would have acquired or that would have been created for it at the time of the privatization of EEGSA, when TGH did not even exist.[260] In any event, neither the Sales Memorandum nor the roadshows documentation establishes any of the "promises" that TGH claims to have received, for example, regarding the role of the Expert Commission or regarding the CNEE's obligation to approve the VAD based on the distributor's study.[261]

159. Furthermore, even though there has been no regulatory change, no guarantee was ever given to TGH or Teco that there would be no change. To the contrary, in the contracts under which EEGSA operates, and therefore TGH operated, all legislative and regulatory changes are fully accepted.[262] Finally, Guatemala has already explained in previous submissions that the frustration of legitimate expectations only occurs when the legal framework has been fundamentally abrogated,[263] given that "any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times,"[264] and an investor "may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."[265] There has been no fundamental abrogation of the legal framework in this case.[266]

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[260] See, for example, Rejoinder, paras. 173-181.

[261] See Section II.B.3 above.

[262] Authorization Contract Between the Ministry of Energy and Mines and Empresa Eléctrica de Guatemala S.A., 15 May 1998, **Exhibit C-31**, Clause 20; Final Electricity Authorization Agreement for the Departments of Chimaltenango, Santa Rosa and Jalapa, 2 February 1999, **Exhibit R-20**, Clause 20 ("[EEGSA] agrees to comply with all the provisions of the [LGE] and [the RLGE] and amendments to them and other regulations and provisions of general application")(Emphasis added).

[263] For example, Rejoinder, paras. 205-210.

[264] *AES Summit Generation Limited and AES-TISZA ERÖMÜ KFT v. Hungary* (ICSID Case No. ARB/07/22) Award, 23 September 2010, **Exhibit RL-24**, para. 9.3.34.

[265] *EDF Services Ltd v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, **Exhibit RL-13**, para. 217.

[266] See Section II.B.2 above.

V. DAMAGES

160. As Guatemala has repeatedly stated, this Tribunal should only consider the arguments of the parties regarding the alleged damages if it deems that it has jurisdiction to decide the matters in dispute in this case and, in addition, it believes that Guatemala violated international law. In this section, Guatemala will limit itself to correcting certain arguments made by TGH in its Post Hearing Brief, referring the Tribunal to its briefs regarding the rest of its arguments.

A. THE 2008-2013 TARIFF REVIEW SHOWS THAT THE CALCULATION IN PERPETUITY PERFORMED BY THE CLAIMANT'S EXPERT IS INCORRECT

161. The truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM. However, as Guatemala explained in its Post Hearing Brief, it is incorrect to consider the alleged measures as perpetual in nature for the purposes of calculating damages, as TGH does. [267] This is obvious given the imminent possibility that a tariff increase will be granted to EEGSA in the tariff review that is under way.[268]

162. In its Post Hearing Brief, TGH maintains that Mr. Kaczmarek did not assume that the 2008 tariff would remain the same in the future, but rather that, in projecting its cash flow, he took into account probable inflation, grid growth and future losses.[269] It is clear, however, that this is mere rhetorical justification on the part of TGH. In reality, these adjustments do nothing more than perpetuate the alleged effect of the supposed measures on TGH's investment. TGH also denies that Mr. Kaczmarek made projections in perpetuity, but rather claims that he projected until 2018 and then issued a final value for EEGSA.[270] But that is also false. The reality is that this final value is calculated on the basis of projections in perpetuity made by Mr. Kaczmarek, and as such this distinction does not resolve the problem with TGH's valuation.[271]

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[267] Respondent's Post Hearing Brief, Section V.C.

[268] Respondent's Post Hearing Brief, Section V.C.

[269] Claimant's Post Hearing Brief, para. 171.

[270] Claimant's Post Hearing Brief, para. 172.

[271] Kaczmarek, **Appendix CER-2**, para. 197.

B. TGH'S ATTACKS ON GUATEMALA'S *BUT FOR* VALUATION DO NOT BEAR CLOSE EXAMINATION

163. Instead of defending its own *but for* valuation, in its Post Hearing Brief, TGH made significant efforts to attack the valuation made by Guatemala's experts. However, as explained below, these attacks are entirely unfounded.

