INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S POST-HEARING BRIEF

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I. INTRODUCTION

1. In accordance with the Tribunal's letter dated 22 March 2013, Claimant hereby submits its Post-Hearing Brief.[1] This submission addresses only certain aspects of the case in light of the issues raised during the Hearing and the questions posed by the Tribunal. Claimant continues to rely upon all of its previous submissions, both written and oral.

2. As Claimant has demonstrated and as the testimony at the Hearing confirmed, this case arises out of Guatemala's arbitrary and unjustified decision to decrease, for purely political purposes, EEGSA's 2008-2013 electricity tariffs by reducing the VAD, as well as the arbitrary and unjustified actions that Guatemala took to achieve that objective. These actions culminated in the CNEE disregarding the entire 2008-2013 tariff review process and imposing its own unjustifiably low VAD on EEGSA, in breach of the specific representations that Guatemala had made during EEGSA's privatization and in complete disregard of the legal and regulatory framework that Guatemala had adopted to attract and to induce foreign investment in its failing electricity sector. As the evidence establishes and as the Hearing testimony confirmed, the actions that the CNEE took to decrease EEGSA's VAD were not the actions of an independent regulatory agency, nor were they motivated by a good faith interpretation of the law, as Respondent would have this Tribunal believe. Rather, as the CNEE's own internal documents confirm, the CNEE deliberately disregarded the key principles set forth in the LGE and RLGE to achieve the outcome that it wanted—namely, a sharp reduction in EEGSA's VAD by preventing EEGSA from using the new replacement value of its network to calculate that VAD. As Carlos Colom himself boasted in an April 2010 presentation regarding EEGSA's tariff review, the VAD-setting process was "exhausting, but *highly rewarding for the regulator*," and succeeded in eliminating alleged "*[h]istorical distortions* from the VAD (the user pays what it should pay)."[2] These are not the words of an independent, disinterested regulator, acting in good faith.

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

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

3. While Claimant's claims in this arbitration are supported by the contemporaneous documentary record, Respondent's defense, as its Opening Statement confirmed, is not. Instead, Respondent's defense is based upon its strategy of deliberately mischaracterizing the nature of this dispute as a mere local, regulatory dispute over the interpretation of the legal and regulatory framework, which already has been resolved by the Guatemalan courts and which Claimant and its partners allegedly misunderstood when they decided to invest in EEGSA. As the Hearing testimony confirmed, however, this dispute does not arise out of a mere disagreement between the parties over the interpretation of certain provisions of Guatemalan law, as Respondent insists, but rather arises out of Guatemala's own deliberate actions designed to prevent EEGSA from calculating its VAD based upon the new replacement value of its network, and thus to ensure a substantial decrease in EEGSA's 2008-2013 VAD and tariffs. As the witness and documentary evidence affirms, there was *no* dispute over the legal and regulatory framework applicable to the calculation of EEGSA's VAD, until the CNEE decided in 2008 to abandon the VNR method set forth in the LGE and RLGE without any legal basis and for the express purpose of depreciating EEGSA's regulatory asset base by 50 percent, thus achieving a substantially lower VAD.

4. The witness and documentary evidence likewise affirms that there was *no* misunderstanding over the proper function of the Expert Commission, until the CNEE determined that, if it were to abide by the Expert Commission's decisions on the discrepancies, including its decision on the issue of depreciation, EEGSA's VAD would increase substantially. Unwilling to accept that result, the CNEE thus proceeded to ignore both the Expert Commission's decisions and EEGSA's revised VAD study, and to approve its own VAD study, which reduced EEGSA's VAD by approximately 45 percent—even though the costs of materials involved in electricity distribution, such as copper and aluminum, had increased significantly since EEGSA's previous tariff review—in blatant violation of Guatemala's prior representations and the legal and regulatory framework that Guatemala had adopted to induce foreign investment in EEGSA. The result of EEGSA's 2008-2013 tariff review thus was the same as if the CNEE simply had set EEGSA's VAD unilaterally from the outset; instead, however, EEGSA had participated in the year-long tariff review process mandated by the LGE and RLGE, funding its own VAD study and an Expert Commission, both of which the CNEE ultimately disregarded, because they did not result in the predetermined outcome that the CNEE wanted. As Claimant has shown, the CNEE's actions in doing so are exactly the type of arbitrary and unjustified State

actions, which Article 10.5 of the DR-CAFTA prohibits.

5. The witness, expert, and documentary evidence similarly confirms that there was *no* dispute over whether EEGSA's consultant had fully incorporated the Expert Commission's decisions into its revised VAD study. To the contrary, as the CNEE's own internal documents show, and as Respondent's witnesses confirmed at the Hearing, the CNEE never even reviewed EEGSA's revised VAD study at the time. Instead, after analyzing the Expert Commission's decisions and determining that complying with them would increase EEGSA's VAD, the CNEE decided to approve its own VAD study and to disregard both the Expert Commission's decisions and EEGSA's revised VAD study. Respondent's arguments at the Hearing criticizing EEGSA's revised VAD study thus are yet another of Respondent's *post-hoc* justifications that should be rejected by this Tribunal.

6. Respondent's strategy also has been not to present the fact witnesses with actual, first-hand knowledge of the events at issue, but rather to prop up its defenses with uncorroborated hearsay testimony from only two fact witnesses, Messrs. Moller and Colom. Respondent thus failed to present any fact witnesses who personally were involved in EEGSA's 2003-2008 tariff review, or who served in the CNEE's Tariff Division or Tariff Department, including Melvin Quijivix, who participated in EEGSA's 2008-2013 tariff review and was directly involved in the negotiation of the Operating Rules, and who continues to serve as the Head of the CNEE's Tariff Division, and Marcela Peláez, who also participated in EEGSA's 2008-2013 tariff review and who worked directly with Mr. Riubrugent in devising the CNEE's improper FRC formula based upon the steady-state model applied in Brazil, which resulted in the depreciation of EEGSA's regulatory asset base by 50 percent. Respondent also failed to present César Fernández, who served as a Director of the CNEE from 2004 to 2012; Mr. Riubrugent, who served not only as a consultant to the CNEE during EEGSA's 2008-2013 tariff review, but also as the CNEE's appointee to the Expert Commission; Amilcar Brabatti, who was and continues to be the Head of the CNEE's Legal Department, and who was responsible for drafting the CNEE's contemporaneous legal justifications for approving its own VAD study based upon RLGE Article 99, which the CNEE later abandoned before the Guatemalan courts; as well as anyone from Sigla, which served as a consultant to the CNEE during EEGSA's 2008-2013 tariff review, and which was responsible for preparing the study upon which EEGSA's VAD was set,

or Mercados Energéticos, which also served as a consultant to the CNEE during EEGSA's 2008-2013 tariff review, and which subsequently was retained in April 2009 solely for the purpose of defending Guatemala's actions in this case.

7. As the testimony at the Hearing confirmed, Respondent's strategy likewise has been to withhold responsive documents that the Tribunal expressly ordered Respondent to produce, or which Respondent itself agreed to produce to Claimant. Thus, although Respondent should have produced the CNEE's "minutes of meetings," Respondent produced *no* minutes of the meetings of the CNEE's directors.[3] On cross-examination, Mr. Moller confirmed, however, that, in accordance with the CNEE's Internal Regulations, the CNEE's directors are required to meet at least once a week, and that minutes of their meetings—both ordinary and extraordinary—must be recorded in writing, but that *Counsel for Respondent never requested a copy of the minute book in which these minutes are recorded*.[4] Similarly, while Respondent was ordered to produce "[a]ll promotional materials, presentations, or other documents prepared,

[3] For example, while Claimant requested and the Tribunal ordered Respondent to produce "[a]ll documents, including but not limited to, minutes of meetings, reports, and memoranda, reflecting the CNEE's review of EEGSA's VAD study for the 2003-2008 tariff period," as well as "[a]ll minutes of meetings, reports, memoranda, or other documents reflecting the CNEE's discussions or analysis of Bates White's 31 March 2008 VAD study, including any reports or memoranda from the CNEE's Department of Tariff Studies," Respondent produced no minutes of meetings, nor any internal reports or memoranda. Claimant's Redfern Schedule, Request Nos. C.5, F.9. Similarly, while Claimant requested and Respondent agreed to produce, among other things, "[a]ll documents referencing or discussing Article 1.10 of the Terms of Reference, as well as all minutes of meetings, reports, memoranda, or other documents reflecting the CNEE's understanding or interpretation of Article 1.10;" "[a]ll minutes of meetings, reports, memoranda, or other documents reflecting the CNEE's discussions or analysis of the proposed operating rules for the Expert Commission, including all drafts of the operating rules and all internal and external correspondence regarding those drafts;" "[a]ll reports, memoranda, minutes of meetings of the CNEE's Board of Directors, or other documents discussing or referencing the CNEE's decision to dissolve the Expert Commission by GJ-Judicial Decision-3121 dated 25 July 2008 (Exh. R-86), as well as any internal or external legal advice received by the CNEE, the MEM, or any other Government agency or official regarding the decision to dissolve the Expert Commission;" and [a]ll reports, memoranda, minutes of meetings of the CNEE's Board of Directors, or other documents discussing or referencing Bates White's proposal for the Expert Commission to meet in Washington, D.C. to review Bates White's 28 July 2008 revised VAD study, including any correspondence between the CNEE and Mr. Riubrugent regarding Bates White's proposal," Respondent produced no responsive documents. Letter from Claimant to Respondent dated 14 Feb. 2012, Request Nos. E.8, G.5, G.7; Claimant's Redfern Schedule, Request No. G.11.

[4] Tr. (4 Mar. 2013) 992:8-993:22 (Moller Cross) (confirming that, "under the Internal Regulations of the CNEE, the CNEE Directors are required to meet at least once a week, and they are required to record the minutes of those meetings, both extraordinary and ordinary, in a minute book," that the minute book is located at the CNEE, and that Counsel for Respondent never asked him for, nor did he ever provide, a copy of that minute book).

used, or distributed by Guatemala during its promotion of the privatization of EEGSA,"[5] including a copy of the presentation given by the CNEE to the High-Level Committee on 13 March 1998 regarding the tariff methodology set out in the LGE,[6] Respondent failed to produce a copy of that presentation. At the hearing, Mr. Moller again confirmed that *Counsel for Respondent never requested a copy of that presentation*.[7] The same is true with respect to Claimant's request for "[d]ocuments showing the three lists of candidates proposed by the national universities, the MEM, and the wholesale market agents for CNEE's Board of Directors in 2007," which the Tribunal likewise ordered Respondent to produce.[8] As Mr. Moller confirmed, while the Ministry of Energy and Mines maintains these records, *Counsel for Respondent never requested these documents, or asked where these documents might be kept*.[9] There is no dispute that Respondent was under a continuing obligation to produce documents responsive to these requests, and that it deliberately failed to do so. In such circumstances, adverse inferences against Respondent are warranted,[10] and the content of the requested documents thus must be presumed to support Claimant's allegations.

8. Respondent's *post-hoc* justifications for the CNEE's actions during EEGSA's 2008-2013 tariff review, which have no contemporaneous support in the documentary record, further demonstrate the inherent weakness in Respondent's defenses. Thus, while Respondent continued to assert at the Hearing that the Expert Commission's decisions merely are advisory in nature and can be ignored by the CNEE, Respondent's assertion is belied not only by its own

[5] Claimant's Redfern Schedule, Request No. B.1.

[6] *Id*., at 18.

[7] Tr. (4 Mar. 2013) 1005:15-1006:15 (Moller Cross).

[8] Claimant's Redfern Schedule, Request No. F.1.

[9] Tr. (4 Mar. 2013) 991:15-992:4 (Moller Cross).

[10] *See* ICSID Arbitration Rules, Rule 34(3) ("The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure."); IBA Rules on the Taking of Evidence in Int'l Arbitration, Art. 9(5) ("If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."); *see also Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Procedural Order Concerning Disclosure of Documents of 1 Oct. 2002 ¶ 6 (observing that, under the 1999 IBA Rules, "the ultimate sanction for nondisclosure is the drawing of an adverse inference") **(CL-111)**.

prior express representations to potential investors, to its own Constitutional Court, and to EEGSA itself during the negotiation of the Operating Rules, but also by the views of the CNEE's own consultants and by Guatemala's own actions in this case. As the Hearing testimony confirmed, Guatemala simply would not have taken the actions that it did to manipulate the Expert Commission process—by, among other things, enacting RLGE Article 98 *bis* and engaging in a series of *ex parte* communications with its own appointee to the Expert Commission—if it believed at the time that the decisions of the Expert Commission merely were advisory in nature. Respondent's argument that the Expert Commission's role simply was to determine whether EEGSA's consultant had duly complied with the CNEE's Terms of Reference ("ToR") also is belied by the documentary record, which shows that this issue never was in dispute. Pursuant to Articles 1.8 and 1.10 of the ToR, EEGSA's consultant had expressly deviated from the ToR, where it considered that the ToR were inconsistent with the LGE and RLGE. There thus was no need for the Expert Commission to determine whether EEGSA's consultant had complied with the ToR. Nor was the Expert Commission ever tasked with doing so; to the contrary, as the witness and documentary evidence establishes, the Expert Commission was tasked with deciding the discrepancies between the parties in accordance with the applicable legal and regulatory framework.

9. Moreover, the fact that the Guatemalan Constitutional Court ultimately validated the CNEE's actions under Guatemalan law does not in any way preclude liability under the DR-CAFTA, as Respondent would have this Tribunal find. As Claimant has explained, not only are the causes of action presented to this Tribunal and to the Guatemalan courts different, but the parties to those proceedings are different as well. Accordingly, no *res judicata* effect may attach to the decisions of the Guatemalan courts with respect to Claimant. Similarly, it is well established that a State may not rely upon the provisions of its own internal law to avoid its international obligations, and thus the fact that the Constitutional Court found the CNEE's actions to be lawful under Guatemalan law based upon RLGE Article 98, as amended in 2007, does not mean that Guatemala did not breach its obligations under the DR-CAFTA.

10. Finally, Respondent's valuation expert at the Hearing confirmed, as the prior written record revealed, that he did not perform a proper valuation exercise, because he refused to calculate what Claimant's damages would be, if Respondent were found to have breached the

DR-CAFTA. Those damages amount to US$ 243.6 million, plus interest, which should be awarded to Claimant.

II. ARTICLE 10.5 OF THE DR-CAFTA

A. The Minimum Standard Of Treatment Under Article 10.5 Of The DR-CAFTA

11. As Claimant has explained, Article 10.5 of the DR-CAFTA provides that each State Party is required to accord to covered investments, such as Claimant's investment in EEGSA, the customary international law minimum standard of treatment,[11] which "refers to all customary international law principles that protect the economic rights and interests of aliens,"[12] including fair and equitable treatment ("FET"). As Claimant has shown and as demonstrated below, the FET standard includes the obligation to honor legitimate expectations arising from specific representations made to induce the investor's investment, to refrain from making fundamental changes to the legal and regulatory framework upon which an investor's investment is premised, to act in good faith, and to refrain from taking arbitrary or unjustified measures against a protected investment.[13]

12. Neither in its written submissions nor at the Hearing was Respondent able to rebut Claimant's showing that its actions in this case breached the FET standard, nor did it contest the central facts, as discussed herein; instead, Respondent, at the Hearing, based its legal defense principally upon its assertion that the FET obligation contained in the DR-CAFTA is "a very limited standard of protection," and a "much-more-limited standard" than the so-called "autonomous" fair and equitable treatment standard contained in many bilateral investment

[11] The Dominican Republic – Central America – United States Free Trade Agreement dated 5 Aug. 2004 ("DR-CAFTA"), Chapter Ten, Art. 10.5 **(CL-1)**.

[12] DR–CAFTA, Annex 10-B ("Customary International Law") **(CL-1)**; *see also* Reply ¶ 231; Memorial ¶ 229; K. Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law in* INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 81 n.32 (2005) ("The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.") **(CL-113)**; A. H. Roth, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 127 (1949) (noting that "the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of alien is regulated by the law of nations") **(CL-112)**.

[13] *See* Reply ¶¶ 231-246; Memorial ¶¶ 229-244.

treaties.[14] Respondent thus argued at the Hearing that the minimum standard of treatment "protects only against serious measures, very egregious ones, and in particular only in the case of denial of justice and express arbitrariness," and does "not protect legitimate expectations," or apply to "any regulatory change."[15] As Claimant has demonstrated, each of these assertions is incorrect.

13. As an initial matter, Respondent is wrong to argue that the express tie to customary international law in Article 10.5 of the DR-CAFTA shields it from liability in this case, because, as Claimant has demonstrated, and as numerous tribunals and even Respondent itself have acknowledged, the minimum standard of treatment has evolved over time and, in the context of foreign investment protection, has converged in substance with the FET standard, such that the standards essentially are the same.[16] Concurring with "a number of previous arbitral tribunals and commentators," the tribunal in *Biwater Gauff v. Tanzania* thus remarked that "the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."[17] The tribunal in *Rumeli v. Kazakhstan* similarly endorsed "the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law," observing that any difference "is more theoretical than real,"[18] while the tribunal in *Saluka v. Czech Republic* noted

[14] *See* Tr. (21 Jan. 2013) 195:7-12 (Respondent's Opening) ("Iberdrola could invoke the broad and independent standard of just and fair and equitable treatment under the Spain-Guatemala treaty. TECO can only invoke under [the] DR-CAFTA the much-more-limited standard of minimum international treatment."); *see also id.* at 263:1-5 (arguing that the customary international law minimum standard of treatment is "a very limited standard of protection and, therefore, one which limits very little, much less than fair and equitable treatment, the regulatory activity" of the State).

[15] Tr. (21 Jan. 2013) 264:21-265:5 (Respondent's Opening); *see also id*. at 263:1-7.

[16] Reply ¶ 231; Memorial ¶¶ 229-244.

[17] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 ("*Biwater Gauff v. Tanzania*") ¶ 592 **(CL-10)**; *see also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 Oct. 2012 ("*Deutsche Bank v. Sri Lanka*") ¶ 419 (observing that "the actual content of the Treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law") **(CL-100)**; S. Montt, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 309 (2009) (noting that "most arbitral tribunals have lately arrived at the conclusion that the FET standard, whether or not it is 'autonomous,' does not go *de facto* beyond [the international minimum standard]") (internal citation omitted) **(CL-115)**.

[18] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008 ("*Rumeli v. Kazakhstan*") ¶ 611 **(CL-39)**.

that "the difference between the Treaty standard . . . and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real."[19] In *El Paso v. Argentina*, the tribunal likewise found that "the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard."[20]

14. The tribunals in *Azurix v. Argentina* and *Siemens v. Argentina* also concluded that the minimum standard of treatment "has evolved,"[21] with the *Azurix* tribunal observing that the standard is "substantially similar" to the fair and equitable treatment standard.[22] Noting "the evolution in the latest ICSID decisions," the tribunal in *Duke Energy v. Ecuador* similarly found that the fair and equitable treatment standard at issue in that case and the minimum standard of treatment under customary international law are "essentially the same."[23] In *Mondev v. United States*, the tribunal likewise observed that each State party to the NAFTA had accepted that the minimum standard of treatment "can evolve" and "has evolved,"[24] and that, in modern times,

[19] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of 17 Mar. 2006 ("*Salula v. Czech Republic*") ¶ 291 **(CL-42)**; *see also SAUR Int'l S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012 ("*SAUR v. Argentina*") ¶ 491 (observing that, "[i]n reality, the question of whether 'fair and equitable treatment in accordance with the principles of international law' defined in the BIT coincides or not with the so-called 'minimum treatment due to foreigners according to customary international law' constitutes a rather dogmatic and conceptualist discussion") ("*En réalité, la question de savoir si le « traitement juste et équitable conformément aux principes du droit international » défini dans l'APRI coïncide ou non avec le niveau dit « minimal de traitement dû aux étrangers selon le droit international coutumier » constitue une discussion plutôt dogmatique et conceptualiste*.") **(CL-107)**.

[20] *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 Oct. 2011 ¶ 336 (internal citation omitted) **(CL-102)**.

[21] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006 ("*Azurix v. Argentina*") ¶ 361 **(CL-8)**; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 Feb. 2007 ("*Siemens v. Argentina*") ¶ 299 **(CL-44)**.

[22] *Azurix v. Argentina* ¶ 361 **(CL-8)**.

[23] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 Aug. 2008 ("*Duke Energy v. Ecuador*") ¶¶ 333, 335-337 (internal citation omitted) **(CL-19)**.

[24] *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 Oct. 2002 ("*Mondev v. United States*") ¶ 124 **(CL-31)**; *see also id.* ¶ 119 ("The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.") (internal citation omitted).

"what is unfair or inequitable need not equate with the outrageous or the egregious."[25] Like the tribunal in *Mondev*, the tribunal in *ADF v. United States* observed that "the customary international law referred to in [NAFTA] Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve," and that the NAFTA incorporates "customary international law 'as it exists today.'"[26]

15. Adopting the reasoning in *ADF*, the tribunal in *RDC v. Guatemala*, the first DR-CAFTA case to reach the merits, found "that the minimum standard of treatment is 'constantly in a process of development,' including since *Neer's* formulation."[27] The tribunal in *SAUR Int'l v. Argentina* likewise confirmed that, "[w]hatever the correct interpretation of the 'customary minimum level' in 1926, there is no doubt that, over time, this level has had to evolve and to improve."[28] As the tribunal noted, when the Treaty "defines the fair and equitable treatment standard 'consistent with the principles of international law,' the Treaty refers to those principles as they are currently understood. And, currently, the interpretation according to which the principle does not require an enhanced volitional element in the conduct of the offending State is virtually unanimous."[29] The tribunal concluded that it thus is "irrelevant whether the concept of FET is interpreted in accordance with its 'ordinary meaning,' as required by the Vienna Convention, or in accordance with customary international law; *in both cases, the level of conduct required from the State is the same,* and it does not require an enhanced volitional element."[30] And in *CMS v. Argentina*, the tribunal also expressly noted that the same actions

[25] *Id*. ¶ 116; *see also Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award of 31 Mar. 2010 ("*Merrill & Ring v. Canada*") ¶ 193 (noting "a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community") **(CL-29)**.

[26] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award of 9 Jan. 2003 ("*ADF v. United States*") ¶ 179 (internal citations omitted) **(CL-4)**.

[27] *Railroad Development Corp. (RDC) v. The Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 ("*RDC v. Guatemala*") ¶ 218 **(CL-92)**.

[28] *SAUR v. Argentina* ¶ 494 ("*Quelle que soit l'interprétation correcte du « niveau minimal coutumier » en 1926, on ne peut douter qu'avec le temps, ce niveau a dû évoluer et se perfectionner*.") **(CL-107)**.

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

that violated an autonomous fair and equitable treaty standard violated the customary international law minimum standard, because "the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."[31]

16. Respondent's position in this arbitration that the minimum standard of treatment is a higher standard not only contravenes this authority, but also is inconsistent with its own prior acknowledgment. Contrary to its position here, in the *Iberdrola v. Guatemala* arbitration, Respondent argued in its Opening Statement that "the international minimum standard and fair and equitable treatment *are hardly distinguishable*."[32] For support, Guatemala relied upon the tribunal's decision in *Saluka v. Czech Republic*, which itself relied upon NAFTA jurisprudence to interpret the FET standard at issue in that case, which was not tied to customary international law.[33] Guatemala also relied upon the tribunal's decision in *CMS v. Argentina*, which found that "the standard of fair and equitable treatment is not different from the international minimum standard and its evolution under customary law."[34] In a complete about-face, Respondent now takes issue with Claimant's reliance on that very statement in this arbitration.[35] Respondent's position that the minimum standard of treatment is a "much-more-limited standard" than the FET standard

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[30] *Id*. ("*Par conséquent, il est devenu indifférent que le concept de TJE soit interprété conformément à son « sens courant », comme l'exige la Convention de Vienne, ou conformément au droit international coutumier; dans les deux cas, le niveau de conduite exigible de l'État est le même et il ne requiert pas d'élément volitif renforcé*.") (emphasis added).

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

[32] Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 25 July 2011 at 170:12-14 (Respondent's Opening) ("*[E]l estándar mínimo internacional y el trato justo y equitativo son difícilmente distinguibles*.") (emphasis added) **(C-628)**. Submitting new evidence on this point is warranted, as it responds to a question from the Tribunal. *See* Tr. (21 Jan. 2013) 387:4-11 (Tribunal Question); Letter from the Tribunal to the Parties dated 11 Mar. 2013 (directing that "the PHBs should not be accompanied by any new evidence, save with respect to the questions identified by the Arbitral Tribunal").

[33] Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 25 July 2011 at 168:13-169:17 (Respondent's Opening) **(C-628)**.

[34] *Id*. at 170:14-18 ("*[E]l estándar de trato justo y equitativo no es diferente del estándar mínimo internacional y su evolución en el marco del derecho consuetudinario*."); *see also CMS v. Argentina* ¶ 284 **(CL-17)**.

[35] *See, e.g.*, Tr. (21 Jan. 2013) 265:4-7 (Respondent's Opening) (arguing that *CMS v. Argentina* "is based on the fair and equitable treatment, not on the international minimum standard"); Counter-Memorial ¶ 507 (same).

thus is not based upon any principled interpretation, but has been adopted simply in an attempt to gain an advantage in this case.[36] In light of its prior acknowledgement that there is no material difference between the minimum standard of treatment and an autonomous FET standard, Respondent thus should be estopped from arguing, as it does here, that the minimum standard of treatment is a higher standard.[37] In any event, even if the Tribunal were to find that the standards are not identical, the conduct at issue in this arbitration, as Claimant has shown, is prohibited by the customary international law minimum standard of treatment.[38]

17. Respondent's further assertion that the minimum standard of treatment "protects only against serious measures, very egregious ones, and in particular only in the case of denial of justice and express arbitrariness," and does "not protect legitimate expectations," or apply to "any regulatory change,"[39] similarly are without merit and again are belied by Respondent's own statements made in the *Iberdrola* arbitration. In its Opening Statement in the *Iberdrola* case, Guatemala noted that, "[i]n reality, what the fair and equitable treatment standard protects against is fundamental changes in use of sovereign power in the rules that affect the legitimate expectations of the investor."[40] In that case, Guatemala argued that there had been no "use or abuse of power" by the State in violation of Iberdrola's legitimate expectations, thus implicitly acknowledging that such a use or abuse of power by the State would have violated its obligations under the BIT.[41] This is in accord with Respondent's arguments made to this Tribunal that

[36] Tr. (21 Jan. 2013) 195:7-12 (Respondent's Opening).

[37] *See, e.g.*, Tr. (21 Jan. 2013) 195:7-12, 263:1-5 (Respondent's Opening); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141 (Cambridge University Press 1987) (stating that the principle of estoppel demands that a party "not be allowed to blow hot and cold – to affirm at one time and deny at another . . . . ") (internal citation omitted) **(CL-48)**; *Duke Energy Int'l Peru Investments No. 1, Ltd. v. The Republic of Peru*, ICSID Case No. ARB/03/28, Award of 18 Aug. 2008 ("*Duke Energy v. Peru*") ¶ 231 (observing that "estoppel or the principle of consistency has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another") **(CL-20)**.

[38] *See* Reply ¶¶ 231-282; Memorial ¶¶ 245-280.

[39] Tr. (21 Jan. 2013) 264:21-265:5 (Respondent's Opening).

[40] Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 25 July 2011 at 170:19-171:1 (Respondent's Opening) ("*En realidad lo que protege, contra lo que protege la regla de trato justo y equitativo es contra cambios fundamentales en uso del poder soberano de las reglas de juego que afectan de este modo las expectativas legítimas del inversor*.") **(C-628)**.

[41] *Id*. at 172:2-3 (Respondent's Opening) ("*No ha habido un uso o un abuso del poder soberano para cambiar las reglas de juego*.").

Article 10.5 of the DR-CAFTA "prohibits changes to the regulatory framework that are fundamental and that affect the legitimate expectations of the investor,"[42] and with its contention that Claimant's claims fall short of that standard. Respondent's belated attempt at the Hearing to disavow its earlier acknowledgements thus should be rejected.

18. Furthermore, Respondent, in accordance with the view of numerous tribunals and commentators, has indicated its agreement that the standard articulated by the *Waste Management II* tribunal accurately reflects the customary international law minimum standard of treatment.[43] As the *Waste Management II* tribunal observed:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic*, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a *complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*.[44]

19. As Claimant noted at the Hearing, Guatemala itself expressly endorsed this standard in the *RDC v. Guatemala* case, referring "with approval" to how the standard had been described by the *Waste Management II* tribunal.[45] The tribunal in *RDC* also adopted the *Waste Management II* standard in its Award, finding that it "persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment."[46] Numerous NAFTA Chapter Eleven tribunals similarly have endorsed the *Waste*

[42] Counter-Memorial ¶ 567 (subheading b); *see also* Reply ¶ 229 (noting same).

[43] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 Apr. 2004 ("*Waste Management II*") **(CL-46)**.

[44] *Id*. ¶ 98 (emphasis added).

[45] *RDC v. Guatemala* ¶ 162 ("Respondent refers with approval to how the minimum standard of treatment was described by the arbitral tribunals in *Waste Management II*, *GAMI*, *Thunderbird* and *Genin*") (internal citations omitted) **(CL-92)**.

[46] *Id*. ¶ 219.

Management II standard, including the tribunals in *GAMI v. Mexico*,[47] *Cargill v. Mexico*,[48] and *Methanex v. United States*.[49] Tribunals interpreting treaties containing a so-called "autonomous" FET standard likewise have endorsed the *Waste Management II* standard, including the tribunals in *Deutsche Bank v. Sri Lanka*,[50] *Jan de Nul v. Egypt*,[51] *Biwater Gauff v. Tanzania*,[52] *Siemens v. Argentina*,[53] *LG&E v. Argentina*,[54] *Azurix v. Argentina*,[55] *BG Group v. Argentina*,[56] and *Saluka v. Czech Republic*.[57]

20. Finding that "the actual content of the Treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law," the *Deutsche Bank* tribunal, for example, concluded "that the standard has been rightly – although not exhaustively – defined in the *Waste Management II* case," and that "its components may be distilled as follows: protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment; good faith conduct although bad faith on the part of the State is not required for its violation; conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary; [and] conduct that does not offend judicial propriety, that complies with due process and the right to be heard."[58] Relying upon the NAFTA Chapter Eleven decisions in

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[47] *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Award of 15 Nov. 2004 ("*GAMI v. Mexico*") ¶ 95 **(RL-7)**.

[48] *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award of 18 Sept. 2009 ("*Cargill v. Mexico*") ¶¶ 283-285 **(CL-12)**.

[49] *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits of 5 Aug. 2005, Part IV, Chapter D, ¶ 8 **(CL-105)**.

[50] *Deutsche Bank v. Sri Lanka* **(CL-100)**.

[51] *Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/07/21, Award of 6 Nov. 2008 ¶ 187 **(RL-11)**.

[52] *Biwater Gauff v. Tanzania* ¶¶ 597, 601-602 **(CL-10)**.

[53] *Siemens v. Argentina* ¶ 297 **(CL-44)**.

[54] *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 Oct. 2006 ("*LG&E v. Argentina*") ¶ 128 **(CL-27)**.

[55] *Azurix v. Argentina* ¶ 370 **(CL-8)**.

[56] *BG Group v. The Argentine Republic*, UNCITRAL, Award of 24 Dec. 2007 (set aside on other grounds) ("*BG Group v. Argentina*") ¶¶ 292, 294 **(CL-9)**.

[57] *Salula v. Czech Republic* ¶ 302 **(CL-42)**.

[58] *Deutsche Bank v. Sri Lanka* **(CL-100)**.

Waste Management II, *Mondev*, and *Thunderbird*, and "applying the general threshold as articulated (in particular) by the tribunal in *Waste Management (No. 2),*" the tribunal in *Biwater Gauff* similarly identified the "[p]rotection of legitimate expectations," "[g]ood faith," and "[t]ransparency, consistency, non-discrimination" as the "[s]pecific [c]omponents of the [s]tandard."[59] And in *BG Group v. Argentina*, the tribunal concurred with the "unambiguous statement" in *Waste Management II* that "commitments to the investor are relevant to the application of the minimum standard of protection under international law,"[60] concluding that the host State's obligations accordingly "must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest."[61]

21. At the Hearing, Respondent nevertheless argued that Claimant had failed to establish a breach of the FET standard, because, in order to establish that certain conduct is required by the customary international law minimum standard of treatment, Claimant must "prove that there is a generalized practice which broadens that standard and which is followed as a practice required by the law. In other words, *opinio juris*."[62] The United States and El Salvador similarly invoked the definition of customary international law in their oral submissions.[63] Respondent's reliance upon the definition of customary international law in an attempt to impose an impossible burden upon a claimant to establish a treaty breach must be rejected. As Claimant has demonstrated, and as the tribunal in *Glamis Gold v. United States* observed, arbitral awards may "serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."[64] In *ADF v. United States*, the tribunal similarly remarked that "any general requirement to accord 'fair and equitable treatment' and 'full protection and

[59] *Biwater Gauff v. Tanzania* ¶¶ 596-599, 601-602 **(CL-10)**.

[60] *BG Group v. Argentina* ¶¶ 294, 296 (citing *Revere Copper and Brass, Inc. v. Overseas Private-Investment Corp.* for its observation that these principles are "particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investments affected by the action") **(CL-9)**.

[61] *Id*. ¶ 298.

[62] Tr. (21 Jan. 2013) 263:17-20 (Respondent's Opening).

[63] Tr. (4 Mar. 2013) 823:1-7 (United States Submission); Tr. (4 Mar. 2013) 815:1-8 (El Salvador Submission).

[64] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award of 8 June 2009 ("*Glamis Gold v. United States*") ¶ 605 **(CL-23)**; Reply ¶ 232.

security' must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law."[65] And in *Cargill v. Mexico*, the tribunal found that "the writings of scholars and the decisions of tribunals may serve as evidence of custom," particularly in light of the fact that "surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as 'fair and equitable treatment' where developed examples of State practice may not be many or readily accessible."[66]

22. In response to a similar argument raised by Guatemala in the *RDC v. Guatemala* case, Professor Michael Reisman likewise confirmed in his legal expert opinion that, "tribunals seized by two states with the authority to determine whether one of their specific practices constitutes fair and equitable treatment are engaged, by the joint authorization of the states concerned, in a delegated appraisal of the lawfulness of practice common to each of the states," and thus "[i]n any examination of state practice, such arbitral awards, by virtue of their very judgment of lawfulness, are a reliable indicator of state practice."[67] As Professor Reisman explained, "[u]nder recognized standards of international law the Claimant need not conduct a vast research of pertinent state practice and *opinio juris* itself, as the Respondent would have it, to confirm the emergence of a new norm of customary international law," but that, "[u]nder Article 38(1)(d) of the Statute of the International Court of Justice, it is entitled to rely on the evidence of customary international law norms provided by pertinent decisions of tribunals and the teachings of the most highly qualified publicists."[68]

23. Indeed, in its Award, the *RDC* tribunal noted that "the Mixed Commission in *Neer* did not formulate the minimum standard of treatment after an analysis of State practice," and thus that "[i]t is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators

[65] *ADF v. United States* ¶ 184 **(CL-4)**.

[66] *Cargill v. Mexico* ¶¶ 277, 274 **(CL-12)**.

[67] Second Opinion of W. Michael Reisman on Legal Issues Raised in the Respondent's Counter-Memorial, *Railroad Development Corp. v. The Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23 dated 11 Mar. 2011 ¶ 52 **(CL-68)**.

[68] *Id*. ¶ 54; Statute of the International Court of Justice, Art. 38(1)(d) (providing that, in deciding disputes in accordance with international law, the Court "shall apply . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law") **(CL-72)**.

and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation."[69] As the tribunal observed, "[b]y the strict standards of proof of customary international law applied in *Glamis Gold*, *Neer* would fail to prove its famous statement . . . ."[70] The tribunal further observed that, while "arbitral awards do not constitute State practice, [] it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue," and that "[i]t is an efficient manner for a party in a judicial process to show what it believes to be the law."[71] As noted above, the tribunal in *RDC* expressly adopted "the conclusion reached by the tribunal in *Waste Management II* in considering NAFTA Article 1105 standard of review and after surveying NAFTA arbitral awards" for the content of the standard.[72]

24. The same argument made by Respondent here also was considered and rejected in *Merrill & Ring v. Canada*.[73] Taking note of the evolution of the minimum standard, as well as prior NAFTA decisions finding that the State could not engage in "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process," the tribunal concluded that "[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*."[74] As the tribunal observed, the standard thus "protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness."[75] Noting Canada's argument "that the existence of the rule must be proven," the tribunal concluded that, "against the backdrop of the evolution of the minimum standard of treatment," it was "satisfied that fair and equitable treatment has become a part of customary law."[76]

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[69] *RDC v. Guatemala* ¶ 216 **(CL-92)**.

[70] *Id*.

[71] *Id*. ¶ 217.

[72] *Id*. ¶ 219.

[73] *See Merrill & Ring v. Canada* ¶¶ 208-210 **(CL-29)**.

[74] *Id*. ¶¶ 208, 210.

[75] *Id*. ¶ 210.

[76] *Id*. ¶ 211; *see also id*. ¶ 212 (observing that if the minimum standard of treatment were construed so as to require "outrageous conduct of some kind, then consistency would demand that the same standard be followed

1. A State Violates The FET Standard, Where, As Here, It Acts Contrary To The Specific Representations That It Made To Induce The Investor's Investment, Thus Frustrating The Investor's Legitimate Expectations

25. As the tribunal in *Waste Management II* made clear, one way in which a State can violate the customary international law minimum standard of treatment is by acting contrary to the specific representations that it made to induce the investor's investment, thereby frustrating the investor's legitimate expectations.[77] As Claimant has explained, the concept of legitimate expectations measures the investor's expectations objectively; that is, the tribunal must assess whether the State made specific representations upon which a reasonable investor would have relied, and whether the State then acted contrary to those specific representations.[78] In making that assessment, the focus of the tribunal must be on the conduct of the State, rather than on the investor's subjective or "mere" expectations.[79] As the tribunal in *Saluka v. Czech Republic* observed, "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*."[80]

26. As noted at the Hearing, this is consistent with the positions advanced by the non-disputing parties in this case. As the Dominican Republic thus remarked, "[t]he conduct of the State is what is relevant as the only factor to take into account, since the Minimum Standard of

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in respect of such claims made by the NAFTA States in respect of the conduct of other countries affecting business, trade or investments interests of their citizens abroad," but that "this is not the case under current international practice").

[77] *Waste Management II* ¶ 98 ("In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.") **(CL-46)**; *see also* Reply ¶¶ 254-260; Memorial ¶¶ 245-258.

[78] *See* Tr. (21 Jan. 2013) 120:17-121:3 (Claimant's Opening); Memorial ¶ 234.

[79] *See* Tr. (21 Jan. 2013) 121:4-14 (Claimant's Opening).

[80] *Saluka v. Czech Republic* ¶ 304 (emphasis in original) **(CL-42)**; *see also Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability of 30 July 2010 ("*Suez v. Argentina*") ¶ 209 (observing that, "in keeping with the BITs' basic goal of fostering economic [cooperation and prosperity], one must not look single-mindedly at the Claimants' subjective expectations," but that "[t]he Tribunal must rather examine them from an objective and reasonable point of view. It must ask a fundamental question: What would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants, at the time they made their investment . . . .") **(RL-17)**.

Treatment should be an objective concept assessing the treatment that States afford to investors."[81] To the extent that any of the non-disputing parties' submissions in this case can be understood as rejecting the notion that legitimate expectations form part of the customary international law minimum standard of treatment under Article 10.5 of the DR-CAFTA, this position should be rejected. Indeed, although Respondent sought to rely upon the United States' submission in this regard, a careful reading of the United States' submissions in this and other cases reveals that it never has addressed the issue of whether a State incurs responsibility for a violation of the minimum standard of treatment when it acts contrary to specific representations made to induce that investor's investment; instead, its submissions focus exclusively on the uncontroverted statement that liability does not arise under the minimum standard of treatment simply because the investor's "mere" expectations allegedly are dashed.[82] That never has been Claimant's position in this case; Claimant does not rely upon its "mere" expectations or frustrations, but rather focuses its claim on the specific representations that Guatemala made to Claimant to induce its investment, and on the actions that Guatemala subsequently took in contravention of those representations. As Claimant has demonstrated, every DR-CAFTA and NAFTA Chapter Eleven tribunal to address the issue of an investor's legitimate expectations arising from the State's representations to induce its investment has recognized that they are an integral part of the obligation to accord an investment treatment that comports with the customary international law minimum standard.[83] Respondent does not and cannot dispute this.

27. In *RDC v. Guatemala*, for example, the tribunal found that "the manner in which and the grounds on which [Guatemala had] applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in Article 10.5 of CAFTA by being, in the words of *Waste Management II*, 'arbitrary, grossly unfair, [and] unjust'. . . .

[81] Tr. (4 Mar. 2013) 820:22-821:4 (Dominican Republic Submission); *see also* Dominican Republic Art. 10.20.2 Submission dated 2 Oct. 2012 ¶ 10 ("What is relevant and the only factor to consider, is the conduct of the State, since the Minimum Standard of Treatment should be an objective concept that evaluates the treatment that a State gives to an investor. Were it a variable concept that takes into account the investor's subjective assessment of the treatment he expects to receive, this would have a detrimental effect on the regulatory capacity of States.").

[82] *See, e.g.*, United States Art. 10.20.2 Submission dated 23 Nov. 2012 ¶ 6.