164. *First*, TGH criticizes Dr. Abdala for not having used the Bates White study of 28 July as a *but for* scenario, as Mr. Kaczmarek did.[272] As explained in detail in the Post Hearing Brief, there is no legal provision that states that the consultant himself must correct his study.[273] Had the CNEE decided that the study could be corrected, it fell to it to the CNEE to study the pronouncements and incorporate them. Guatemala has already explained that this was not possible because of the serious flaws in the May 5 study and the time available. As a result, the CNEE considered itself obligated to use the Sigla study. If this Tribunal considers that using this study is a violation of international law on the part of Guatemala, then it must determine the damage resulting from using the May 5 study according to how the CNEE may have corrected it and not based on the study corrected by Bates White itself. This is precisely the exercise that Mr. Damonte carried out and that Dr. Abdala used as a *but for* scenario. As explained earlier, the Expert Commission's FRC contains serious technical errors, which is why no regulator used it. Under these circumstances, Mr. Damonte used an FRC that contained an imputed amortization value very similar to that used in 2003 (29.6%). It is noted that this value is conservative compared to EEGSA's actual depreciation values (43.5%) and those applied to Deorsa-Deocsa (42.2%).[274] With respect to TGH's accusations that Mr. Damonte did not incorporate all of the Expert Commission's pronouncements, as explained in detail in the Post Hearing Brief, the pronouncements not included were those that required input or information from EEGSA and optimization.[275] As explained earlier, the inclusion of these changes would have only further reduced the study's VNR and VAD value.[276]

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[272] Claimant's Post Hearing Brief, paras. 175-177.

[273] Respondent's Post Hearing Brief, paras. 44-47.

[274] Direct examination of Mario Damonte, slide 17.

[275] Respondent's Post Hearing Brief, para. 194.

[276] Respondent's Post Hearing Brief, para. 194.

165. *Secondly*, TGH argues that Dr. Abdala's model is deceptive because it "contains a "Control Panel" tab with options to select different combinations of assumptions, including assumptions for the VNR, FRC, and Capital Expenditures. However, selecting the "NCI" or Navigant VNR and FRC assumptions *also* changes the capital expenditure assumptions."[277] This is incorrect. The capital expenditure "scenarios" that TGH mentions do not change. What changes is the "amount" of capital expenditures, which is reasonable considering that: (i) to take NCI using a VNR higher than that used by Guatemala's experts indicates that the value of electric distribution grid is higher and, therefore, the cost of replacing it (replacement capital expenditures) is necessarily higher;[278] and (ii) NCI's FRC contains useful lives of assets that are slightly different from those of Guatemala's experts. Therefore, the capital expenditure to replace assets will change slightly because the assets must be replaced at different intervals. In any event, except for two modifications specifically explained in the second report,[279] the entire model by Guatemala's experts was presented and explained in the first report. Nevertheless, neither TGH nor its expert made any comment regarding the alleged problems with the model either in their briefs or, more curious still, during Dr. Abdala's cross-examination at the Hearing. It is clear, therefore, that this is another one of TGH's opportunistic arguments.

166. *Thirdly*, TGH claims that if the valuation done by Guatemala's experts is modified to include the Expert Commission's FRC and the VNR of 28 July is included, one arrives at a *but for* value greater than that estimated by Mr. Kaczmarek.[280] First of all, it is necessary to recall that this exercise is incorrect because (i) the 28 July study corrected by the consultant is not supported by the regulatory framework and, in any event, it has been shown in this arbitration that this study contains substantial errors that make it unfit for setting tariffs; and (ii) the Expert Commission's FRC contained technical errors that meant it could not be applied in calculating EEGSA's VAD. Secondly, the values presented by TGH cannot be corroborated. Furthermore, the steps that Mr. Kaczmarek took to reach that conclusion have not been provided by him or

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277 Claimant's Post Hearing Brief, footnote 669.

278 This relationship between the grid value and the cost of replacing/expanding it was explained in detail by Messrs. M. Abdala and M. Schoeters, **Appendix RER-1**, Section III.2.1.

279 The only two modifications made to the valuation model corresponding to the second report were the correction of an inflation-related adjustment and the effective income tax rate; see Messrs. M. Abdala and M. Schoeters, **Appendix RER-4**, paras. 93-94.

280 Claimant's Post Hearing Brief, para. 179-180.

by TGH; therefore, they must be rejected.[281] Thirdly and more importantly, the results presented by TGH stem from an incorrect analysis. The modification proposed by TGH involves using the investment expenditures from the May 5 Bates White study corrected by Damonte as expenses and those from the 28 July Bates White study (which contains significantly higher income to cover investment expenditures) as income. As a result, TGH creates an inconsistency between the income and expenses of the different tariff studies, conveniently considering high income covering high investment expenditures on one hand (28 July) and low expenses for investment expenditures (May 5, as corrected by Damonte) on the other. The exercise results in artificially-enhanced damages.