[83] Reply ¶¶ 254-260; Memorial ¶¶ 245-258; *see also BG Group v. Argentina* ¶ 295 (noting, with reference to the *Generation Ukraine* case, that "the protection of [legitimate expectations] is a major concern of the minimum standards of treatment contained in bilateral investment treaties") **(CL-9)**.

including by evidencing that *lesivo* was in breach of representations made by Guatemala upon which Claimant reasonably relied . . . . "[84] In holding that Guatemala had abused its authority and tried to mask its wrongdoing "under a cloak" of legality by declaring one of the claimant's contracts *lesivo*, or contrary to the national interest, the tribunal thus found, among other things, that the claimant had a legitimate expectation that the contract at issue, which contained the same terms as a prior contract put out for public bidding, was not contrary to the public interest; that Guatemala had breached representations made to the claimant upon which it was entitled to rely; and that the contemporaneous evidence demonstrated that Guatemala was using the legal power granted to it under its laws for reasons other than their intended purpose.[85]

28. In *Mobil and Murphy v. Canada*, a NAFTA Chapter Eleven tribunal similarly found that "in determining whether [the minimum standard of treatment] has been violated it will be a relevant factor if the treatment is made against the background of (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were, by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host State."[86] Considering "recent investment case law and the good faith principle of international customary law," the tribunal in *Thunderbird v. Mexico* likewise found that "the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[87] The tribunal in *Glamis Gold v. United States* agreed with this principle, noting that "a State may be tied to the objective expectations that it creates *in order to induce* investment."[88]

29. The tribunal in *Grand River Enterprises v. United States* likewise understood "the

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

[85] *Id*. ¶¶ 232-235; *see also id.* ¶ 222.

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

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

[88] *Glamis Gold v. United States* ¶ 621 (emphasis in original) **(CL-23)**.

concept of reasonable or legitimate expectations in the NAFTA context to correspond with those expectations upon which an investor is entitled to rely as a result of representations or conduct by a state party."[89] As the tribunal observed, "reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party."[90] As the tribunal noted, "[t]he question of reasonable expectations, therefore, is not equivalent to whether or not an investor is ultimately right on a contested legal proposition that would favor the investor."[91] Indeed, as the tribunal in *ADF v. United States* suggested, such a claim may be made on the basis of misrepresentations made by an authorized official regarding the legal framework.[92] It is in this respect that Claimant has emphasized that its FET claim does not depend upon the correct interpretation of Guatemalan law;[93] although Claimant maintains that its interpretation is correct, it is irrelevant for this purpose, because Respondent made specific representations about the content of its own law and then acted contrary to those representations. It now cannot defend those actions, as it attempts to do here, on the ground that it misrepresented its own laws. Nor should Respondent's attempt at the Hearing to twist Claimant's statements to mean that Claimant seeks to have the Tribunal ignore the correct interpretation of Guatemalan law be given any credence.[94]

30. As Claimant has explained, the concept of legitimate expectations is closely related to the principle of estoppel, which is universally accepted across legal systems.[95] As the tribunal observed in *ADC v. Hungary*, "[a]lmost all systems of law prevent parties from blowing

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

[90] *Id*. ¶ 141.

[91] *Id*. ¶ 140.

[92] *ADF v. United States* ¶ 189 (denying the investor's claim, in part, after finding that "any expectations that the Investor had with respect to the relevancy or applicability of the caselaw it cited were not created by any misleading representations made by authorized officials of the U.S. Federal Government . . . . ") **(CL-81)**.

[93] *See* Rejoinder on Jurisdiction ¶¶ 6, 43-48; *see also Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability of 27 Dec. 2010 ("*Total v. Argentina*") ¶ 331 (finding that "[t]he disregard of the basic principles of the Electricity Law is relevant irrespective of whether the changes introduced were in violation of Argentina's domestic legal system, an issue that the Tribunal does not need to resolve") **(CL-70)**.

[94] *See* Tr. (21 Jan. 2013) 273:17-274:14 (Respondent's Opening).

[95] *See* Tr. (21 Jan. 2013) 115:21-116:11 (Claimant's Opening); Memorial ¶ 279. Without prejudice to any of the points made above, Claimant notes that its claim in this regard does not depend solely upon arbitral awards to demonstrate a rule of customary international law, a point which Respondent never has attempted to address in its submissions.

hot and cold."[96] The tribunal in *Duke Energy v. Peru* similarly observed that "estoppel or the principle of consistency has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another."[97] And in *Total v. Argentina*, the tribunal noted that, "[u]nder international law, unilateral acts, statements and conduct by States may be the source of legal obligations which the intended beneficiaries or addressees, or possibly any member of the international community, can invoke," and that "[t]he legal basis of that binding character appears to be only in part related to the concept of legitimate expectations—being rather akin to the principle of 'estoppel.'"[98] As the tribunal observed, "[b]oth concepts may lead to the same result, namely, that of rendering the content of a unilateral declaration binding on the State that is issuing it."[99] In its written and oral submissions, Respondent simply has ignored the principle of estoppel and these authorities.

2. A State Violates The FET Standard, Where, As Here, It Fundamentally Changes Critical Elements Of Its Regulatory Framework, In Violation Of The Investor's Legitimate Expectations

31. As Claimant has explained, even in the absence of representations directed specifically to a foreign investor, a fundamental change to critical elements of the State's regulatory framework that undermines the investor's legitimate expectations will violate the international minimum standard.[100] Numerous tribunals thus have found that domestic law and regulations can, in and of themselves, form the basis of the investor's legitimate expectations, particularly where, as here, the regulatory framework was adopted specifically with the aim of

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[96] *ADC v. Hungary* ¶ 475 **(CL-3)**; *see also* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141 (Cambridge University Press 1987) (stating that the principle of estoppel demands that a party "not be allowed to blow hot and cold – to affirm at one time and deny at another . . . . ") (internal citation omitted) **(CL-48)**.

[97] *Duke Energy v. Peru* ¶ 231 **(CL-20)**.

[98] *Total v. Argentina* ¶ 131 **(CL-70)**.

[99] *Id.*

[100] Reply ¶¶ 238-246; Memorial ¶¶ 228-258; *see also* Letter from the Tribunal to the Parties dated 11 Mar. 2013 (asking "[w]hether representations made to the investor need to be specific (i.e. specifically directed to the investor) and whether the memorandum of sale can be considered as such a representation").

attracting and inducing foreign investment.[101] Indeed, Guatemala itself has admitted that Article 10.5 of the DR-CAFTA "prohibits changes to the regulatory framework that are fundamental and that affect the legitimate expectations of an investor . . . ."[102] As ICSID Secretary-General Meg Kinnear has confirmed, "[t]he weight of authority suggests that an undertaking or promise need not be directed specifically to the investor and that reliance on publicly announced representations or well known market conditions is a sufficient foundation for investor expectations."[103] Leading commentators likewise have noted that it is "not necessary that expectations were induced by conduct that was individually directed towards a foreign investor," and that "[l]egitimate expectations can also originate from the provisions of the general regulatory framework that a host state has put in place, as long as the confidence the framework generated is sufficiently specific."[104] This is consistent with the findings of recent investment treaty tribunals.

32. In *Merrill & Ring*, for example, the tribunal observed with respect to the claim at issue that, "[w]hile it is clear that no representations have been made by Canada to induce the Investor to make a particular decision or to engage in conduct that is later frustrated, any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives."[105] As noted above, the tribunal in *Suez v. Argentina* likewise found that "[w]hen an investor undertakes an investment, a host government through its *laws, regulations, declared policies, and statements* creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State," and that "[t]he resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and

[101] Reply ¶¶ 258-260.

[102] Counter-Memorial ¶ 566.

[103] M. Kinnear, *The Continuous Development of the Fair and Equitable Treatment Standard*, in A. Bjorklund, I. Laird, S. Ripinsky (eds.), INVESTMENT TREATY LAW, CURRENT ISSUES III (2009), at 228 **(CL-73)**.

[104] S. W. Schill, *Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law, in* International Investment Law and Comparative Public Law (Stephan W. Schill ed., 2010), at 165 (internal citation omitted) **(CL-78)**; *see also* RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 145 (2nd Ed. 2012) (internal citation omitted) (observing that "[t]he investor's legitimate expectations are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state") **(CL-114)**.

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

afterwards the manner in which the investment is to be managed."[106] Reviewing "the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them," the tribunal noted that "an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, *acted in reliance upon those laws and regulations and changed their economic position as a result*."[107] As the tribunal observed, "it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment," but rather "the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not accorded protected investments fair and equitable treatment."[108]

33. Turning to the facts of that case, the *Suez* tribunal found that "the expectations of the Claimants with respect to their investment in the water and sewage system of Santa Fe did not suddenly and surprisingly come into their minds the way Athena sprang from the head of Zeus," but that "Argentina through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which the Province designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Province's water and sewage system."[109] The tribunal further found that, "[l]ike any rational investor, the Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework," as "their ability to make a profit was crucially dependent on it."[110] Given the "central role" of the legal framework, as well as the "care and attention that the Province devoted to the creation of that framework," the tribunal found that the claimants'

[106] *Suez v. Argentina* ¶ 203 (emphasis added) **(RL-17)**; *see also id*. (observing that "[t]he theoretical basis of this approach no doubt is found in the work of the eminent scholar Max Weber, who advanced the idea that one of the main contributions of law to any social system is to make economic life more calculable and also argued that capitalism arose in Europe because European law demonstrated a high degree of 'calculability,'" and that "[a]n investor's expectations, created by law of a host country, are in effect calculations about the future").

[107] *Id*. ¶ 207 (emphasis in original).

[108] *Id*.

[109] *Id*. ¶ 208.

[110] *Id*. ¶ 212.

expectations that the framework would be respected by Argentina were "legitimate, reasonable, and justified," and that its failure to act in accordance with that legal framework breached Argentina's obligation to accord FET.[111]

34. Similarly, in *Total v. Argentina*, the tribunal found that, "when the basis of an investor's invocation of entitlement to stability under a fair and equitable treatment clause relies on legislation or regulation of a unilateral and general character," the "investor's expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor."[112] As the tribunal noted, while "[t]his type of regulation is not shielded from subsequent changes under the applicable law . . . a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations," and that "[t]his is the case for regimes, which are applicable to long-term investments and operations," such as "capital intensive and long term investments and operation of utilities under a license."[113] The tribunal further noted that, "[i]n such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick," and that "[t]he concept of 'regulatory fairness' or 'regulatory certainty' has been used in this respect."[114] As the tribunal concluded, "[i]n the light of these criteria when a State is empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time, as indeed Argentina's gas regime provided."[115]

35. Applying these principles, the *Total* tribunal found that Argentina's modification of electricity pricing mechanisms through a series of administrative decrees—while leaving the electricity law in place—had "objectively breached" the FET standard.[116] As the tribunal observed, "[a] foreign investor is entitled to expect that a host state will follow those basic

[111] *Id*.

[112] *Total v. Argentina* ¶ 122 **(CL-70)**.

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *Id*. ¶ 333.

principles (which it has freely established by law) in administering a public interest sector that it has opened to long term foreign investments," and that "[e]xpectations based on such principles are reasonable and hence legitimate, *even in the absence of specific promises by the government*."[117] As the tribunal concluded, "the fair and equitable standard has been breached through the setting of prices that do not remunerate the investment made nor allow reasonable profit to be gained contrary to the principles governing the activities of privately owned generators under Argentina's own legal system," and "[t]his is especially so in the utility or general interest sectors, which are subject to governmental regulation (be it light or strict), where operators cannot suspend the service, investments are made long term and exit/divestment is difficult."[118]

36. At the Hearing, Respondent, relying upon the series of cases in which Argentina was held liable for disregarding a tariff regime that it had implemented for the purpose of soliciting foreign investment in large State-owned utility companies, continued to assert that the "total destruction" of a regulatory framework, through legislative measures or otherwise, is necessary for a violation of the FET standard.[119] That is incorrect. As an initial matter, Respondent's suggestion that its actions were somehow less egregious than those taken by Argentina is untrue: Guatemala acted in this case purely for political gain and accomplished its objective of fundamentally changing the legal regime through deceptive and non-transparent means. In any event, Respondent is wrong in arguing that a complete destruction of the legal regime is necessary to find a violation of the FET standard. As the tribunal's decision in *Total* makes clear, targeted measures that fundamentally change a central component of a regulatory regime, in violation of an investor's legitimate expectations, can breach the FET standard.[120] In yet another example, the tribunal in the *Biwater Gauff v. Tanzania* case held that a State's commitment to appoint an independent regulatory authority, if not met, could violate the FET standard, noting that "as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and

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

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

[119] *See* Tr. (21 Jan. 2013) 200:6-20 (Respondent's Opening).

[120] *See Total v. Argentina* ¶ 333 (emphasis added) **(CL-70)**.

equitable treatment standard, in that it represents a departure from [the claimant's] legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA."[121]

37. Similarly, in *ATA Construction v. Jordan*, the tribunal found that "that the extinguishment of the Claimant's right to arbitration by application" of a new arbitration law to the claimant's contract retroactively breached the FET standard.[122] As the tribunal noted, the claimant's contractual right to arbitrate disputes in a neutral forum, so that the State party to the investment contract would not be "both litigant and judge," was an "integral part" of that contract.[123] Thus, even without dismantling the entire regulatory framework, Jordan was held liable for extinguishing "a valid right to arbitration," which had deprived the claimant "of a valuable asset in violation of the Treaty's investment protections."[124]

38. At the Hearing, Respondent also continued to argue that Claimant cannot assert any claim based upon the fundamental changes that Guatemala made to its legal and regulatory framework, because the fifty-year concession contract that EEGSA entered into with the Republic of Guatemala "expressly allows the possibility of making modifications to adapt to the conditions which probably are going to change throughout the 50 years of the concession."[125] This too is incorrect. As Claimant noted in its Reply, while Claimant does not dispute that States retain their ability to regulate and that, absent a stability clause, their laws and regulations are not frozen, this does not mean that the State is permitted to dismantle the central components of the very regulatory framework that it established to attract foreign investment through amendments, or through administrative or regulatory actions, which clearly are at odds with the law and its objectives and with the State's prior representations.[126] As the tribunal in

[121] *Biwater Gauff v. Tanzania* ¶ 615 **(CL-10)**.

[122] *See ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award of 18 May 2010 ("*ATA Construction v. Jordan*") ¶¶ 121, 125, 133 **(CL-58)**.

[123] *Id*. ¶¶ 121-128.

[124] *Id*. ¶ 126.

[125] Tr. (21 Jan. 2013) 202:22-203:3 (Respondent's Opening); *see also* Authorization Agreements for the Departments of Guatemala, Sacatepéquez and Escuintla, signed by EEGSA and Ministry of Energy and Mines, dated 15 May 1998, Clause 20 ("The AWARDEE agrees to comply with all the provisions set forth in the General Law of Electricity and its Regulations or modification they suffer.") **(C-31)**.

[126] Reply ¶ 262.

Impregilo v. Argentina stated, "[t]he legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from *unreasonable modifications* of that legal framework."[127] As the tribunal in *Parkerings v. Lithuania* similarly observed, "there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment," but "[w]hat is prohibited . . . is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[128]

39. The tribunal's decision in *Suez v. Argentina* also is instructive. As that tribunal observed, although "[t]here is no question that under the legal framework Argentina and the Province [of Santa Fe] had the right to regulate the activities of the Concession concerning a broad range of matters, including the tariff structure, investment standards, and performance," the claimants and its investment, "as participants in any regulated industry, had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that the Province had established for the Concession," which they had failed to do.[129] The tribunal thus found that the Province had "enacted various measures directing the regulatory authorities not to respect important elements of the legal framework," which "considered together and in the light of the legal framework governing the Concession, particularly in connection with tariff adjustment, were outside the scope of Santa Fe's legitimate right to regulate and in effect constituted an abuse of regulatory discretion," in violation of the FET standard.[130]

3. A State Violates The FET Standard, Where, As Here, It Takes Arbitrary Measures Against A Protected Investment

40. As the tribunal in *Waste Management II* also made clear, another way in which a State can violate the customary international law minimum standard of treatment is by taking

[127] *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011 ¶ 291 (emphasis added) **(RL-31)**.

[128] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 Sept. 2007 ¶ 332 **(RL-10)**.

[129] *Suez v. Argentina* ¶ 217 **(RL-17)**.

[130] *Id*.

arbitrary, grossly unfair, unjust, or idiosyncratic measures against a protected investment.[131] Relying on *Waste Management II*, the tribunal in *Biwater Gauff* thus found that the standard "implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary."[132] The *Merrill & Ring* tribunal likewise affirmed that, even if there were no "stand-alone obligations" under the NAFTA or international law regarding good faith and the prohibition of arbitrariness, "these concepts are to a large extent the expression of general principles of law and hence also a part of international law . . . Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law."[133] In his legal expert opinion in the *RDC v. Guatemala* case, Professor Reisman concurred with this sentiment, commenting that Respondent's arguments to the contrary were "unusual, to say the least, [in] argu[ing] that international law allows states to act in an arbitrary fashion," and confirming that "the standard[] of non-arbitrariness . . . [is] alive and well in customary international law."[134]

41. There is no dispute between the parties that arbitrariness, as the ICJ stated in the *ELSI* case, "is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful [*sic*] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[135] As the tribunal in *Azurix v. Argentina* observed, "the definition in *ELSI* is close to the ordinary meaning of arbitrary since it emphasizes the element of willful disregard of the law."[136] As noted by the Dominican Republic at the Hearing, the customary international law minimum standard of treatment thus prohibits "manifest

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

[132] *Biwater Gauff v. Tanzania* ¶ 602 **(CL-10)**.

[133] *Merrill & Ring v. Canada* ¶ 187 (**CL-29**).

[134] Second Opinion of W. Michael Reisman on Legal Issues Raised in the Respondent's Counter-Memorial, *Railroad Development Corp. v. Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23 dated 11 Mar. 2011 ¶ 55 **(CL-68)**.

[135] *See* Tr. (21 Jan. 2013) 139:21-140:3 (Claimant's Opening); Reply ¶ 237 (quoting *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, reprinted in 1989 I.C.J. REP. 15 ("*ELSI*") ¶ 128 **(RL-1)**); Counter-Memorial ¶ 528.

[136] *Azurix v. Argentina* ¶ 392 **(CL-8)**; *see also Glamis Gold v. United States* ¶ 625 (observing that "arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals") (emphasis omitted) **(CL-23)**.

arbitrariness or inconsistent arbitrariness concerning judicial and public administration policies, as well as proceedings, in such a way that it constitutes a denial of the object and purpose of the policy; lack of due process infringing judicial rectitude; blatant unfairness. And last but not least, evident discrimination, or *a manifest lack of reasons for a decision*."[137] This is consistent with recent jurisprudence.

42. As discussed above, in *RDC v. Guatemala*, the tribunal found that Guatemala had violated the customary international law minimum standard of treatment under Article 10.5 of the DR-CAFTA, because it had acted in a manner that was "arbitrary, grossly unfair, [and] unjust,"[138] when it declared one of Claimant's contracts *lesivo*, or contrary to the national interest.[139] In so finding, the tribunal examined not only the claimant's legitimate expectations, but also the extent of the President's powers under Guatemalan law to issue a *lesivo* declaration, concluding that "the *lesivo* procedure has characteristics which may be easily abused by the Government,"[140] and that "the *lesivo* remedy [had] been used under a cloak of formal correctness allegedly in defense of the rule of law . . . ."[141] This finding, moreover, was made despite Guatemala's insistence that the "Guatemalan courts have ruled that the *Lesivo* Declaration had no effect upon Claimant's investment or rights under [the] Contract . . . ."[142]

43. Finding that "the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law,"[143] the tribunal in *Lemire v. Ukraine* similarly ruled that Ukraine's practice regarding the award of radio licenses violated the FET standard, because it facilitated "the secret awarding of licences, without transparency, with total disregard of the process of law and without any possibility of judicial review," and that it "must be considered arbitrary, since it meets the *Saluka* test of 'manifestly violat[ing] the requirements of

[137] Tr. (4 Mar. 2013) 819:10-18 (Dominican Republic Submission) (emphasis added); *see also* Non-Disputing Party Submission of the Government of the Dominican Republic dated 2 Oct. 2012 ¶ 6.

[138] *RDC v. Guatemala* ¶ 235 (quoting *Waste Management II*) **(CL-92)**.

[139] *Id*.

[140] *Id*. ¶ 233.

[141] *Id*. ¶ 234.

[142] *Id*. ¶ 171.

[143] *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 21 Jan. 2010 ¶ 263 **(CL-104)**.

consistency, transparency, even-handedness and non-discrimination.'"[144]

44. Likewise, in *PSEG v. Turkey*, the tribunal held that Turkey had violated the FET standard based upon "serious administrative negligence and inconsistency," as well as "abuse of authority," by the Ministry of Energy and Natural Resources, with which the claimant had entered into a concession contract for the construction of a thermal power plant.[145] The tribunal found that the Ministry had failed to handle its negotiations with the claimant competently and professionally due to, among other things, its failure to address and disclose key points of disagreements with the claimant, its failure to examine important communications, and its refusal to address the need to end fruitless negotiations.[146] As the tribunal observed, the Ministry's demands for a renegotiation of the claimant's contract "went far beyond the purpose of the Law and attempted to reopen aspects of the Contract that were not at issue in this context or even within [its] authority."[147]

45. Similarly, the tribunal in *Walter Bau v. Thailand* found that Thailand had violated its obligation to accord fair and equitable treatment by arbitrarily decreasing toll payments on a tollway project.[148] In that case, Thailand had solicited the investment, because it lacked the resources to build the tollway on its own.[149] Because the claimant needed to invest large amounts, the project did not produce any return for several years, and the parties thus signed a second memorandum of agreement providing for toll increases to ensure a reasonable rate of return.[150] Thailand subsequently claimed, however, that it could not increase the tolls until after the removal of a ramp, which the Government refused to authorize while the claimant remained a shareholder in the project company.[151] After eight years of refusing to increase the tolls,

[144] *Id*. ¶ 418 (internal citation omitted).

[145] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ("*PSEG v. Turkey*") ¶¶ 246-248 **(CL-37)**.

[146] *Id*. ¶¶ 246-248.

[147] *Id*. ¶ 247.

[148] *Walter Bau AG v. The Kingdom of Thailand*, Award of 1 July 2009 ("*Walter Bau v. Thailand*") ¶¶ 12.4(b), 12.14, 12.24 **(CL-45)**.

[149] *Id*. ¶ 12.2(a)-(b).

[150] *Id*. ¶¶ 12.4(b), 12.14, 12.24.

[151] *Id*. ¶ 12.24.

Thailand's Prime Minister then publicly announced a decrease in the tolls.[152] The tribunal concluded that, even though there was never a guarantee of any particular rate of return, the continued refusal to implement toll increases was "the culmination of a series of wrongful acts of the Respondent which converged when the Respondent decreased the tolls."[153]

46. Finally, while bad faith necessarily will violate the minimum standard of treatment, it is well established that an investor need not demonstrate bad faith to engage the international responsibility of the State.[154] As the tribunal in *Loewen v. United States* observed, "[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment,"[155] while the tribunal in *CMS v. Argentina* concurred that the FET standard is an "objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question," and that "[o]f course such intention and bad faith can aggravate the situation but are not an essential element of the standard."[156] The tribunal in *Cargill v. Mexico* similarly remarked that "the standard is not so strict as to require 'bad faith' or 'willful neglect of duty,'" although "the presence of such circumstances will certainly suffice."[157] Thus, although mere negligence by a regulatory agency,

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[152] *Id*. ¶ 12.26.

[153] *Id*. ¶¶ 12.2(g), 12.36; *see also id.* ¶ 12.36.

[154] *See, e.g.*, *Glamis Gold v. United States* ¶ 616 (observing that bad faith is not required to find – but is "conclusive evidence" of – a violation of the fair and equitable treatment standard and that "an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation") **(CL-23)**; *Mondev v. United States* ¶ 116 (holding that "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.") **(CL-31)**; *Azurix v. Argentina* ¶ 372 (observing that it would be "incoherent" to consider that a State party "has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious") **(CL-8)**; *Siemens v. Argentina* ¶ 299 (noting that bad faith is "not an essential element of the standard" under customary international law) **(CL-44)**; *LG&E v. Argentina* ¶ 129 (remarking that it "is not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment") **(CL-27)**; *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA UNCITRAL, Award of 1 July 2004 ¶ 186 (finding that fair and equitable treatment "is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not") **(CL-34)**.

[155] *The Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003 ¶ 132 **(CL-108)**.

[156] *CMS v. Argentina* ¶ 280 **(CL-17)**.

[157] *Cargill v. Mexico* ¶ 296 **(CL-12)**.

without more, may not violate the international minimum standard, as the *Cargill* tribunal observed, "arbitrariness may lead to a violation . . . when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point *where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive*."[158] Accordingly, while intentionality, like bad faith, is not required for a finding of arbitrariness, evidence of regulatory action that "grossly subverts a domestic law or policy for an ulterior motive," as is the case here, does violate the international minimum standard.

4. A Showing Of A Denial Of Justice Is Not Required To Find A Violation Of The Minimum Standard Of Treatment

47. At the Hearing, Respondent continued to conflate FET with denial of justice, arguing that, because the Guatemalan courts have ruled that the CNEE's actions were lawful under Guatemalan law, this Tribunal lacks jurisdiction *ratione materiae* to review those actions under international law, and that Claimant's only cognizable claim under the DR-CAFTA could be for a denial of justice.[159] In so arguing, Respondent asserted that "the substance of the dispute stated by TECO continues to be the same as the Iberdrola case," namely "that the regulatory framework of Guatemala should have been interpreted one way," but "the CNEE dissented and defended its own interpretation;"[160] that EEGSA "took this dispute to the local, competent bodies to receive a final interpretation of the regulatory framework, subject to local law;" and that Claimant now "wants to turn ICSID into a major third-instance administrative Tribunal to decide on the correct interpretation of the domestic regulatory framework."[161] Respondent's assertions

[158] *Id*. ¶ 293 (emphasis added); *see also* Tr. (21 Jan. 2013) 386:1-21 (Tribunal Question) (questioning "whether or not, in trying to distinguish between the mistakes that can create liability and the mistakes that cannot, there must be an element of intentionality, that the regulator intended to do something wrong; or is it enough that there be simple negligence in the regulatory act?").

[159] *See, e.g.*, Tr. (21 Jan. 2013) 183:10-184:4, 186:4-14, 256:18-257:8, 260:13-15 (Respondent's Opening).

[160] *Id*. at 198:3-8.

[161] *Id.* at 198:12-199:8; *see also id.* at 199:15-21 (arguing that a dispute "regarding the interpretation of the regulatory framework cannot constitute an international controversy under an investment treaty; much less, when as in the present case, the controversy has already been presented in all of the legal instances, including the maximum judicial authority."); *id*. at 183:20-184:4 (arguing that "no standard of international law, even less the minimum standard of treatment under DR-CAFTA, protects an investor in a dispute with a regulator whose only actual ground is a difference of opinion on the interpretation of the local regulatory framework" and that "[t]hese disputes are to be resolved before the competent local Tribunals").

deliberately mischaracterize the nature of the dispute, distort the content of Claimant's arguments, and are manifestly incorrect.

48. As Claimant repeatedly has explained, it has not presented to arbitration a mere regulatory dispute over the proper interpretation of Guatemalan law, nor is this case identical to the case brought by Iberdrola in the *Iberdrola v. Guatemala* arbitration, as Respondent continued to assert at the Hearing.[162] Rather, as the record reflects and as the testimony at the Hearing confirmed, Claimant's FET claim arises from Guatemala's deliberate and calculated actions taken in contravention of its prior representations; its fundamental changes to the regulatory framework, which was established specifically to induce foreign investment; and its arbitrary and, indeed, bad faith conduct taken in connection with EEGSA's 2008-2013 tariff review to decrease EEGSA's VAD.[163] Moreover, unlike in *Iberdrola*, where the tribunal found that, "beyond labeling the behavior of [the] CNEE as violating the Treaty, the Claimant did not raise a dispute under the Treaty and international law, but a technical, financial and legal discussion on provisions of the law of the Respondent State," and that the claimant had asked the tribunal to review "the regulatory decisions of the CNEE, the MEM and the judicial decisions of the Guatemalan courts, not in the light of international law, but of the domestic law of Guatemala,"[164] Claimant has expressly asked this Tribunal to review Guatemala's actions during EEGSA's 2008-2013 tariff review not in light of Guatemalan law, but in light of Guatemala's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment.[165]

49. Respondent's assertion at the Hearing that the tribunal's decision in *Iberdrola* "is not an outlier," but that "it follows a well established line,"[166] also is demonstrably wrong. As Claimant has explained, the *Iberdrola* decision, which currently is subject to annulment

[162] *Id*. at 243:1-244:12, 255:14-260:5.

[163] Tr. (21 Jan. 2013) 113:13-153:9 (Claimant's Opening); Rejoinder on Jurisdiction ¶¶ 14-24; Reply ¶¶ 228-282.

[164] *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award of 17 Aug. 2012 ("*Iberdrola v. Guatemala*") ¶¶ 353, 354 **(RL-32)**.

[165] *See, e.g.*, Tr. (21 Jan. 2013) 157:21-158:10 (Claimant's Opening); Rejoinder on Jurisdiction ¶¶ 14-24; Reply ¶¶ 228-282.

[166] Tr. (21 Jan. 2013) 260:7 (Respondent's Opening).

proceedings,[167] is the *only* case in which a claim was dismissed for lack of jurisdiction on those grounds.[168] Indeed, numerous investment treaty cases have found an FET violation based upon a State's legislative, administrative, or regulatory actions, irrespective of whether there had been a denial of justice by the host State's courts.[169] This is so, because denial of justice is but a subset of the international minimum standard, and only one way in which a State may violate its obligation to accord an investment fair and equitable treatment.[170] In *Vivendi II*, the tribunal thus rejected the very same argument that Respondent advances here, finding that "[t]o the extent that Respondent contends that the fair and equitable treatment obligation constrains government conduct only if and when the state's courts cannot deliver justice, this appears to conflate the legal concepts of fair and equitable treatment on the one hand with the denial of justice on the other."[171] As the tribunal observed, if it "were to restrict the claims of unfair and inequitable treatment to circumstances in which Claimants have also established a denial of justice, it would eviscerate the fair and equitable treatment standard."[172]

50. Similarly, in *EDF v. Argentina*, the fact that the Supreme Court of Mendoza had rejected all claims brought by the claimants' distribution company in the Argentine courts did not render the tribunal without jurisdiction *ratione materiae* to consider the claimants' FET claim, nor did it limit that claim to a claim for denial of justice.[173] As the tribunal observed, "the legality of Respondent's acts under national law does not determine their lawfulness under international legal principles," and "[t]he fact that the Argentine Supreme Court has vested

[167] The fact that the *Iberdrola* Award currently is subject to annulment proceedings is (and was at the time of the Hearing) publicly-available information. *See* Procedural Details regarding *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), *available at* http://icsid.worldbank.org.

[168] Rejoinder on Jurisdiction ¶ 50.

[169] *Id*. ¶ 51; Reply ¶¶ 272-282.

[170] Rejoinder on Jurisdiction ¶ 51; Reply ¶ 272; DR-CAFTA, Art. 10.5(1) ("Each Party shall accord to covered investments treatment in accordance with customary international law, *including* fair and equitable treatment and full protection and security") (emphasis added) **(CL-1)**; *compare id.*, Art. 10.5(2)(a) ("'fair and equitable treatment' *includes* the obligation not to deny justice . . . .") (emphasis added), *with id*., Art. 10.5(2)(b) ("'full protection and security' *requires* each Party to . . . .") (emphasis added).

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

[172] *Id*. ¶ 7.4.11.

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

Respondent with robust authority during national economic crises does not change the Tribunal's analysis."[174]

51. Moreover, Respondent continued to rely upon the tribunal's decision in *Generation Ukraine v. Ukraine* at the Hearing,[175] without addressing the fact that, as noted by Claimant in its Reply, that decision is distinguishable because the challenged acts in that case were taken by low-level officials, as opposed to the highest levels of Government, as is the case here, and because it properly has been the subject of criticism, including by the *ad hoc* Committee in *Helnan v. Egypt*.[176] As the *ad hoc* Committee observed, "[i]n numerous ICSID cases, tribunals have rendered awards in favour of the claimants as a result of administrative decisions, in which no such application to the local courts had been made," and, "[i]n the light of these precedents and considerations, the Award in *Generation Ukraine* . . . stands somewhat outside the *jurisprudence constante* under the ICSID Convention in the review of administrative decision-making for failure to provide fair and equitable treatment."[177] As the *ad hoc* Committee further observed, "[a] requirement to pursue local court remedies would have the effect of disentitling a claimant from pursuing its direct treaty claim for failure by the Executive to afford fair and equitable treatment, even where the decision was taken at the highest level of government within the host State," and "[i]t would leave the investor only with a complaint of unfair treatment based upon denial of justice in the event that the process of judicial review of the Ministerial decision was itself unfair."[178]

52. Respondent's argument at the Hearing that "the only possible international claim after having received a decision on local law on the interpretation of local norms, [is] denial of

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[174] *Id*. ¶ 907.

[175] Tr. (21 Jan. 2013) 259:17-260:6 (Respondent's Opening).

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

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

[178] *Id*. ¶ 53.

justice,"[179] also failed to respond to Claimant's observation that this interpretation contravenes the object and purpose of the "no u-turn" provision in Article 10.18(2) of the DR-CAFTA, which provides that claimants must waive their rights to initiate or continue proceedings challenging the objectionable measure once they commence arbitration.[180] As Claimant has explained, the objective of this provision is to encourage parties to resolve their differences in the local courts, but to allow them to commence international arbitration, if their dispute is not resolved to their satisfaction in the local courts.[181]

53. In this case, Claimant never availed itself of the Guatemalan courts. As the record reflects, after challenging the CNEE's actions administratively through the MEM, EEGSA, not Claimant, submitted *amparo* petitions to the Guatemalan courts under Guatemalan law, challenging the legality of the CNEE's Resolutions.[182] These *amparo* petitions not only presented different causes of action than those before this Tribunal, but the parties to those court proceedings were different as well.[183] The Guatemalan court decisions regarding EEGSA's *amparo* petitions thus can have no *res judicata* effect *vis-à-vis* Claimant.[184] Nor can Claimant be penalized for failing to present a claim in the Guatemalan courts; not only would that result find no support in the DR-CAFTA—and, in fact, would be equivalent to inserting an exhaustion of local remedies requirement into the Treaty—but Claimant, as a shareholder in EEGSA, did not have a cognizable claim under Guatemalan law against the CNEE.[185]

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[179] Tr. (21 Jan. 2013) 186:5-8 (Respondent's Opening).

[180] DR-CAFTA, Art. 10.18(2) **(CL-1)**; Tr. (21 Jan. 2013) 154:11-16 (Claimant's Opening); Rejoinder on Jurisdiction ¶ 57.

[181] Tr. (21 Jan. 2013) 154:11-16 (Claimant's Opening); Rejoinder on Jurisdiction ¶¶ 56-57.

[182] *See* EEGSA Amparo Request 37-2008 against CNEE Resolution No. GJ-Providencia-3121 and Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 dated 14 Aug. 2008 **(C-291)**; EEGSA Amparo Request against Resolution No. CNEE-144-2008 dated 27 Aug. 2008 **(C-298)**.

[183] Tr. (21 Jan. 2013) 154:17-21 (Claimant's Opening); Rejoinder on Jurisdiction ¶ 49.

[184] *See, e.g.*, *EDF v. Argentina* ¶ 1132 (observing that "it is generally accepted that an identity requirement must be satisfied in order for a tribunal to take into account the decisions of national courts," and that, "[a]s Claimants explain, there is a notable absence of the requisite parity relating to the parties, cause of action, and applicable legal standards between the claims brought in local courts by Claimants and those currently before this Tribunal," and thus "[t]his lack of parity precludes satisfaction of the identity requirement in *res judicata* or *lis pendens*, rendering Respondent's defense in this respect moot") **(CL-86)**.

[185] *See* Tr. (22 Jan. 2013) 414:17-21 (Tribunal Question) (questioning "[u]nder Guatemalan law, was there a claim feasible with the same facts? […] And in such a case, what type of procedure would that have been?").

54. Finally, Respondent's assertion at the Hearing that the minimum standard of treatment does not apply to "any regulatory change,"[186] and that the Tribunal does not have jurisdiction to consider issues of domestic law in assessing the conduct of regulatory authorities under international law,[187] also is manifestly incorrect. As Claimant has shown, numerous investment treaty tribunals have ruled on issues of domestic law in assessing the conduct of regulatory or administrative authorities under international law, including where, as here, the investor's claim was based upon a unilateral and fundamental change of the regulatory framework, an abuse of power or authority, or conduct that otherwise was arbitrary by the host State.[188] The fact that such actions take place within a regulatory context does not divest a tribunal of jurisdiction *ratione materiae* or limit a claimant's claim to denial of justice, as Respondent would have this Tribunal find. The issue of whether any action—regulatory or otherwise—by the State is arbitrary in violation of the minimum standard of treatment thus is a merits decision, and not a jurisdictional decision.[189] As the tribunal in *Chemtura v. Canada* affirmed, the customary international law minimum standard of treatment "seeks to ensure that investors from NAFTA member States benefit from *regulatory fairness*."[190] Similarly, the tribunal in *Rompetrol v. Romania* recently observed that, in interpreting the FET standard, it would "take into particular account the two general elements that other tribunals have found come into play in connection with claims to 'fair and equitable treatment,' namely the way in

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As a shareholder in EEGSA, TECO did not have a claim under Guatemalan law against the actions and resolutions of the CNEE, because, under Guatemalan law, only the party that is directly affected by the actions at issue has standing to file administrative remedies and an *amparo*, which, in this case, was EEGSA. *See* Decree No. 119-96, Law on Administrative Disputes, Art. 10 **(C-425)**; Decree No. 1-86 dated 8 Jan. 1986, Amparo Action, Habeas Corpus and Constitutionality Law, Art. 23 **(C-5)**. Because TECO was only indirectly affected by the CNEE's actions and resolutions, it therefore had no claim of its own to file in Guatemalan court. Guatemalan law in this respect is not unique. *See, e.g.*, *Urbaser S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of 19 Dec. 2012 ¶¶ 162-163 (noting that, under Argentine law, foreign shareholders of a corporation "lack standing to act in their own name in support of rights that are considered to belong to [the corporation] and not to the shareholders") **(CL-110)**.

[186] Tr. (21 Jan. 2013) 264:21-265:5 (Respondent's Opening).

[187] *See, e.g.*, *id*. at 183:20-184:4, 254:14-256:8, 260:13-15.

[188] *See* Rejoinder on Jurisdiction ¶¶ 35-41 (citing the tribunals' decisions in *EDF v. Argentina*, *RDC v. Guatemala*, *PSEG v. Turkey*, and *Tecmed v. Mexico*).

[189] *See* Tr. (22 Jan. 2013) 413:19-414:1 (Tribunal Question) (questioning whether, "if it's a very minor regulatory change in the opinion of one of the parties, if that is a matter, maybe, decided on the jurisdictional phase or if it's a matter that necessarily has to be decided on the [merits]?").

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

which the foreign investor or the foreign investment have been treated by the organs of the host State (*whether in a regulatory context or otherwise*), measured against the expectations legitimately entertained by the foreign investor in making its investment."[191] As the tribunal noted, "[s]uch actions will be viewed against the background of [the claimant's] legitimate expectations in respect of those investments, and notably whether the evidence shows that the actions by Romania in question were tainted by unfairness or unreasonableness, or were discriminatory."[192]

B. Claimant's Claim Under Article 10.5 Of The DR-CAFTA

55. In a transparent effort to mislead this Tribunal and to establish the relevance of the decision in the *Iberdrola v. Guatemala* case, Respondent repeatedly asserted at the Hearing that Claimant initially made a claim for expropriation under Article 10.7 of the DR-CAFTA, and then dropped that claim after it sold its investment in EEGSA to EPM in October 2010.[193] As it has explained, however, Claimant never made a claim for expropriation. Under the DR-CAFTA, a claim is not submitted to arbitration until a notice of arbitration is filed.[194] As Claimant's Notice of Arbitration clearly reflects, Claimant did not assert a claim for expropriation under Article 10.7 of the DR-CAFTA, but rather asserted only a claim for breach of Guatemala's obligation under Article 10.5 to accord Claimant's protected investment in EEGSA fair and

[191] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013 ("*Rompetrol v. Romania*") ¶ 197 (emphasis added) **(CL-109)**.

[192] *Id*. ¶ 198.

[193] *See, e.g.*, Tr. (21 Jan. 2013) 193:10-15 (Respondent's Opening) ("TECO, after the sale, decided to withdraw its claim of expropriation under Article 10.7 of DR-CAFTA which it had communicated to Guatemala in its trigger letter. After the sale it withdrew its claim for expropriation knowing that it could not be maintained."); Tr. (22 Jan. 2013) 535:22-536:4 (Gillette Cross) ("The notice of dispute signed by you in January 2009 contains a claim for expropriation. Is my understanding of that that in January 2009 when you signed this letter, that you thought that EEGSA was valueless?"); Tr. (22 Jan. 2013) 592:13-15 (Callahan Cross) ("Were you aware that in January of 2009, the company had notified a claim for expropriation of the asset, i.e, that it considered the asset was valueless?"); *see also* Tr. (21 Jan. 2013) 372:10-373:4 (Respondent's Opening) ("Members of the Tribunal, it's a very serious accusation to accuse a government of expropriating something, and the only way in which one can assume being advised by competent counsel that you would make a claim for expropriation is that you believe that what you have has had its value destroyed. And we say that that is not a credible allegation at any stage in this case. . . . This is not a worthless asset. It never was. The expropriation claim was always an exaggeration.").

[194] Rejoinder on Jurisdiction ¶¶ 23, 28 n.71. Under the DR-CAFTA, "[a] claim shall be deemed submitted to arbitration under this Section when the claimant's *notice of or request for arbitration* ('notice of arbitration')" is received by the ICSID Secretary-General or the respondent, as the applicable rules require. DR-CAFTA, Art. 10.16(4) (emphasis added) **(CL-1)**.

equitable treatment.[195] Quite apart from the issue of whether the *Iberdrola* tribunal's criticism of Iberdrola for shifting its emphasis from its expropriation claim to its FET claim was accurate or warranted,[196] it is irrelevant to this arbitration, as Claimant has not shifted its emphasis or restructured its claims in any way. To the contrary, Claimant consistently has maintained its FET claim, as well as the factual allegations underlying that claim, throughout its written and oral pleadings in this case.