167. *Finally,* TGH attempts, using contrived arguments, to make the Tribunal believe that Dr. Abdala's testimony was inconsistent with his report. TGH claims, in particular, that Dr. Abdala criticized Mr. Kaczmarek's investment expenditures in his direct examination when, in his second report, he had admitted that, after Mr. Kaczmarek corrected his model in light of the criticisms of Guatemala's experts, the experts no longer disagreed about capital expenditures.[282] This is incorrect. As has been clearly explained by Guatemala's experts in their first report,[283] Mr. Kaczmarek's valuation suffers from a serious inconsistency when one considers that the tariffs calculated (and, therefore, EEGSA's income) are based on the VAD resulting from the 28 July Bates White study while, in projecting the investment expenditures (expenses), he ignores that study and uses significantly lower investment levels. In his second report, Mr. Kaczmarek presented corrected capital expenditures (expenses) very similar to those used by Guatemala's experts, and in this respect Guatemala's experts conclude that "there are no longer any significant differences between the parties as to the amount of investments EEGSA would have made."[284] However, the problem that remains with Mr. Kaczmarek's model is the incompatibility of a very high VAD (based on the 28 July 2008 Bates White study) with lower amounts of capital expenditures (expenses) (close to those required to maintain the network contemplated in the May 5 Bates White model modified by

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[281] Claimant's Post Hearing Brief, para. 180. Mr. Kaczmarek only presented some of the steps in his direct examination, slide 18, but this information does not allow replication of the value obtained by Mr. Kaczmarek.

[282] Claimant's Post Hearing Brief, para. 181.

[283] Messrs. M. Abdala and M. Schoeters, **Appendix RER-1**, Abdala II, Section III.2.1.

[284] Messrs. M. Abdala and M. Schoeters, Rejoinder, **Appendix RER-4**, Abdala II, para. 2.

Damonte).[285] The basic principle is that investment expenditures (expense) must always be consistent with imputed investment expenditures in the VAD approved by the regulator.[286] Otherwise, one would obtain tariff levels that are disproportionate to the value of the network. As Dr. Abdala explained at the hearing, the investment levels proposed by Mr. Kaczmarek in his valuation are unsustainable in the long term because they do not suffice to replace the assets required to keep the network operational.[287] In using a level of income that is disproportionate to the level of capital expenditures, Mr. Kaczmarek is simply artificially increasing TGH's alleged damages.

168. TGH's false arguments cannot, however, hide TGH's main problem, which is Mr. Kaczmarek's flawed valuation of the *but for* scenario and, in particular, the fact that this valuation is entirely based on the 28 July study which, as Mr. Kaczmarek admitted in the hearing, he did not even review.[288] As Guatemala explained in detail in its Post Hearing Brief, the 28 July Bates White study did not contain all of the pronouncements. Furthermore, its "approval" by its author, Mr. Giacchino, and by Mr. Bastos, who admitted that he had neither reviewed the spreadsheets nor the report,[289] cannot validate the exercise carried out by Mr. Kaczmarek. Recall that, despite Mr. Kaczmarek's attempt to conceal this during his cross-examination, he prepared his report before Mr. Barrera prepared his report on the 28 July study[290] and, in any event, Mr. Barrera did not dare give an opinion on the reasonableness of the 28 July study.[291]

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[285] In its Post Hearing Brief, TGH insists on defending Mr. Kaczmarek's comparison between the capital costs of various companies. However, Guatemala's experts have already explained that the analysis presented by Mr. Kaczmarek is seriously flawed and, once these are corrected, the analysis corroborates the results obtained by Messrs. Abdala and Schoeters, see Rejoinder of Messrs. M. Abdala and M. Schoeters, Appendix RER-4, Appendix B.1. TGH did not respond to this criticism during the hearing (nor in its direct examination of Mr. Kaczmarek or the cross-examination of Dr. Abdala) and continues not to respond to this criticism in its Post Hearing Brief.

[286] Tr. (English), Day Six, 1550:8-13, Abdala.

[287] Tr. (English), Day Six, 1531:4-11 to 1549:20-22 and 1550:1-6, Abdala.

[288] Respondent's Post Hearing Brief, paras. 25-26.