56. The fact that Claimant reserved the right in its Notice of Intent to assert a claim for expropriation also is irrelevant.[197] As Claimant's witnesses have confirmed, at the time Claimant filed its Notice of Intent on 9 January 2009, Claimant did not know what effect the CNEE's decision to impose its own drastically reduced VAD on EEGSA ultimately would have on its investment.[198] As Mr. Gillette testified at the Hearing, "as an investor . . . [TECO] initially thought that this could be devastating enough to the cash flows in the company that the cash flows might go negative and that we could be in a liquidity situation at EEGSA."[199] As he explained, EEGSA's management team "took significant actions to cut all manner of costs, including capital expenditures, and maybe especially capital expenditures, and O and M costs to try to preserve a level of cash flow in the company."[200] While the "management team had been able to stabilize things [by October/November 2008] with the cost reductions that they made to the point where [they] would not go cash-flow negative," as Mr. Gillette testified, he still "was concerned at the time that some of the cuts that [they] were making would affect the quality of service and the provision of new service to customers on the system."[201] As he noted, "management had taken some stopgap measures in order to preserve cash flow," but "[i]t was not clear to [him] that the company could continue to operate in that mode indefinitely."[202]

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[195] Notice of Arbitration ¶¶ 71-78; *see also* Tr. (21 Jan. 2013) 337:19-338:19 (Claimant's Opening).

[196] *Iberdrola v. Guatemala* ¶¶ 320, 324, 347-348 **(RL-32)**.

[197] Notice of Intent ¶ 30.

[198] Tr. (22 Jan. 2013) 534:11-536:14 (Gillette Cross); Callahan I ¶ 6 **(CWS-2)**.

[199] Tr. (22 Jan. 2013) 534:11-16 (Gillette Cross).

[200] *Id*. at 534:17-21.

[201] *Id*. at 534:22-535:9.

[202] *Id*. at 536:11-14.

57. As Ms. Callahan similarly has explained, while "EEGSA was able to maintain a slightly positive net income due to these cost-cutting measures," she also questioned "whether these cost-cutting measures were sustainable over the long term, as it is impossible for any company, especially one in the electricity distribution service, to postpone indefinitely capital expenditures."[203] And as Ms. Callahan further noted, "although projections from EEGSA had shown that the company should be able to meet its debt service obligations (specifically EEGSA's Citibank loan that had a balloon payment due in 2014), [she] was concerned that there may not be sufficient cushion to absorb operating outcomes less favorable than those forecast."[204]

58. In view of this uncertainty, Claimant thus reserved the right in its Notice of Intent to assert a claim for unlawful expropriation under Article 10.7 of the DR-CAFTA.[205] Contrary to the repeated insinuations made by Respondent throughout the Hearing in both its Opening Statement and during its questioning of Claimant's witnesses, however, Claimant never asserted in its Notice of Intent that its investment in EEGSA had been rendered "worthless" by the CNEE's actions.[206] Rather, as Claimant's Notice of Intent reflects, Claimant stated that TECO "has suffered severe financial losses," and that EEGSA's "financial performance has deteriorated . . . with negative net income occurring in two consecutive months in 2008."[207] Claimant further stated that, "[i]n the face of these losses, EEGSA has been forced to implement extreme measures to reduce its costs, including foregoing planned capital expenditures, and reducing operational costs (including elimination of personnel) to a degree not sustainable long term," and that "[t]his situation severely jeopardizes TGH's investment in Guatemala."[208] In view of the actual language of Claimant's Notice of Intent, it thus was misleading and disingenuous for Guatemala to have repeatedly asserted at the Hearing, over Claimant's objections, that TECO had claimed in its "trigger letter" that its investment in EEGSA had been rendered "worthless"

[203] Callahan I ¶ 6 **(CWS-2)**.

[204] *Id*.

[205] Notice of Intent ¶ 30.

[206] *See* Tr. (21 Jan. 2013) 372:10-373:4 (Respondent's Opening); Tr. (22 Jan. 2013) 535:22-536:4 (Gillette Cross); Tr. (22 Jan. 2013) 592:13-15 (Callahan Cross).

[207] Notice of Intent ¶¶ 27-28.

[208] *Id*.

by the CNEE's actions.[209]

59. Furthermore, it is readily apparent from Claimant's Notice of Intent that Claimant was not claiming that its investment in EEGSA was "worthless," as Respondent repeatedly and erroneously asserted. As Claimant's Notice of Intent reflects, Claimant claimed estimated damages of US$ 285.6 million,[210] which is the very same amount claimed in Claimant's Notice of Arbitration.[211] Claimant's damages analysis thus did not change in any way between the filing of its Notice of Intent and its Notice of Arbitration. Instead, while Claimant initially had feared that EEGSA might go cash negative as a result of the CNEE's actions, in the twenty-one months between the filing of its Notice of Intent and Notice of Arbitration, EEGSA had not done so, and Claimant thus did not assert an expropriation claim in its Notice of Arbitration.[212] As the record reflects, Claimant now is claiming US$ 243.6 million plus interest in damages, which is consistent with Claimant's longstanding legal theory in this arbitration.[213] The fact that the actual amount of damages changes over time, as experts refine their analyses and respond to each other's reports, is typical and should be encouraged.[214] Moreover, this difference in the amount of damages does not reflect any difference in legal theory. As Claimant has shown, TECO's share of EEGSA's but-for value and lost cash flow is approximately US$ 379 million.[215] If Claimant had claimed that the actions taken by the CNEE had rendered EEGSA valueless, it would have estimated damages in its Notice of Intent consistent with this amount, but it did not do so. Rather, Claimant's estimated damages in its Notice of Intent were consistent with the legal theory it maintained throughout this arbitration.

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[209] *See* Tr. (21 Jan. 2013) 372:10-373:4 (Respondent's Opening); Tr. (22 Jan. 2013) 535:11-536:4 (Gillette Cross); Tr. (22 Jan. 2013) 592:13-593:11 (Callahan Cross).

[210] Notice of Intent ¶ 31.

[211] Notice of Arbitration ¶ 79.

[212] *Id*. ¶¶ 71-78; *see also* Tr. (21 Jan. 2013) 337:19-338:19 (Claimant's Opening).

[213] *See infra* Section IV.

[214] Tr. (21 Jan. 2013) 339:11-14 (Claimant's Opening); *see also Rompetrol v. Romania* ¶ 151 **(CL-109)**. ("[T]he Tribunal finds nothing surprising or out of the ordinary in these successive adjustments of the Claimant's case; it would be a sad day for investment arbitration if parties did not set out to confront in this way the counter-arguments of their opponents and the emerging facts, so that at the end of the day the tribunal is faced in a concrete form with the Claimant's final case and the Respondent's final answer to it.").

[215] Kaczmarek II Table 14 **(CER-5)**.

III. GUATEMALA BREACHED ARTICLE 10.5.1 OF THE DR-CAFTA

A. Guatemala Breached The Specific Representations That It Made To Induce Foreign Investment In EEGSA, Thereby Frustrating Claimant's Legitimate Expectations

60. As the record reflects and as the testimony at the Hearing confirmed, Guatemala sought to induce much needed foreign investment in EEGSA and to maximize its privatization proceeds by adopting a new legal and regulatory framework for its electricity sector based upon recommendations from World Bank and USAID consultants,[216] and by promoting that new legal and regulatory framework to the TECO group of companies and to other foreign electricity companies, which Guatemala had directly targeted for EEGSA's privatization.[217] EEGSA's privatization took place against the backdrop of Price Waterhouse's 1991 study, which had advised Guatemala that, "[u]ntil a regulatory scheme was established for EEGSA . . . investors would be hesitant to invest in EEGSA."[218] Price Waterhouse further noted that the "regulatory scheme" adopted by Guatemala "will directly [affect] the way [investors] will value EEGSA's shares, because it will determine EEGSA's potential profitability," and that "[v]aluations will vary depending on the regulatory scheme that is assumed."[219] Chilean consultants Juan Sebastián Bernstein and Jean Jacques Descazeaux, to whom Respondent repeatedly referred during the Hearing, reiterated in their 1993 USAID Report that, in order to encourage "the participation of private external investors in competitive generation and distribution," Guatemala must have "objective rules which define the parties' obligations and rights, thus preventing the arbitrary intervention of regulatory entities."[220] Based upon these and other recommendations,

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[216] *See, e.g.*, Tr. (4 Mar. 2013) 973:22-974:7 (Moller Cross); Tr. (4 Mar. 2013) 1156:3-9 (Alegría Direct); Tr. (4 Mar. 2013) 1222:19-22 (Aguilar Cross); Juan Sebastián Bernstein & Jean Jacques Descazeaux, *Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report* dated June 1993 **(C-9)**; Reply ¶ 10; Memorial ¶¶ 14-20; *see also* Counter-Memorial ¶ 139.

[217] *See* Empresa Eléctrica de Guatemala, S.A., Investors' Profiles dated 17 Feb. 1998 ("Investors' Profiles"), at 7, 9 **(C-26)**; *see also* Empresa Eléctrica de Guatemala, S.A., Preliminary Information Memorandum dated Apr. 1998 ("Preliminary Information Memorandum") **(C-27)**; Empresa Eléctrica de Guatemala S.A., Memorandum of Sale dated May 1998 ("Sales Memorandum") **(C-29)**; Empresa Eléctrica de Guatemala, S.A., Roadshow Presentation dated May 1998 ("Roadshow Presentation") **(C-28)**.

[218] Price Waterhouse, *Estudio de la Empresa Eléctrica de Guatemala* dated 11 Jan. 1991, at 22 **(C-7)**.

[219] *Id*.

[220] Juan Sebastián Bernstein and Jean Jacques Descazeaux, Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report dated June 1993, at 38 **(C-9)**.

Guatemala undertook to restructure and to reform its electricity sector before privatizing EEGSA.[221]

61. After enacting a new legal and regulatory regime in 1996 and 1997, which unbundled and depoliticized the electricity sector in Guatemala,[222] Respondent sought to attract and to induce foreign investment in EEGSA by making a series of specific representations regarding EEGSA and the operation of its new legal and regulatory framework to the foreign electricity companies that it had targeted for EEGSA's privatization, including the TECO group of companies.[223] As Mr. Gillette confirmed at the Hearing, these specific representations were contained in the Memorandum of Sale circulated by Guatemala to potential investors in EEGSA,[224] as well as in the newly-enacted LGE and RLGE, which were included as attachments to the Memorandum of Sale,[225] and were reiterated at Road Show presentations given by the then Minister of Energy and Mines and other members of the High-Level Committee, which Guatemala had established to oversee EEGSA's privatization.[226]

62. The Hearing testimony affirmed that Guatemala's specific representations regarding EEGSA's new depoliticized legal and regulatory framework, as well as its conduct up until EEGSA's 2008-2013 tariff review, created objective expectations as to how and on what

[221] *See* Tr. (4 Mar. 2013) 1155:15-1158:1 (Alegría Direct); Alegría II ¶¶ 2-16 **(CER-3)**; Alegría I ¶¶ 13-19 **(CER-1)**.

[222] Decree No. 93-96, General Electricity Law dated 16 Oct. 1996, entered into force on 15 Nov. 1996 ("LGE") **(C-17)**; Government Accord No. 256-97, Regulations of the General Electricity Law dated 21 Mar. 1997 ("RLGE") **(C-21)**.

[223] *See* Investors' Profiles, at 7, 9 **(C-26)**; Preliminary Information Memorandum **(C-27)**; Sales Memorandum **(C-29)**; Roadshow Presentation **(C-28)**.

[224] Tr. (22 Jan. 2013) 447:5-15, 469:11-19, 470:3-10 (Gillette Cross); Sales Memorandum, at 46-53 **(C-29)**. As discussed below, at the Hearing, Respondent tried to distance itself from the Memorandum of Sale, arguing that it was "a document that was not drafted by the government of Guatemala." Tr. (21 Jan. 2013) 274:20-21 (Respondent's Opening). The Memorandum of Sale, however, was prepared by EEGSA (which then was a State-owned company) and its advisor Salomon Smith Barney, and was approved by the Government through the High-Level Committee that it had established to oversee EEGSA's privatization. *See infra* ¶ 89; Tr. (4 Mar. 2013) 1163:17-1164:3 (Alegría Direct); Minutes of the High Level Committee, Empresa Eléctrica de Guatemala, S.A. dated 27 Apr. 1998, at 5 **(C-548)**.

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

[226] Roadshow Presentation, at 44-45 (noting the participation of the then Minister of Energy and Mines, Leonel López Rodas, and other members of the High-Level Committee) **(C-28)**.

basis EEGSA's VAD would be recalculated every five years, and as to how disputes between the CNEE and EEGSA that arose during that process would be resolved, upon which Claimant legitimately relied in deciding to invest in EEGSA. Guatemala's conduct during EEGSA's 2008-2013 tariff review, namely, its decisions to set EEGSA's tariffs on the basis of its own VAD study, to disregard the Expert Commission's rulings on the discrepancies, and to calculate EEGSA's VAD on a VNR that was depreciated by 50 percent, thus allowing EEGSA to recover only half of its cost of capital, violated Claimant's objective expectations that Guatemala created in order to induce foreign investment in EEGSA.

1. Guatemala Specifically Represented That EEGSA's VAD Would Be Calculated On The New Replacement Value Of A Model Efficient Company's Regulatory Asset Base

63. As the documentary evidence reflects and as the testimony at the Hearing confirmed, Guatemala specifically represented to potential investors that EEGSA's VAD would be recalculated every five years based upon the model efficient company approach using the new replacement value ("VNR") method.[227] As LGE Article 71 states, "[t]he VAD is the average cost of capital and operation of a distribution network of a benchmark efficient company operating in a given density area,"[228] while LGE Article 73 provides that the average cost of capital "shall be calculated as the constant annuity of cost of capital corresponding to the *New Replacement Value* of an economically sized distribution network."[229] As Guatemala thus explained in the Memorandum of Sale, under its newly-adopted legal and regulatory framework, "the tariff for a given distribution company is not equal to the costs it incurs, but to the 'market' costs inherent in distribution, which result from the theoretical costs of a highly-efficient 'model

[227] Sales Memorandum, at 14 **(C-29)**; Roadshow Presentation, at 19 **(C-28)**; *see also* Preliminary Information Memorandum, at 9 **(C-27)**.

[228] LGE, Art. 71 **(C-17)**.

[229] *Id.*, Art. 73 (emphasis added); *see also id.*, Art. 67 ("The investment annuity shall be calculated based on the New Replacement Value of the optimally designed facilities, using the discount rate that is used in the calculation of the rates and a useful life of thirty (30) years. The New Replacement Value is the cost involved in building the works and physical assets of the authorization with the technology available on the market to provide the same service. The concept of economically adapted installation involves recognizing in the New Replacement Value only those facilities or parts of facilities that are economically justified to provide the required service.").

company.'"[230] Guatemala also specifically represented that, while electricity tariffs historically "have been low, which has severely stunted the distributor's potential for gains . . . [t]he Law addresses this particular issue, empowering the companies (INDE and EEGSA) to fix tariffs by reference to market prices."[231]

64. As Dr. Barrera has confirmed, under Guatemala's model efficient company approach, the costs used for calculating the distributor's VAD are the costs that an efficient model company would incur during the regulatory period in servicing the distributor's area, rather than the distributor's actual, historical costs, which creates an incentive for the distributor to perform efficiently.[232] Under the VNR method adopted by Guatemala, the distributor's VAD is calculated off of a regulatory asset base of a model efficient company that is valued as if all of its assets were new, *i.e.*, the VNR corresponds to the total cost that a model efficient company would incur if it were to enter the market and build an efficient company with new assets to provide service to the area in question.[233]

65. This understanding is reflected in the internal management presentations made to TECO Energy's Board of Directors to obtain its approval for the TECO group of companies to

[230] Sales Memorandum, at 53 **(C-29)**; *see also id*. at 52-53 ("The VAD accounts for: 1. The constant monthly costs of capital, operating and maintenance costs, expressed in USD/KW/month, of an efficient standard distribution company (the 'model company') with a certain distribution density. 2. The administrative and customer service costs per user of the properly-managed 'model company,' expressed in USD/client/month. 3. Energy and power losses of the 'model company.'") **(C-29)**.

[231] Sales Memorandum, at 53 **(C-29)**; *see also* Roadshow Presentation, at 39 (stating that EEGSA represented a "landmark opportunity for investors," providing access to "a growing economy within a stable political framework" and to "the leading company of an attractive electric market with high growth potential") **(C-28)**.

[232] Barrera ¶ 21 **(CER-4)**; *see also* Tr. (5 Mar. 2013) 1292:17-1293:8 (Barrera Direct). In response to the Tribunal's question regarding where in the LGE or RLGE operating costs, depreciation, and capital return are defined, (i) LGE Articles 67, 71, and 72 and RLGE Article 91 provide that recoverable operating costs are those of a model efficient company operating in a given density area, while RLGE Article 82(e) provides that operating costs include "supervision, operation engineering, labor, materials, load dispatch, installation operation, leasing of installations and others related to the operation of the assets used in the activity of Distribution"; (ii) RLGE Article 83 is the only article that mentions depreciation, providing that depreciation is not recoverable as a cost in the base tariffs; and (iii) LGE Article 79 provides that the discount rate shall be equal to the cost of capital and within the range between 7 to 13 percent in real terms. *See* Tr. (21 Jan. 2013) 290:18-291:4 (Tribunal Question); LGE, Arts. 67, 71, 72, 79 **(C-17)**; RLGE, Arts. 82(e), 83, 91 **(C-21)**.

[233] Barrera ¶ 28 **(CER-4)**; *see also* Tr. (5 Mar. 2013) 1293:17-20 (Barrera Direct) ("The regulatory asset base is always new, always new, because this is what it would cost an entrant to enter this industry, build a network from scratch.").

bid for EEGSA as part of a consortium.[234] As Mr. Gillette testified, the management presentation prepared for TECO's Board referred directly to Guatemala's model efficient company approach using the VNR method, providing that "the VAD is recalculated every five years based on [their] allowable return on the new replacement cost of an efficient network plus O and M costs."[235] As Mr. Gillette further testified, the TECO group of companies "had the general expectation from the offering memorandum that the real rate of return on the value of a new replacement system would be 7 to 13 percent," and, on that basis, they "made some of [their] various assumptions for the scenarios that [they] ran on what the revenue stream would be over time."[236]

66. Unlike in cost-of-service regulation, where the regulatory asset base is based upon the distributor's actual asset base and therefore reflects the depreciated state of the actual assets, under the VNR method, the regulatory asset base of the model efficient company off of which the VAD is calculated is not reduced by accumulated depreciation.[237] This is made clear in the LGE, which, as Dr. Barrera testified, "does not say [that] the VNR should be reduced by

[234] EEGSA Privatization Management Presentation dated 9 July 1998, at 30 (noting that the "economic parameters" of EEGSA's privatization are: "Rate recalculated every 5 years based on allowable return on *new replacement cost* of efficient network plus O&M costs" and "Rate is adjusted annually to correct for foreign exchange exposure and inflation") (emphasis added) **(C-33)**; *see also* TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 6 (noting that "[t]he Law and its Regulations represent a new approach for Guatemala and its power sector investors") **(C-32)**.

[235] Tr. (22 Jan. 2013) 493:11-18 (Gillette Cross) (referencing the "second bullet point under the VAD components" on page 5 of Exhibit C-33, and further testifying that the "words 'efficient network' is kind of the shorthand for the model efficient company"); Empresa Eléctrica de Guatemala S.A., Privatization Management Presentation dated 9 July 1998, at 5 **(C-33)**.

[236] Tr. (22 Jan. 2013) 502:17-503:1 (Gillette Cross); *see also* Gillette I ¶ 13 (explaining that making the investment in EEGSA only made sense if it could "attain return levels that exceed those of a US utility," and that the TECO group of companies determined this was attainable "in large part because the law guaranteed a real rate of return of between 7% and 13% on the new replacement value of the assets") **(CWS-5)**; LGE, Art. 79 (providing that "[t]he discount rate to be used in this Law to determine the rates shall be equal to the rate of cost of capital determined by the [CNEE] through studies commissioned with private entities that specialize in the matter," and that, "if the discount rate should be less than an annual real rate of seven percent or greater than an annual real rate of thirteen percent, the latter values, respectively, will be used") **(C-17)**.

[237] Barrera ¶¶ 25-29 **(CER-4)**; *see also* Tr. (5 Mar. 2013) 1294:10-16 (Barrera Direct) ("Mr. Damonte claims the VNR must be reduced by accumulated depreciation. So, Mr. Damonte is looking at this from the perspective of the company and not from the perspective of the entrant. That basically means that his asset base is not new in contradiction with what the Guatemalan law is saying.").

accumulated depreciation."[238] As Mr. Kaczmarek confirmed, "the law says New Replacement Value. There is no doubt it must be new. It cannot be adjusted for age and wear and tear."[239] Indeed, there is no mention of depreciation in the LGE at all, and the only mention of depreciation in the RLGE is in Article 83, which expressly provides that depreciation is not recoverable by the distributor as a cost in the base tariffs.[240] As Mr. Bastos similarly confirmed:

> 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 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.[241]

67. Mr. Kaczmarek further explained that RLGE Article 83 precludes the distributor from recovering the cost of depreciation, because under the VNR method the assets comprising the regulatory asset base are new, and thus there is no need to incur maintenance capital expenditures.[242] As Mr. Kaczmarek observed, "if the network was old, if it was depreciated, [the CNEE] would have to recognize [that] a Model Company would incur maintenance CAPEX, and they should be putting that into the VNR . . . ."[243] This was confirmed by Dr. Barrera, who testified that, "in Guatemala, . . . maintenance capital expenditures of depreciation [are] not paid. It's not recovered as a cost. . . . Article 83 of the [RLGE] . . . make[s] sure that you don't get paid for the depreciation,"[244] and by Mr. Giacchino, who also explained that, "if you include

[238] Tr. (5 Mar. 2013) 1302:2-3 (Barrera Direct); RLGE, Art. 83 **(C-21)**.

[239] Tr. (5 Mar. 2013) 1493:22-1494:2 (Kaczmarek Tribunal Question); *see also* Tr. (5 Mar. 2013) 1490:13-16 (Kaczmarek Tribunal Question) ("The fact that it's already modified here in the law to me is a clear indication that they meant New Replacement Value, no adjustment for wear and tear and age . . . .").

[240] Tr. (5 Mar. 2013) 1302:5-8 (Barrera Direct); RLGE, Art. 83 **(C-21)**; *see also* Tr. (22 Jan. 2013) 399:20-21 (Tribunal Question) ("Where in the law and the regulation is the question of depreciation dealt with?").

[241] Tr. (1 Mar. 2013) 791:5-20 (Bastos Tribunal Question).

[242] Tr. (5 Mar. 2013) 1506:10-1508:20 (Kaczmarek Direct).

[243] *Id*. at 1510:16-19.

[244] Tr. (5 Mar. 2013) 1295:7-14 (Barrera Direct).

depreciation as an expense, then you have to subtract [it] from the asset base" and in the "Model Company, you don't do that. Depreciation is not an expense, and you don't subtract that accumulated depreciation from the VNR," but rather "use a new value."[245]

68. As Dr. Barrera and Mr. Kaczmarek reiterated at the Hearing, the VNR method, which is widely used in Latin America, including in Guatemala, Chile, and Peru, increases the value of State-owned distribution companies, as well as the proceeds that governments can obtain when privatizing such companies, because the asset base of the company is valued at its replacement cost value, rather than at its book value.[246] This was precisely the case for EEGSA. As the Tribunal observed at the Hearing, there was a great discrepancy between the privatization price paid and Price Waterhouse's valuation of EEGSA a few years earlier, before Guatemala had adopted its new regulatory framework.[247] Price Waterhouse estimated that, in 1991, the net asset value of Guatemala's 91.7 percent shareholding in EEGSA was worth approximately Q297.8 million (US$ 59.6 million), while a valuation based upon EEGSA's earnings indicated a much lower value of approximately Q69.6 million (US$ 13.9 million).[248] After Guatemala adopted the model efficient company approach using the VNR method for calculating the VAD, however, Guatemala obtained US$ 520 million for the sale of 80.1 percent of EEGSA in 1998,[249] which Guatemala subsequently used to fund rural electrification expansion.[250]

69. As Mr. Kaczmarek explained at the Hearing, the very high proceeds that Guatemala obtained from EEGSA's privatization can only be explained by the fact that

[245] Tr. (4 Mar. 2013) 961:11-19 (Giacchino Cross); *see also* Tr. (4 Mar. 2013) 831:11-833:10 (Giacchino Direct) (explaining that in "Cost of Service Regulation you use original cost, the Book Value of those assets" and that "when you use the Book Value of those assets, you do subtract accumulated depreciation," but that you do not do so in the "Model Company" approach adopted by Guatemala).

[246] *See, e.g.*, Tr. (5 Mar. 2013) 1490:4-1492:15 (Kaczmarek Direct); Tr. (5 Mar. 2013) 1303:4-15 (Barrera Direct); Barrera ¶¶ 31-32 **(CER-4)**.

[247] Tr. (21 Jan. 2013) 297:1-7 (Tribunal Question).

[248] Price Waterhouse, *Estudio de la Empresa Eléctrica de Guatemala* dated 11 Jan. 1991, at 35 **(C-7)**; *see also* Price WaterhouseCoppers, "Limited Scope Analysis to Estimate the Fair Market Value of Certain Intangible Assets, as of Sept. 10, 1998" dated 13 Apr. 1999, Exh. 1 (calculating the book value of EEGSA's assets in 1998 at US$ 78.3 million) **(C-43)**.

[249] Notarized Minutes of the Award dated 30 July 1998 **(C-36)**.

[250] Jacqueline Koch, NBR, *Expanding Access to Electricity: What Asia Can Learn from a Success Story in Latin America*, at 2 ("[T]he monetary resources obtained from the privatization were funneled exclusively to a trust fund that was established to fund rural electrification expansion.") **(C-615)**.

Guatemala adopted the VNR approach.[251] As Mr. Kaczmarek testified, EEGSA's purchase price reflected "valuation multiples of 17 times EEGSA's Book Value, 40 times cash flow EBITDA as a proxy for cash flow,"[252] and the Consortium's bid of US$ 520 million was within 9 percent of the second highest bid.[253] As he noted, "clearly . . . it was all understood by the Parties that that was a fair price given the regulatory scheme being introduced"[254] and with those "first and second place bids, there is no way . . . that [the bidders] could have viewed it as not being a New Replacement Value measurement,"[255] because "[t]he only way to achieve those kind of metrics is because the buyers, the bidders had to have understood [that] the value of the regulatory asset base was new and not a depreciated one."[256] Further, as Mr. Moller confirmed, the Government was well aware that the manner in which EEGSA's VAD was to be calculated and set would have a direct impact upon EEGSA's sales price,[257] because, as Mr. Moller acknowledged, investors do not purchase "the wires," but rather purchase the tariffs, and "the VAD that is what the Distributor receives from the tariff."[258] In other words, as Mr. Gillette confirmed, the

[251] Tr. (5 Mar. 2013) 1490:4-1494:10 (Kaczmarek Direct).

[252] *Id*. at 1492:8-10.

[253] Notarized Minutes of the Award dated 30 July 1998 **(C-36)**; *see also* Tr. (5 Mar. 2013) 1577:14-17 (Abdala Cross) (testifying that "normally" one would "look at either the winning bid or the second bid as a reference for what a Fair Market Value of that asset was as it relates to the outcome of an auction").

[254] Tr. (5 Mar. 2013) 1519:5-8 (Kaczmarek Cross).

[255] Tr. (5 Mar. 2013) 1493:2-6 (Kaczmarek Direct).

[256] *Id*. at 1492:8-15.

[257] Tr. (4 Mar. 2013) 1004:5-16 (Moller Cross); Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. the Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 27 Jul. 2011 at 702:15-20 (Moller Cross) ("*P ¿Y usted coincidirá conmigo que la fijación de las tarifas era un elemento que incidiría directamente en el precio de la compraventa de las acciones de EEGSA por parte de quien fuese? R Eso era lo que los expertos nos indicaban.*") ("Q. And you agree with me that the setting of the tariffs was an element with direct impact on the purchase price of EEGSA's shares by whomever? A. That is what the experts told us.") **(C-539)**.

[258] Tr. (4 Mar. 2013) 1002:21-1003:10 (Moller Cross) ("As part of this privatization process, as the sale of these shares of EEGSA was called, and there were several international advisors, and I do remember listening or hearing one of them saying that the interested parties, the potential interested parties in buying the Shares of EEGSA were more interested in the consumers and in their consumption profile than in the wires. That's what I heard. And the consumption related to the sale price or rate, and especially the VAD that is what the Distributor receives from the tariff."); Transcript of the Final Hearing in *Iberdrola Energía, S.A. v. the Republic of Guatemala*, ICSID Case No. ARB/09/05 dated 27 Jul. 2011 at 702:12-14 (Moller Cross) ("*Efectivamente, eso nos decían los expertos, que los compradores no compran los alambres, nos decían, sino compran la tarifa*.") ("Indeed, that is what the experts told us, that the purchasers do not purchase the wires, they would tell us, but rather purchase the rate.") **(C-539)**.

Consortium was buying "a cash flow, essentially."[259]

2. Guatemala Specifically Represented That EEGSA's Consultant Would Calculate The VAD, And That Disputes Concerning The Same Would Be Resolved By An Expert Commission

70. Guatemala also specifically represented to potential investors that EEGSA's VAD would be recalculated every five years by EEGSA through a VAD study prepared by an engineering firm prequalified by the CNEE; that the CNEE's authority during the VAD-calculation process would be limited to reviewing and making observations on EEGSA's VAD study; and that any differences between the CNEE and EEGSA regarding that study would be resolved by a three-person Expert Commission appointed by the parties.[260] As Guatemala expressly stated in the Memorandum of Sale, "VADs *must be calculated by distributors* by means of a study commissioned [by] an engineering firm," and the CNEE "will review those studies and *can make observations*, but in the event of discrepancy, a Commission of three experts will be convened *to resolve the differences*."[261] LGE Articles 74 and 75 thus provide that "[e]ach distributor shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE]," and that the CNEE "shall review the studies performed and may make comments on the same," but, "[i]n case of differences made in writing," the CNEE and the distributor shall agree on the appointment of a three-person Expert Commission, which "shall rule on the differences in a period of 60 days counted from its appointment."[262] LGE Article 76 further provides that the CNEE "shall use the VAD . . . to

[259] Tr. (22 Jan. 2013) 551:12-14 (Gillette Tribunal Question); *see also* Tr. (22 Jan. 2013) 614:11-13 (Calleja Direct) ("[T]he legal framework for establishment of tariffs was the value of the company . . . ."); *see also* DresdnerKleinwort EEGSA Base Case Scenario dated June 1998 (showing that DresdnerKleinwort ran various models using a DCF analysis to inform the TECO group of companies' bid for EEGSA) **(C-418)**.

[260] *See* Sales Memorandum, at 53 **(C-29)**; Roadshow Presentation, at 19 **(C-28)**; Preliminary Information Memorandum, at 9 **(C-27)**; *see also* LGE, Arts. 74-76 **(C-17)**. As Professor Alegría has explained, Guatemala's specific representations regarding the depoliticization of the VAD-setting process were particularly important for potential investors in EEGSA, in view of the long history of political intervention in Guatemala's electricity sector. *See* Alegría II ¶¶ 5-6 **(CER-3)**; Alegría I ¶¶ 20-33 **(CER-1)**; *see also* Gillette I ¶¶ 9-14 **(CWS-5)**.

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

[262] LGE, Arts. 74, 75 **(C-17)**; *see also* RLGE, Art. 98 ("If discrepancies between the Commission and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed. The cost of this contracting shall be covered by the Commission and the Distributor in equal parts.") **(C-21)**.

structure a set of rates for each awardee."[263]

71. As Professor Alegría has explained, in accordance with Article 154 of the Guatemalan Constitution, LGE Article 75 thus expressly delegates to the Expert Commission the authority to rule on the differences or discrepancies between the CNEE and the distributor relating to the distributor's VAD study.[264] The results of the VAD study incorporating the rulings of the Expert Commission then must be used by the CNEE to establish the distributor's new tariffs under LGE Article 76.[265] Nowhere in the LGE, the RLGE, the Memorandum of Sale, or the Road Show presentation does it provide that, although LGE Article 74 limits the CNEE's authority to making observations on the distributor's VAD study, the CNEE nonetheless retains ultimate authority to disregard that study and the Expert Commission's decisions, if it disagrees with their results, and to set the distributor's VAD at whatever level it deems appropriate in the circumstances, as Guatemala now contends.[266]

72. As Mr. Gillette testified, the TECO group of companies thus legitimately expected, based upon the legal and regulatory framework adopted by Guatemala, and Guatemala's specific representations regarding that framework, that "[t]he distributor would hire

[263] LGE, Art. 76 **(C-17)**; *see also* Sales Memorandum, at 53 (representing that the CNEE "will have to add the average purchase price of power and energy to the standard VAD, and devise several different tariff options which will only differ as to the measurement system to be chosen by users: hour tariff, contracted capacity tariff, or simple energy measurement, among others") **(C-29)**.

[264] Tr. (4 Mar. 2013) 1159:1-1161-3 (Alegría Direct); *see also* Tr. (4 Mar. 2013) 1214:2-1216:16 (Alegría Redirect); Alegría II ¶¶ 6-10 **(CER-3)**; Alegría I ¶¶ 31-32 **(CER-1)**; Tr. (1 Mar. 2013) 760:10-14 (Bastos Cross) ("I understand that the decision is final. Once the Expert Commission reaches a decision, the consultant needs to make changes based on the decision. So, the spirit of the law and the spirit of the Regulations, in my opinion, is that one."); Political Constitution of Guatemala dated 17 Nov. 1993, Art. 154 **(C-11)**. While neither the LGE nor the RLGE expressly indicates whether it is the CNEE or the distributor's consultant which revises the distributor's VAD study after the Expert Commission has rendered its decisions, it is axiomatic that the Expert Commission's decisions must be incorporated either by the CNEE or the distributor's consultant, and that the CNEE simply cannot ignore the Expert Commission's decisions, if it disagrees with them, as the CNEE did in the present case. *See, e.g.*, Tr. (4 Mar. 2013) 1262:21-1264:3 (Alegría Tribunal Question).

[265] Alegría II ¶ 23 **(CER-3)**; LGE, Art. 76 **(C-17)**.

[266] Tr. (4 Mar. 2013) 1247:15-1248:5 (Aguilar Cross) (testifying that "the regulating body with [] authority to calculate and define the tariffs is the CNEE," and that "[t]his is a power granted to it by the law, it cannot be delegated"); *id*. at 1252:20-1253:6 (testifying that the distributor can never object to the CNEE's observations, because "that would be to diminish the authority of the [CNEE]"); *see also* Tr. (21 Jan. 2013) 234:4-8 (Respondent's Opening) ("The Expert Commission issued its ruling, its opinion, and after that, what was supposed to happen? What was the issue? The issue was who at that time was to decide on the applicable VAD. And the law does not indicate that it should be any other but the CNEE.").

a consultant to do a model efficient company study," and that "the CNEE, or the regulator, would be in a position to comment on that study and there would be a period of discussion and attempts to incorporate the CNEE's comments, to the extent the distributor agreed;" however, "[i]f there were differences that could not be resolved, it was [their] understanding at the time that [they] made the investment that the remedy would be an Expert Commission [that] would be formed to independently review and decide on how to go forward with the tariff."[267] As Mr. Gillette explained, the TECO group of companies "viewed the formation of the Expert Commission to, in effect, be a form of an arbitration clause in a contract," and "believed in the case of EEGSA, when [they] were making the investment, that . . . [they] wouldn't want to have to be in a position where [they] used that Expert Commission clause," but "felt like it was a good backstop" and provided "a fair and independent way to reach resolution at the time . . . of a dispute."[268] As Mr. Gillette confirmed, "if at the time of EEGSA's privatization Guatemala had represented that the regulator, the CNEE, would have full discretion in setting EEGSA's VAD at whatever level it deemed appropriate," the TECO group of companies would not have invested in EEGSA.[269]

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

73. In view of Guatemala's specific representations during EEGSA's privatization, as well as Guatemala's statements and conduct following EEGSA's privatization, Claimant legitimately expected that EEGSA's 2008-2013 VAD would be based upon the VAD study prepared by its consultant; that its VNR would be calculated in accordance with technical criteria to reflect that of a model efficient company distributing electricity in EEGSA's area of distribution; that its VAD would be calculated off of that VNR so that it could obtain a real rate of return between 7 to 13 percent; and that any disputes regarding its consultant's VAD study

[267] Tr. (22 Jan. 2013) 425:11-426:2 (Gillette Direct).

[268] *Id*. at 426:6-17.

[269] *Id*. at 425:6-11.

would be resolved by an Expert Commission.[270] In order to decrease EEGSA's VAD,[271] however, the CNEE devised an improper capital recovery factor ("FRC") formula that calculated EEGSA's annuity off of a VNR that was depreciated by 50 percent; directed that EEGSA's demand be calculated in a manner that grossly undervalued the VNR by understating the assets that a model efficient company would need to service the area; and instructed that old prices be used to calculate the regulatory asset base of the model efficient company. When the Expert Commission ruled against the CNEE on these key discrepancies, the CNEE proceeded to ignore both the Expert Commission's decisions and EEGSA's revised VAD study that incorporated the Expert Commission's rulings, and to approve its own VAD study, which Mr. Moller admitted did not comply with the Expert Commission's decisions,[272] in blatant violation of Guatemala's prior representations and Claimant's legitimate expectations.

74. As the *El Periódico* correctly reported in its 1 July 2008 article, from the very beginning of EEGSA's 2008-2013 tariff review, the CNEE was intent on "prevent[ing] EEGSA from continuing pricing a network that [had] depreciated over the years at its replacement value,"[273] and thus worked with Mr. Riubrugent of Mercados Energéticos to devise an FRC formula that would result in the depreciation of EEGSA's regulatory asset base.[274] As the CNEE's own internal communications reflect, Mr. Riubrugent recommended, "first and foremost," the "steady-state" model for the FRC formula that is used in Brazil "due to its simplicity (*it yields the lowest tariff*)."[275] As Mr. Moller confirmed on cross-examination, based

[270] Gillette I ¶ 20 (noting that he believed that "the CNEE would follow the process set out in the law [for EEGSA's 2008 VAD review process], as it had done during the 2003 VAD review process") **(CWS-5)**.

[271] *See, e.g.*, Colom Bickford, Carlos E., Presidente CNEE, *Evolucion de la Methodología del Calculo Tarifario en Guatemala* dated Apr. 2010, at 5 (noting that "[t]he tariff schedule is valid for 5 years . . . and *contrary to what should happen (that the VAD decreases over time) EEGSA was always willing to increase it*") (emphasis added) **(C-348)**.

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

[273] El Periódico, *Distribution tariff assessment pits EEGSA against the CNEE* dated 1 July 2008 **(C-492)**.

[274] *See, e.g.*, Email chain from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez Yat, and A. Garcia dated 13 Dec. 2007 **(C-490)**; Email from J. Riubrugent to M. Peláez dated 19 Dec. 2007 **(C-491)**; Email exchange between M. Peláez and J. Riubrugent dated 9 Jan. 2008 **(C-567)**.

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

upon Mr. Riubrugent's recommendations, the CNEE designed the FRC formula for EEGSA's 2008-2013 tariff review using the steady-state model applied in Brazil, rather than the VNR method applied in Guatemala, and included a "2" in the denominator of the FRC formula, which resulted in the depreciation of EEGSA's regulatory asset base by 50 percent.[276] Mr. Moller further testified that, contrary to the model efficient company approach, the "2" in the denominator could be adjusted to reflect the *actual* depreciation of the distributor's network, as the CNEE had agreed to do for DEORSA and DEOCSA in their tariff reviews.[277]

75. As Dr. Barrera has explained, the steady-state model applied in Brazil, also known as the Depreciated Optimized Replacement Cost ("DORC") model, uses an accounting method in which assets are valued at their replacement cost taking depreciation into account, which is inconsistent with the VNR method or Optimized Replacement Cost ("ORC") model adopted by Guatemala, in which, as explained above, depreciation is not taken into account.[278] This is further confirmed by a December 2011 report prepared by Respondent's own consultant, Mercados Energéticos, which contrasts the two methods, noting that, in the VNR method, unlike in the DORC method, depreciation is not taken into account.[279] In EEGSA's VAD study, Bates

[276] Tr. (4 Mar. 2013) 1013:21-1017:14 (Moller Cross); *see also id*. at 1015:14-20 ("As I understood, what Consultant Riubrugent explained to us, the concepts of the '2', the '2' denominator were based on his study, and there was an exchange of documents where he actually explained to us how he got to '2' and its meaning, and I understand there was a study or an analysis because it gets to a 50 percent [depreciation]").

[277] *See* Tr. (4 Mar. 2013) 1027:10-15, 1028:15-19 (Moller Cross); Moller I ¶ 50 **(RWS-2)**; *see also* Tr. (5 Mar. 2013) 1418:1-17 (Damonte Direct) (testifying that, "[i]n the case of DEOSCA and DEORSA, we provided the Financial Statements of the DEOSCA and DEORSA, and we showed the CNEE that the ratio that we had was 42 percent," that the CNEE "studied that and they accepted that, and we decided it was 1,73," and that "[t]his is what would have happened if EEGSA had submitted its balance sheets").

[278] Tr. (5 Mar. 2013) 1297:22-1298:12 (Barrera Direct); *see also* Barrera ¶ 239 **(CER-4)**; David Johnstone, Replacement Cost Asset Valuation and the Regulation of Energy Infrastructure Tariffs, Theory and Practice in Australia dated Jan. 2003, at 17, 21-25 **(C-597)**. Even Mr. Damonte conceded that the CNEE's FRC formula was fundamentally different from what had been represented. Tr. (5 Mar. 2013) 1404:18-21 (Damonte Direct) (asserting that the FRC formula "is completely okay . . . because of the right [the CNEE] had to change the methodology").