[289] Respondent's Post Hearing Brief, paras. 198-203.

[290] Respondent's Post Hearing Brief, para. 26.

[291] Respondent's Post Hearing Brief, para. 209.

C. THE REASONABLENESS TEST PROPOSED BY TGH COMPLETELY DISREGARDS THE GUATEMALAN REGULATORY FRAMEWORK

169. In its Post Hearing Brief, TGH insists that its calculation of alleged damages is reasonable because it is the only value that would provide TGH with a reasonable IRR (internal rate of return). To respond to Guatemala's criticism of this exercise during the hearing (primarily, the error of calculating an IRR for the investment when the legal framework only establishes the opportunity to obtain a minimum return for EEGSA and not for its shareholders), TGH presents a calculation of EEGSA's IRR in its Post Hearing Brief.[292] However, this calculation continues to assume that the regulatory framework guarantees a return on the investment in its entirety, including the initial purchase price. As previously explained,[293] the Guatemalan regulatory system does not guarantee such a return, but rather the possibility of obtaining a return of between 7% and 13% of the optimum capital base in each tariff period. The LGE does not guarantee a return on the initial purchase price paid by TGH, nor a return on TGH's inefficient investments. Both are risks taken by the investor himself and are irrelevant when calculating the IRR. To argue (as TGH does) that this type of calculation is "standard"[294] is not a valid justification in this case, where the LGE specifically excludes this possibility.

170. To support its weak position, TGH mischaracterizes an article written by Guatemala's experts, arguing that the "Respondent's own expert agrees that a well-managed enterprise should be able to recover its cost of capital, and that an IRR analysis is an appropriate way not only to confirm a damages analysis, but also to calculate damages."[295] However, in reading the cited article, it is clear that that method is applicable when "investors have the right to recover their capital contributions to the firm," which is not the case for EEGSA since the regulation does not guarantee a return on the purchase price. This very principle was accepted by Mr. Barrera when he stated:

> No, we haven't looked at what actually has been invested because we, as far as I understand, you're looking at the company over the next five years, sort

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[292] Claimant's Post Hearing Brief, para. 192.

[293] Respondent's Post Hearing Brief, para. 348.

[294] Claimant's Post Hearing Brief, para. 169.

[295] *Ibid.*, para. 188.

> of a prospective analysis. So, what has actually been invested by the company, I understand, is not part of the regulatory asset base in Guatemala.[296]

171. TGH also tries to divert attention from the specific terms of the LGE guaranteeing a return only on the VNR and for each tariff period, attempting to show that the price paid by TGH was not elevated.[297] *First of all*, the reality is that the price offered by TGH was the highest among all of the other bidders. This means that if TGH had offered less for EEGSA, its IRR would have been higher. What this shows is that a variable (the price offered), which is beyond Guatemala's control (and is controlled solely by TGH), cannot be used as a basis for measuring the effect of the alleged measures. *Secondly*, TGH's attempts to show that the synergies repeatedly mentioned by TGH's management bodies as the main reason for acquiring EEGSA[298] were not taken into consideration by Dresdner when recommending the purchase price does not stand up to scrutiny.[299] As previously explained in Guatemala's Post Hearing Brief, the price offered was substantially higher than that recommended by Dresdner. This shows that other factors outside the future flow of funds from EEGSA were taken into consideration in deciding the price to be paid.[300] Again, Guatemala is not involved in these factors and cannot be judged based on them. *Thirdly*, at the hearing, Guatemala showed that Mr. Kaczmarek had made the calculation using an initial value invested by TGH that was not reflected in TGH's books.[301] At the hearing, Mr. Kaczmarek confessed that he had never verified these figures, which shows, at the least, the TGH's expert's lack of rigor in his calculations.[302] In its Post Hearing Brief, TGH justifies the difference in the figures by explaining that the figure reflected in the financial statements do not take into account the value of the debt acquired by TGH in purchasing EEGSA's shares.[303] This shows further the lack of rigor on the part of Mr. Kaczmarek and the inapplicability of his calculation, given that Mr. Kaczmarek should have taken the cost of the debt into account in his calculation.

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296 Tr. (English), Day Six, 1343:11-16, Barrera.