[279] Mercados Energéticos, *Estudio del Impacto del Marco Regulatorio del Sector de Energía Eléctrica, Incluida la Regulación de los Intercambios Internacionales de Energía* dated Dec. 2011, at 78-79 (observing that "the VNR is the cost of replacing existing assets with new assets . . . . This method is also known as Gross Optimised Replacement Cost (GORC), as it does not include depreciation. . . . [The] Depreciated Optimized Replacement Cost (ODRC or DORC) [method], is the cost of the existing network to its value of a Modern Equivalent Asset . . . which has been optimized from an engineering perspective and adjusted for depreciations corresponding to its age. The main difference with the VNR method is the form of depreciation of the assets: in the case of DORC depreciation is included in the annuity as if it were a loan. . . . [I]f the company has old

White thus believed that there was a typographical error in the FRC formula, and applied the formula disregarding the number "2" in the denominator.[280] In its observations on EEGSA's VAD study, the CNEE maintained that its FRC formula was correct, but did not explain its reasons for including a "2" in the denominator, *i.e.*, that it was applying the steady-state model applied in Brazil and recommended by Mr. Riubrugent.[281]

76. After this issue was submitted to the Expert Commission, the Expert Commission ruled, by majority, that the CNEE had incorrectly equated two variables in the FRC formula, which had the effect of depreciating EEGSA's VNR by 50 percent and cutting its return on capital by half.[282] As Mr. Bastos testified, "the mathematical formula used in the Terms of Reference [was correct], except that Factor 2 was not correct because Factor 2 was tantamount to considering half the useful life."[283] As Mr. Bastos explained, the CNEE's FRC formula is "used mainly in Australia, and . . . in New Zealand as well, which have very stable electrical distribution systems that are not growing in any major way, and so one can . . . adopt a position saying we are going to depreciate at one half of useful life," because "some of [the assets] are very new, some are very old, and others are halfway through their use life."[284] As Mr. Bastos further explained, "in the case of young systems, systems that are growing very fast with growth in demand, and obviously if there is growth in demand, then there is growth of the grids and the assets one is putting in," such as in Guatemala, and "if you use this method, you are introducing biases. It's not accurate because most of the assets are newer than half of their useful life."[285]

77. The Expert Commission thus applied the depreciation factor of "2" only during

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assets, the VNR method will result in higher values than those found by the DORC method. In that sense, the VNR-ER [*Empresa de Referencia* or Model Company] gives results that are independent of the age of the assets.") **(C-629)**. Submitting new evidence on this point is warranted, as it responds to questions from the Tribunal. *See* Tr. (22 Jan. 2013) 399:20-21, 401:1-22 (Tribunal Question).

[280] Expert Commission Report dated 25 July 2008, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 90 ("EC Report") **(C-246)**; *see also* Tr. (22 Jan. 2013) 707:13-19 (Calleja Redirect); Giacchino I ¶ 59 **(CWS-4)**.

[281] EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 90 **(C-246)**.

[282] *Id*., at 91-93.

[283] Tr. (1 Mar. 2013) 794:14-17 (Bastos Tribunal Question).

[284] *Id*. at 792:20-793:8.

[285] *Id*. at 793:9-15.

the tariff period, because, as Mr. Bastos explained, "the idea is these tariffs are going to be in place for a tariff period, so one should [incur] at least the depreciation that occurs during that tariff period."[286] The manner in which the Expert Commission calculated the FRC thus comported with the way in which the VNR method is applied in Chile and was adopted in Guatemala, which served as the model for Guatemala, as was confirmed by Dr. Barrera at the Hearing.[287] In addition, as the Tribunal will recall, the Expert Commission ruled in favor of EEGSA with regard to two other discrepancies that had a significant impact on the resulting VNR and VAD, namely, the demand density calculation and the date of the reference prices.[288]

78. As the CNEE's own internal documents reflect, the CNEE reviewed and analyzed the Expert Commission's Report and determined that setting EEGSA's VAD in accordance with the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD.[289] The CNEE concluded, among other things, that "[t]he decisions of the Expert Commission would tend to make significant changes [to] EEGSA's [VNR] by reducing it ([by] approximately 50%)," but that "it remains higher than the [VNR] of the CNEE's Independent Study" prepared by Sigla; that "[t]he effect of the [FRC] formula increases the [VNR's] Annuity [by] 47% compared to the formula set forth in the ToR"; and that, "[a]ssuming that neither SIGLA's [VNR] nor the costs are changed and that the new [FRC] formula is applied, the [VAD] would be increased [by] approximately 25%."[290]

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[286] *Id*. at 793:22-794:3.

[287] Tr. (5 Mar. 2013) 1333:5-9 (Barrera Tribunal Question) ("[Q.] If you take the Expert Commission Decision, you would have something similar in Guatemala as to what you explained in the case of Chile; correct? [A.] Exactly."); *see also* Tr. (5 Mar. 2013) 1293:6-15 (Barrera Direct) (explaining that the VNR method "basically came out of Chilean Regulation and has been applied not only in the electricity industry, but also a lot in the telecoms industry"); Tr. (5 Mar. 2013) 1300:1-2 (Barrera Tribunal Question) ("[T]he Guatemalan law was inspired by the Chilean sort of Regulation"); Alegría II ¶¶ 8-10, 38 **(CER-3)**; Alegría I ¶ 13 **(CER-1)**; Moller I ¶ 9 **(RWS-2)**; Tr. (22 Jan. 2013) 400:22-401:22 (Tribunal Question) (asking whether the Expert Commission's decision on the FRC is "compliant with the law and the regulation," and, if not, why not?).

[288] EC Report, Discrepancies A.2, Spatial Unbundling of the Demand, Zoning Criteria, Size of the Squares, at 17-24 and B.1.b, Age of the Prices, at 32-36 **(C-246)**; Bastos I ¶¶ 23-26, 28 **(CWS-1)**; *see also* Tr. (4 Mar. 2013) 850:21-851:6, 864:21-865:12 (Giacchino Cross).

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

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

79. Having determined that applying the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD, the CNEE proceeded to ignore both the Expert Commission's decisions and EEGSA's 28 July 2008 VAD study, which had been revised to incorporate the Expert Commission's decisions, and to approve Sigla's VAD study, which Mr. Moller admitted did not comply with the Expert Commission's decisions,[291] as the basis for setting EEGSA's 2008-2013 VAD and tariffs.[292] As Mr. Moller acknowledged at the Hearing, applying the CNEE's FRC formula, which had been rejected by the Expert Commission as incompatible with the LGE and RLGE, had "an impact on the profitability in connection with the part that was recovered from the VNR."[293] As Mr. Kaczmarek confirmed, "the '2' [in the CNEE's FRC formula] effectively halves the profitability of EEGSA,"[294] because "what they proposed for in the Terms of Reference was a 50 percent reduction in the WACC."[295] Respondent's expert, Dr. Abdala, agreed, testifying that "the Factor equal to 2 would affect basically the calculation of the asset base because it implicitly tells that the VNR divided by the Factor 2 or affected by 50 percent of implicit accumulated depreciation that it would reduce the asset base to half the value of the VNR plus working capital."[296] As the record reflects, by approving Sigla's VAD study as the basis for setting EEGSA's 2008-2013 VAD and tariffs, the CNEE unilaterally reduced EEGSA's VAD by more than 45 percent and its revenue by approximately 40 percent,[297] leading to downgrades by the two major rating agencies,[298] and

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

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

[293] Tr. (4 Mar. 2013) 1017:17-20 (Moller Tribunal Question).

[294] Tr. (5 Mar. 2013) 1505:12-13 (Kaczmarek Direct).

[295] *Id*. at 1506:1-2.

[296] Tr. (5 Mar. 2013) 1595:9-14 (Abdala Redirect).

[297] *See* TECO Energy's Form 10-K dated 26 Feb. 2009, at 49 **(C-324)**; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**; Moody's Investor Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**.

[298] Tr. (22 Jan. 2013) 573:10-21 (Callahan Direct); Callahan I ¶ 6 **(CWS-2)**. Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 **(C-297)**; Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**.

requiring EEGSA to take drastic cost-cutting measures.[299]

80. The CNEE's actions during EEGSA's 2008-2013 tariff review, as well as Guatemala's current position in this arbitration, are directly contrary to Guatemala's prior representations contained in the Memorandum of Sale, and in the LGE and RLGE, which were adopted specifically to induce foreign investment.[300] Having specifically represented that EEGSA's VAD would be calculated by EEGSA's consultant based upon the model efficient company approach using the VNR method, the CNEE imposed its own VAD on EEGSA, which, according to the CNEE's own internal documents, had been calculated by Sigla using an FRC formula based upon the steady-state model applied in Brazil, rather than the VNR method applied in Guatemala, and which resulted in the depreciation of EEGSA's regulatory asset base by 50 percent, in violation of LGE Articles 67 and 73.[301] And having specifically represented that the Expert Commission would *resolve* the discrepancies between the CNEE and EEGSA, the CNEE, after determining that the application of the Expert Commission's decisions would result in a higher VNR and VAD for EEGSA, took the position for the very first time that it retained ultimate authority to determine the outcome of the tariff review process, and thus could reject the Expert Commission's decisions and the distributor's revised VAD study, if it disagreed with their result.[302] As Mr. Gillette testified, "through the government's actions, [it] took away the ability of the Expert Commission to be that body that was conducting the arbitration."[303]

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[299] Tr. (22 Jan. 2013) 534:17-535:9 (Gillette Cross); Gillette I ¶ 24 **(CWS-5)**; Tr. (22 Jan. 2013) 573:22-574:16 (Callahan Direct); Callahan I ¶ 6 **(CWS-2)**.

[300] *See supra* Sections III.A.1-2; Sales Memorandum **(C-29)**; Resolution No. CNEE-88-2002 dated 23 Oct. 2002 **(C-59)**; CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003 **(C-81)**; Email from M. Quijivix to M. Calleja dated 15 May 2008 **(C-210)**.

[301] *See supra* Section III.A.1; Resolution No. CNEE-144-2008 dated 29 July 2008 **(C-272)**.

[302] *See supra* Section III.A.2. As discussed below, Professor Aguilar admitted that Guatemala's prior representations all reflect a procedure in which the Expert Commission *resolves* the disputes between the CNEE and the distributor relating to the distributor's VAD study. *See infra* ¶¶ 83-84; Tr. (4 Mar. 2013) 1235:7-1243:22 (Aguilar Cross).

[303] Tr. (22 Jan. 2013) 426:18-21 (Gillette Direct). As discussed below, in the CNEE's current flowchart for EEGSA's 2013-2018 tariff review, the CNEE effectively has written the Expert Commission out of the tariff review process altogether, replacing the Expert Commission with the CNEE itself. *See infra* Section III.B; EVAD Methodology dated Sept. 2012, at 16 **(C-619)**; Tr. (4 Mar. 2013) 1165:16-1166:1 (Alegría Direct).

4. None Of Respondent's Alleged Defenses Excuse It From Liability For Contravening Its Specific Representations, Thereby Frustrating Claimant's Legitimate Expectations

81. With respect to its representations regarding the VNR method, Respondent asserted at the Hearing that, contrary to Claimant's contentions, it did not represent that EEGSA's VAD would be calculated on the basis of the new replacement value of EEGSA's regulatory asset base,[304] and that it would "entail[] a kind of fraud" for Respondent to have done so, because EEGSA's actual assets were old at the time of privatization.[305] Guatemala's assertions grossly distort the VNR method, as well as the specific representations that Guatemala made during EEGSA's privatization regarding its newly-adopted legal and regulatory framework, which, as discussed above, was designed specifically to maximize EEGSA's privatization proceeds for the benefit of Guatemala.[306] As Claimant's witnesses and experts confirmed at the Hearing, not only does the LGE and RLGE make clear that the distributor's VAD is calculated off of a regulatory asset base of a model efficient company that is valued as if all of its assets were new,[307] but the bids generated by EEGSA's privatization leave no doubt that

[304] Tr. (21 Jan. 2013) 294:10-295:4 (Respondent's Opening) ("[I]t's not like TECO wants us to believe – and its experts as well – that it is a system that remunerates the investor every five years for a new network, I think that any one of us applying common sense for a few minutes can understand that this position is not sustainable. A system which has the efficiency of tariffs, how can it compensate the distributor every five years over the value of a new network which is not new? But, most importantly, the distributor is not offering a complete renewal every five years. As has been proven in this case and we will discuss further along, it is clear that the return is paid on the value invested less the depreciation or the capital which has already been recovered. It's as if you issued a bond and borrowed from an investor.").

[305] *See, e.g.*, *id.* at 295:10-296:5 ("TECO . . . says that the high price . . . paid [by the Consortium] in the privatization was due to its expectation that the tariffs would pay every five years the new value of that network. What TECO argues, if we understand it correctly . . . is that the Guatemalan state would have sold to TECO and its partners a -- an old network at the price of a new network, compelling users and the citizens of Guatemala to pay for a new network but, most importantly, a new network of which they would not be benefiting. I think that this -- if this scheme presented by TECO -- if we think about it a bit, I think that we could see that it entails a kind of fraud on the part of the Guatemalan state vis-a-vis its users . . . .").

[306] *See supra* Section III.A.1.

[307] *See, e.g.*, Tr. (1 Mar. 2013) 791:6-17 (Bastos Tribunal Question) ("[T]he 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 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."); Tr. (5 Mar. 2013) 1294:10-16 (Barrera Direct) ("Mr. Damonte claims the VNR must be reduced by accumulated depreciation. So, Mr. Damonte is looking at this from the perspective of the company and not from the perspective of the entrant. That basically means that his asset base is not new in contradiction with what the Guatemalan law is saying.").

EEGSA's VAD was to be calculated using the new replacement value of its assets, and not their depreciated value.[308]

82. This is further confirmed by the manner in which EEGSA's VAD was calculated during its 2003-2008 tariff review. As the record reflects, EEGSA's 2003-2008 VNR was not depreciated, nor did the FRC formula set forth in EEGSA's 2003-2008 ToR contain a "2" in the denominator or otherwise calculate EEGSA's VAD off of a depreciated VNR.[309] As Mr. Giacchino testified, consistent with the LGE and RLGE, the ToR for EEGSA's 2003-2008 tariff review did not contain an FRC formula that calculated EEGSA's return off of a depreciated regulatory asset base.[310] Mr. Kaczmarek similarly confirmed that "in the Second Rate Period new meant new. There was no adjustment for depreciation at all . . . it was applied like a mortgage, but there [was] no depreciation."[311] Before EEGSA's 2008-2013 tariff review and the CNEE's deliberate insertion of an improper FRC formula based upon the steady-state model applied in Brazil, which included 50 percent depreciation, there thus was no confusion that the application of the VNR method in the LGE and RLGE meant that EEGSA's VAD would be calculated off of a regulatory asset base that was valued as if all of its assets were new, and thus without depreciation. Guatemala cannot create confusion and regulatory uncertainty through this arbitration, as it clearly seeks to do.

83. With respect to its representations regarding the role of the Expert Commission, Respondent, at the Hearing, notably did not—because it could not—contest that its actions contravened its prior specific representations regarding the role of the Expert Commission. Instead, Professor Aguilar remarkably testified that *all* of Guatemala's prior representations regarding the Expert Commission's authority to resolve disputes between the CNEE and the

[308] *See supra* Section III.A.1; Tr. (5 Mar. 2013) 1492:8-1493:6 (Kaczmarek Direct).

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

[310] Tr. (4 Mar. 2013) 959:22-960:4 (Giacchino Tribunal Question) ("[Q.] And I had a look at the Terms of Reference for the 2003-2008 period. I didn't find any similar formula with the Factor 2 or anything regarding depreciation, or am I wrong? [A.] No, you're not wrong."); Tr. (4 Mar. 2013) 961:21-962:10 (Giacchino Tribunal Question) ("[Q.] . . . And do you remember what in the tariff for [2003] what was the adopted depreciation factor? . . . [A.] There was no depreciation factor adopted. It was a formula which is a mortgage formula . . . . ").

[311] Tr. (5 Mar. 2013) 1504:15-18 (Kaczmarek Direct).

distributor were wrong as a matter of Guatemalan law:

> Q. . . . Now, the verb being used in EEGSA's Sales Memo is, Mr. Aguilar, in fact, to resolve or 'resolver' in Spanish; is that right?
>
> A. Well, the verb that is used is correct, but the way that it is used is completely incorrect because that is not what the law says.
>
> Q. You're saying that the Sales Memorandum that was prepared and distributed to potential investors in EEGSA was, in fact, incorrect?
>
> A. The way in which they're using the term resolve is completely incorrect.
>
> . . .
>
> Q. . . . Now, again, the verb here, Mr. Aguilar, is to resolve or 'resolver' in Spanish. Is it your testimony that the CNEE, in its submission to the Court, was incorrect?
>
> A. . . . When you compare this against the law, the lawyer was wrong. . . . An error is not a source of law in Guatemala.
>
> . . .
>
> Q. . . . Now, this document is a document prepared by the CNEE. It's a draft Operati[ng] Rules. . . . the noun here is 'The resolution,' which again comes from the verb to resolve, or 'resolver.' Is this correct?
>
> A. That is correct. But that is not what the law says. The law talks about 'pronouncing,' not resolving.[312]

84. Professor Aguilar's testimony is implausible, that is, it simply is not credible that Respondent misinterpreted a central tenet of its own law in the Memorandum of Sale that it expressly approved and circulated to potential investors when it privatized EEGSA, in its pleadings to its own Constitutional Court, and in the draft operating rules that it itself proposed

[312] Tr. (4 Mar. 2013) 1237:14-1243:9 (Aguilar Cross).

to EEGSA during a contentious negotiation.[313] Nor would this be the first time that Professor Aguilar's testimony before an ICSID tribunal regarding the content of Guatemalan law was wrong. As the tribunal in the *RDC v. Guatemala* case found, "these are Respondent's documents, drafted by Respondent, and they contradict the arguments made by Respondent [the Republic of Guatemala] and its expert [Professor Aguilar] . . . ."[314] In any event, even if Respondent had repeatedly misinterpreted and misrepresented its own law, that would not absolve Respondent from liability for acting contrary to those specific representations, as it is well established that a State may not rely upon its own internal law to avoid international liability arising from the specific representations that it makes to induce foreign investment.[315]

85. For the same reasons, Professor Aguilar's testimony at the Hearing that, if the Expert Commission's decisions were binding on the CNEE, that would violate Article 3 of the Guatemalan Law on Administrative Disputes,[316] is irrelevant. It also is incorrect. As Professor Alegría has explained, the purpose of Article 3, which provides that "[a]dministrative resolutions shall be issued by a competent authority, quoting the statutes or regulations on which they are grounded," and that "[t]he opinions of a technical or legal advisory body shall under no

[313] This also is another instance where positions taken by Respondent are internally inconsistent. Professor Aguilar consistently has maintained that, if the LGE intended to make the Expert Commission's decision binding, it would have used the verb "to resolve" rather than "to pronounce." Tr. (4 Mar. 2013) 1236:19-1237:1 (Aguilar Cross); Aguilar II ¶ 8(b) **(RER-6)**. In its Opening Statement, however, Respondent argued that the use of the verb to "resolve" in the Sales Memorandum "changes absolutely nothing." Tr. (21 Jan. 2013) 275:5-6 (Respondent's Opening).

[314] *RDC v. Guatemala* ¶ 227 **(CL-92)**. When confronted with this decision, Professor Aguilar deflected blame and maintained that the ICSID tribunal was mistaken. Tr. (4. Mar. 2013) 1228:9-15 (Aguilar Cross) ("[Q.] . . . So, the Tribunal, in fact, rejected your opinion regarding the President's discretion; is that correct? A. Yes, that is correct. Yes, that is a decision by a tribunal, but that does not change my opinion, and it doesn't change the content nor the context of the law.").

[315] *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY (2005), Art. 32 ("The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.") **(CL-54)**; *see also Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 Apr. 2013 ("*Arif v. Moldova*") ¶ 547(c) (observing that, "at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act.") **(CL-103)**; *ATA Construction v. Jordan* ¶ 122 (recalling "the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law") **(CL-58)**.

[316] Tr. (4 Mar. 2013) 1230:6-14, 1234:14-1235:3 (Aguilar Cross); Tr. (4 Mar. 2013) 1266:15-1267:13 (Aguilar Tribunal Question); *see also* Aguilar II ¶¶ 41-43 **(RER-6)**; Aguilar I ¶¶ 49-50 **(RER-3)**; *see also* Letter from the Tribunal to the Parties dated 11 Mar. 2013 ("[What is t]he impact, if any, of Article 3 of the '*Ley de lo Contencioso Administrativo*' on the dispute").

circumstances be deemed as resolutions,"[317] is to compel administrative authorities to issue formal resolutions, so that private citizens may exercise their rights and avail themselves of the remedies to challenge those resolutions provided by the Law on Administrative Disputes.[318] The Expert Commission process set forth in LGE Article 75, however, is a special provision that derogates from the general provisions of Guatemalan law, including the Law on Administrative Disputes.[319] In addition, on its face, Article 3 applies exclusively to State organs that are part of the ordinary administrative structure of the Government. By contrast, the Expert Commission under LGE Article 75 is a temporary body created for the specific purpose of deciding the discrepancies in the VAD calculation. Accordingly, once the Expert Commission has issued its decisions on the discrepancies, the CNEE must use those decisions to set EEGSA's VAD and tariffs through its own resolutions, so that the distributor may challenge them by appealing to the MEM.[320] This does not mean, however, that the Expert Commission's decisions cannot bind the CNEE as a matter of Guatemalan law, as Guatemala would have this Tribunal find.