297 Claimant's Post Hearing Brief, paras. 188-189.

298 Rejoinder, paras. 267 et seq.

299 Claimant's Post Hearing Brief, para. 189.

300 Respondent's Post Hearing Brief, para. 323.

301 Respondent's Post Hearing Brief, para. 346.

302 Respondent's Post Hearing Brief, para. 347.

303 Claimant's Post Hearing Brief, para. 189-190.

Logically, greater leveraging generates greater profitability for the investor and vice versa. *Finally*, TGH makes no effort (because it cannot) to explain why the VADs obtained by EEGSA between 1998 and 2008 are substantially higher than the decreases of between 2% and 3% in the VADs that TGH projected in real terms at the time of its investment (which did not even taken into account the effects of efficiency).[304] TGH has obtained VAD increases that are far greater than those anticipated in investing in EEGSA,[305] and it cannot now claim damages based on VAD increases that are not only unjustified, but never even imagined.

172. Lastly, it is important to point out the falsity of TGH's claim that the "Respondent itself never conducted an IRR analysis for EEGSA."[306] This is false. Guatemala's experts presented that analysis in their second report.[307]

D. THE INTEREST RATE APPLICABLE BETWEEN THE SALE AND THE DATE OF THE AWARD IS NOT THE WACC

173. Again distorting the statements made by Dr. Abdala in the Hearing, TGH claims that since Dr. Abdala had supposedly admitted in the hearing that TGH's sale to EPM "bears some relationship with the measures here," the applicable interest rate for adjusting the alleged damages following the sale must be the WACC [Weighted Average Cost of Capital].[308] This is incorrect. At no time did Dr. Abdala admit that the sale had anything to do with the measures as TGH claims; rather, he explained that he was "unaware" of the reasons that TGH sold its share to EPM.[309]

174. In fact, contrary to what TGH has claimed, the testimony given at the hearing indicates precisely the opposite. As clearly explained in the Post Hearing Brief, Mr. Callahan admitted during his cross-examination that after the measures, EEGSA continued producing profits and TGH made no attempt to sell its shares. TGH only considered the possibility of selling its

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304 Respondent's Post Hearing Brief, para. 349.

305 Respondent's Post Hearing Brief, paras. 349-350.

306 Claimant's Brief Subsequent to the Hearing, para. 191.

307 Messrs. M. Abdala and M. Schoeters, Rejoinder, **Appendix RER-4**, table V.

308 Claimant's Post Hearing Brief, para. 202.

309 Tr. (English), Day Six, 1579:11-16, Abdala.

shares when its partner Iberdrola presented TGH the opportunity to sell its shares.[310] As Guatemala has already shown, Iberdrola did not sell its shares to EPM because of the measures, but rather as a corporate strategy to consolidate investments in countries with greater growth, such as Brazil and Mexico.[311]

175. Therefore, TGH's alleged damages must be adjusted to the WACC in effect before TGH's sale (since TGH even assumed an operating risk) and from 21 October 2010 onwards using an adjustment factor based on a risk-free rate, such as (for example) US 10-year government bonds. On average, these bonds produced a yield of 3.3% during the period of August 2008-October 2010 and 2.8% during October 2010-December 2011.[312]

VI. REQUEST FOR RELIEF

176. The Republic of Guatemala respectfully requests that this Tribunal:

(a) DECLARE that it does not have jurisdiction over the claim filed by TGH;

(b) Alternatively and subsidiarily to request (a), REJECT each and every one of the claims made by TGH on their merits; and, in addition to either case;

(c) GRANT any other compensation to Guatemala that the Tribunal deems appropriate and fair; and

(d) ORDER that TGH pay all costs of these arbitration proceedings, including the fees and costs of the Tribunal and ICSID as well as all fees and costs incurred by Guatemala for its legal representation in this arbitration, with interest prior and subsequent to the award being issued until [the date] of actual payment pursuant to the submission on costs claimed that Guatemala will make in due course.

Respectfully submitted by the Republic of Guatemala on 8 July 2013.

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[310] Tr. (English), Day Two, 581:8-584:18, Callahan and Respondent's Post Hearing Brief, para. 357.

[311] Iberdrola Energía S.A. Press Release, 22 October 2010, **Exhibit R-132**; Teco Press Release, "TECO Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company," 21 October 2010, **Exhibit R-162**.

[312] Messrs. M. Abdala and M. Schoeters, **Appendix RER-1**, para. 111.

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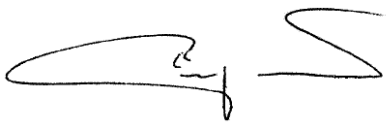

Rodolfo Salazar