86. At the Hearing, Respondent also continued to attempt to minimize the importance of its own specific representations to potential investors during EEGSA's privatization, including the TECO group of companies, asserting that these representations consisted of a "memorandum of sale prepared by a merchant bank"[321] and a "PowerPoint."[322] Respondent's continued attempt fails. As Claimant has explained, these materials were prepared by Respondent for the specific purpose of inducing foreign investment in EEGSA; not surprisingly, numerous tribunals thus have found an FET violation when a State takes action contrary to representations made in sales memoranda and other similar materials.[323] In *EDF v. Argentina*, for example, the tribunal

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

[318] Alegría II ¶ 42 **(CER-3)**.

[319] *Id*. ¶ 43.

[320] *See id*. ¶ 14.

[321] Tr. (21 Jan. 2013) 373:19-374:4 (Respondent's Opening).

[322] Tr. (22 Jan. 2013) 471:6-12 (Gillette Cross).

[323] *See, e.g., National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award of 3 Nov. 2008 ("*National Grid v. Argentina*") ¶ 177 (discussing prospectus) **(CL-33)**; *CMS v. Argentina* ¶¶ 133-134 (discussing information memorandum) **(CL-17)**; *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007 ("*Enron v. Argentina*") ¶ 103 (same) (annulled on other grounds) **(CL-21)**; *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 Sept. 2007 (annulled on other grounds) ("*Sempra v. Argentina*") ¶ 113 (same) **(CL-43)**; *BG Group v. The*

examined the regulatory framework for electricity distribution in Argentina and found that the regulatory agency responsible for the electricity sector had unilaterally modified the tariff regime, as well as the terms of the claimants' concession agreement, in violation of the FET standard.[324] In so finding, the tribunal noted that the "Province of Mendoza had clearly embarked on a campaign to attract foreign investors," and that "Respondent's road shows and Info Memo promoted *inter alia* a foreign investor-friendly legal regime that provided investors with reasonable returns as well as a series of protections tailored to make the investment more appealing to foreign capital markets."[325] The tribunal found that the respondent had given "specific guarantees and commitments that created strong expectations of a long-term investment subject to only *de minimis* political or regulatory risk," and that "[k]ey features of the sales pitch included (i) the creation of a regulatory agency with independent oversight to insulate investors from politically motivated measures and actions; (ii) the Currency Clause; (iii) the Cost Adjustment Clause; (iv) the Extraordinary Tariff Adjustment Clause; (v) an initial tariff schedule with a fixed-term of five years; and (vi) a concession with a duration of thirty years."[326]

87. In *Suez v. Argentina*, the tribunal similarly found that, after enacting a new water law "to govern the privatization by concession of the water distribution and waste water services in the Province" of Santa Fe, "[t]he Province, in cooperation with the federal authorities, actively publicized its desire to privatize [its water and sewage] systems, preparing and distributing a prospectus aimed at private investors, both foreign and national."[327] Noting that "a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State," and that "[t]he resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be

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Argentine Republic ¶¶ 171-72 (same) **(CL-9)**; *see also* Letter from the Tribunal to the Parties dated 11 Mar. 2013 (asking "[w]hether representations made to the investor need to be specific (i.e. specifically directed to the investor) and whether the memorandum of sale can be considered as such a representation").

[324] *EDF v. Argentina* ¶¶ 998-1090 **(CL-86)**.

[325] *Id*. ¶ 1008.

[326] *Id*.

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

managed,"[328] the tribunal found that Argentina had breached the FET standard by refusing to revise the tariff in accordance with the legal framework and by pursuing the forced renegotiation of the claimants' concession contract contrary to that legal framework, in violation of the claimants' legitimate expectations.[329]

88. Respondent's attempt at the Hearing to disavow the specific representations contained in the Memorandum of Sale on the basis that the Memorandum of Sale was "not drafted by the government of Guatemala,"[330] and that it contains an express disclaimer that it "may be subject to errors"[331] is equally unavailing. As Claimant has explained, similar arguments have been rejected in other cases.[332] The tribunal in *Enron v. Argentina* thus found that, "[e]ven if the Information Memorandum was in fact prepared by private consultants and the responsibility of the Government was expressly disclaimed, if it had been in error in this respect, what is not quite likely in the case of highly prestigious consulting firms engaged by the Government to explain the privatization plan to prospective foreign investors, such error would not have passed unnoticed to competent government officials," and that, "in such case . . . the Government would have been under the duty to issue a clarification, as otherwise a false legitimate expectation would have been created."[333] The tribunal in *CMS v. Argentina* likewise found that the information memorandum at issue in that case, "while not legally binding,

[328] *Id*. ¶ 203.

[329] *Id*. ¶ 227.

[330] Tr. (21 Jan. 2013) 274:15-22 (Respondent's Opening) ("What is the legitimate expectation that they actually say they have? Well, it is one based on a phrase in the memorandum of sale. As we can see here, for them the legitimate expectation arose from the memorandum of sale, a document that was not drafted by the government of Guatemala, and that doesn't say either what they say it says."); *see also* Rejoinder ¶ 199.

[331] Tr. (4 Mar. 2013) 1237:2-1238:12 (Aguilar Cross) ("The memorandum itself also says that the information that is being provided may be subject to errors, and they make reservations in connection with the truthfulness and the content of the information."); *see also* Counter-Memorial ¶ 562 & n.797.

[332] Tr. (21 Jan. 2013) 125:21-126:18 (Claimant's Opening); Reply ¶ 265.

[333] *Enron v. Argentina* ¶ 103 **(CL-21)**; *see also Sempra v. Argentina* ¶ 113 (finding that "[e]ven if the Information Memorandum was in fact prepared by private consultants and the Government expressly disclaimed responsibility for it, and even if there had been some error in this respect, what is unlikely in the case of highly prestigious consulting firms engaged by the Government to explain the privatization plan to prospective foreign investors, such errors would [not] have passed unnoticed by competent government officials," and that "the Government would in such a situation have been duty-bound to issue a clarification to avoid the engendering of a false legitimate expectation," but that "[n]o such clarification was ever issued") **(CL-43)**.

accurately reflect[ed] the views and intentions of the Government."[334] And in *National Grid v. Argentina*, the tribunal noted that "the Respondent solicited the investments in the power sector internationally," and that "[i]t is disingenuous for the Respondent now to rely on the disclaimers in the prospectus in order to distance itself from the information given therein."[335]

89. Moreover, as the record reflects and as the testimony at the Hearing confirmed, in the present case, the Memorandum of Sale not only was prepared by EEGSA, which at the time was State-owned, with the assistance of Salomon Smith Barney, but also was directly approved by the High-Level Committee that was established by the Government of Guatemala to oversee EEGSA's privatization, which included the then Minister of Energy and Mines, Leonel López Rodas.[336] As the 22 April 1998 minutes of the High-Level Committee record, "*[i]n view that no member of the committee made any other comments or remarks on the [Memorandum of Sale], it was agreed that there was no objection to the issuance of the note, as requested*."[337] Having expressly approved the Memorandum of Sale through its own High-Level Committee, Respondent thus cannot credibly argue, as it did at the Hearing, that the Memorandum of Sale was not prepared by the Government, or that it was "subject to error."

90. Respondent's further suggestion at the Hearing that Claimant should have undertaken additional due diligence to evaluate the specific representations made by Guatemala in the Memorandum of Sale similarly fails.[338] As the tribunal in *EDF v. Argentina* ruled in that case, "[t]he due diligence obligations of a concession bidder provide no basis for the Tribunal to

[334] *CMS v. Argentina* ¶ 134 **(CL-17)**.

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

[336] *See* Empresa Eléctrica de Guatemala S.A. High-Level Committee Members dated 1997 **(C-18)**; Minutes of the High-Level Committee, Empresa Eléctrica de Guatemala, S.A. dated 27 Apr. 1998, at 5 **(C-548)**; *see also* Tr. (4 Mar. 2013) 1163:7-16 (Alegría Direct) ("When EEGSA was privatized, it was fully controlled by the Government of Guatemala. All of the Directors and managers were appointed by the Government of Guatemala, and it was the Government of Guatemala that appointed through the Ministry of Energy and Mines a high-level Commission to conduct the privatization process. This Commission acted under the authority of the Ministry and approved every step of the privatization and directly approved the Memorandum of Sale for the privatization of EEGSA.").

[337] Minutes of the High-Level Committee, Empresa Eléctrica de Guatemala, S.A. dated 27 Apr. 1998, at 5 (emphasis added) **(C-548)**.

[338] *See* Tr. (22 Jan. 2013) 470:20-474:2 (Gillette Cross).

ignore Argentina's duties under its investment treaty with France."[339] The promotional materials prepared by Guatemala, including the Memorandum of Sale, were directly targeted at potential foreign investors, including the TECO group of companies, and contained specific representations regarding the stability and operation of Guatemala's new regulatory framework, including the applicable tariff calculation methodology and the process by which EEGSA's VAD would be recalculated every five years, which were intended to attract foreign investment in EEGSA.[340] Like the respondent in *EDF v. Argentina*, Guatemala, through these materials, "gave specific guarantees and commitments that created strong expectations of a long-term investment subject to only *de minimis* political or regulatory risk."[341] Respondent now cannot disavow those guarantees and commitments on the alleged basis that Claimant should have undertaken more rigorous due diligence, particularly when those guarantees and commitments were expressly approved by Respondent's own High-Level Committee.

91. In any event, Claimant has shown that Respondent's representations in the Memorandum of Sale accurately reflected the legal and regulatory reforms that Guatemala had adopted in the LGE and RLGE and, indeed, were adhered to by Guatemala up until the time of EEGSA's 2008-2013 tariff review, when it decided to force a decrease of EEGSA's VAD and tariffs at any cost, including by fundamentally changing its legal and regulatory regime, in contravention of its prior representations. Thus, Respondent's assertion at the Hearing that Claimant should have conducted additional due diligence rings hollow, as any such due diligence would have *confirmed* the accuracy of the representations contained in the Memorandum of Sale, and would not have lent any support to Respondent's current *post-hoc* interpretation of its regulatory framework. Indeed, it is notable that Respondent has not introduced *any* contemporaneous documentary support for its current interpretation of the regulatory framework, including for its positions that the distributor's VAD must be calculated on the basis of a depreciated regulatory asset base, and that the decisions of the Expert Commission merely are advisory and thus can be ignored by the CNEE, neither of which is supported by the documents

[339] *EDF v. Argentina* ¶ 1009 **(CL-86)**.

[340] *See supra* Sections III.A.1-2; Preliminary Information Memorandum, at 9-13 **(C-27)**; Roadshow Presentation, at 39 **(C-28)**; Sales Memorandum, at 46-53 **(C-29)**.

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

prepared and circulated by Guatemala during EEGSA's privatization,[342] or by the CNEE's own legal opinions regarding the CNEE's purported authority to approve Sigla's VAD study under RLGE Article 99.[343]

92. Finally, Respondent's defense that it should not be held liable because, while it may have acted contrary to the specific representations that it made to Claimant's parent company and affiliates at the time of EEGSA's privatization in 1998, Claimant itself was not incorporated until 2005, must be rejected.[344] Indeed, at the Hearing, Respondent accepted that the knowledge and legitimate expectations of one company may be transferred to another company in the same group of companies, provided that "the officers or directors will either be the same or at least people who have been well-informed of these matters."[345] As Mr. Gillette testified, when Claimant was incorporated in 2005 as a new holding company to hold the TECO group of companies' Guatemalan investments, TECO Energy did not bring in new officers and directors to manage Claimant, but appointed the very same officers and directors that were managing other companies in the TECO group.[346] As Mr. Gillette confirmed, Claimant's officers and directors included the "same officers and directors who received the reports on the due diligence that was conducted by TPS and the same officers and directors who made the

[342] *See, e.g.*, Preliminary Information Memorandum **(C-27)**; Sales Memorandum **(C-29)**; Roadshow Presentation **(C-28)**.

[343] *See* CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Scheduledated 29 July 2008, at 5, 9-10 **(C-503)**.

[344] *See* Tr. (21 Jan. 2013) 373:21-374:2 (Respondent's Opening) (arguing that the representations in the Memorandum of Sale were made "to an entity which is not the entity that's the Claimant in this case"); *see also* Counter-Memorial ¶ 549.

[345] Tr. (21 Jan. 2013) 277:21-278:6 (Respondent's Opening).

[346] Tr. (22 Jan. 2013) 541:21-548:8 (Gillette Redirect). As the record reflects, the transfer of the TECO group of companies' ownership interest in EEGSA to Claimant in 2005 was an internal corporate transfer between members of the same group of companies (as opposed to an asset sale) and thus was effectuated for the nominal sum of USD 1.00 per share, for a total of USD 100. *See* Gillette II ¶ 11 **(CWS-11)**; Stock Power dated 17 June 2004 (confirming transfer of 100 shares in TPS International Power, Inc. from TECO Wholesale Generation, Inc. (f/k/a TECO Power Services Corporation) to TWG Non-Merchant, Inc.) **(C-464)**; Stock Power dated 4 May 2005 (confirming transfer of 100 shares in TPS International Power, Inc. from TECO Guatemala, Inc. (f/k/a TWG Non-Merchant, Inc.) to TECO Guatemala Holdings, LLC) **(C-471)**; Register of Members, TPS International Power, Inc. dated 9 Sept. 2010 (confirming share transfers, each at a price of USD 100 for 100 shares) **(C-526)**.

recommendation to TECO Energy to approve the investment" in EEGSA.[347] This is corroborated by the documentary record. As Claimant's corporate records show, in 2005, Claimant's directors were G.L. Gillette, S.M. Payne, and J.B. Ramil, and its officers were G.L. Gillette (President and Treasurer), S.M. Payne (Vice President-Controller, Assistant Secretary and Tax Officer), D.E. Schwartz (Secretary), and S.W. Callahan (Assistant Secretary).[348] As the minutes of TECO Energy's Board of Directors' meeting held on 15 July 1998 reflect, G.L. Gillette and J.B. Ramil both personally participated in TECO Energy's decision to invest in EEGSA.[349] As Mr. Gillette testified, "there were other officers that were involved in TECO Power Services, TECO Wholesale Generation, which were the predecessor companies to TECO Guatemala Holdings, from the very beginning" and "[they] did, in fact, rely on – [he] personally relied on the representation of the Guatemalan government" in deciding to invest in EEGSA.[350] The knowledge and expectations that the TECO group of companies had and legitimately relied upon in deciding to invest in EEGSA in 1998 thus were transferred directly to Claimant when it was incorporated in 2005.

93. Respondent's continued reliance on the tribunal's decision in *Total v. Argentina* to reach a contrary conclusion is misplaced.[351] As set forth above, the tribunal in that case found that Argentina's modification of electricity pricing mechanisms through a series of administrative decrees had "objectively breached" the FET standard.[352] In so holding, the tribunal found, however, that the claimant could not have relied upon certain bidding rules and conditions when it made its investment in Argentina, because the claimant had not participated in the bidding process itself, but had invested in the gas sector several years later, by purchasing

[347] Tr. (22 Jan. 2013) 541:21-548:14 (Gillette Redirect).

[348] TECO Guatemala Holdings, LLC Limited Liability Company Agreement dated 4 May 2005, Arts. 3.2 & 3.9 **(C-472)**; Gillette II ¶ 11 n.20 **(CWS-11)**.

[349] Minutes of the Board of Directors of TECO Energy, Inc. dated 15 July 1998, at 1 **(C-34)**; *see also* TECO Wholesale Generation, Inc., Action by Consent in Lieu of Directors' Meeting dated 27 Apr. 2005 (showing that in 2005, with only one exception, all of the officers and directors of TECO Wholesale Generation, Inc., Claimant's immediate parent company, were the same as the officers and directors of Claimant) **(C-470)**; Gillette II ¶ 11 & nn. 20 & 21 **(CWS-11)**.

[350] Tr. (22 Jan. 2013) 435:5-11 (Gillette Cross).

[351] Tr. (21 Jan. 2013) 376:11-377:15 (Respondent's Opening); *see also* Rejoinder ¶ 180; Counter-Memorial ¶ 546.

[352] *Total v. Argentina* ¶ 333 **(CL-70)**.

shares from TransCanada Group, an unrelated, third company.[353] Unlike Claimant in the present case, Total's predecessor, TransCanada Group, which had participated in the bidding process, was not part of the same group of companies, but rather was completely unrelated to it.[354] Total's officers and directors at the time of its investment thus were not the same officers and directors who had participated in the bidding process at TransCanada Group, which is not the case here. In any event, the tribunal in *Total* nonetheless found that the principles set forth in the bidding rules and conditions, including the denomination of tariffs in US dollars, were "an integral element of the Gas Regulatory Framework in place in Argentina when Total made its investment."[355] Thus, the fact that Total could not have relied upon the bidding rules and conditions at the time of its investment was irrelevant, as the principles set forth therein also were included in the regulatory framework, upon which it did rely. As set forth above, the principles set forth in the Memorandum of Sale regarding the calculation of EEGSA's VAD also are included in the legal and regulatory framework that Guatemala adopted to induce foreign investment in its electricity sector,[356] upon which Claimant relied in deciding to invest in EEGSA.

94. Moreover, while the tribunal in *Total* ultimately found that, at the time Total made its investment, "the financial and currency conditions of Argentina had already deteriorated markedly and steadily throughout 2001" such that "[t]he possibility of abandoning the 1:1 fixed parity with the US dollar, which would have affected the value of Total's investments and its future revenues in dollar terms, should . . . have been taken into account by a prudent and experienced international investor such as Total,"[357] the same cannot be said here. At the time the TECO group of companies incorporated Claimant as a new holding company to hold its interest in EEGSA in 2005, Guatemala not only had adhered to the principles set forth in its legal and regulatory framework, but, as discussed below, Guatemala also repeatedly had

[353] *Id*. ¶ 148. As the Award reflects, Total S.A., a French company, acquired on 23 January 2001 an indirect 19.23 percent stake in Transportadora de Gas del Norte S.A. ("TGN") from the TransCanada Group, which was part of the consortium Gasinvest that had acquired a 70 percent share in TGN from Argentina on 28 December 1992, after Argentina had conducted an international bidding process. *See id*. ¶¶ 41-44.

[354] *See id*. ¶¶ 41-44.

[355] *Id*. ¶ 150.

[356] *See supra* Sections III.A.1-2.

[357] *Total v. Argentina* ¶¶ 323, 324 **(CL-70)**.

confirmed its prior representations regarding that framework, including through the very manner in which it conducted EEGSA's 2003-2008 tariff review.[358]

95. The tribunal's decision in *EDF v. Argentina* is instructive in this regard. Like Claimant, León Participaciones Argentinas, one of the claimants in that case, had not yet been incorporated, when its parent company, Crédit Lyonnais, formed a consortium to bid on Empresa Distribuidora de Energía de Mendoza S.A. ("EDEMSA").[359] After Crédit Lyonnais had made its investment in EDEMSA through the consortium, Crédit Lyonnais subsequently incorporated Léon under the laws of Luxembourg as a wholly-owned subsidiary to hold its interest in EDEMSA, and thus transferred its shares in the consortium to Léon.[360] In assessing Léon's legitimate expectations under the FET standard, the fact that Léon had not yet been incorporated when its parent company had decided to invest in EDEMSA was irrelevant. As noted above, the tribunal in *EDF* found that Argentina had given specific guarantees and commitments through its road shows and Information Memorandum, which had been "distributed to potential investors, including Claimants,"[361] and that Argentina's actions in that case had contravened those specific guarantees and commitments, in violation of the FET standard.[362]

96. Similarly, in *Suez v. Argentina*, Interagua Servicios Integrales del Agua, one of the claimants in that case, was not a member of the original bidding consortium that was formed to bid for a concession to operate certain water distribution and waste water systems in Argentina, but subsequently acquired shares in that concession.[363] In assessing Interagua's legitimate expectations under the FET standard, the fact that Interagua had not participated in the bidding process itself likewise was irrelevant. As noted above, the tribunal in *Suez* found that Argentina had created certain expectations through, among other things, a prospectus that it had prepared and distributed to potential investors,[364] and subsequently had acted contrary to those

[358] *See infra* ¶¶ 97-99.

[359] *EDF v. Argentina* ¶¶ 68-72 **(CL-86)**.

[360] *Id*.

[361] *Id*. ¶ 65.

[362] *Id*. ¶¶ 998-1090.

[363] *Suez v. Argentina* **(RL-17)**.

[364] *Id*. ¶ 33.

expectations, in violation of the FET standard.[365] The fact that Interagua had not participated in the bidding process itself, did not mean that it could not have relied upon the statements made by Argentina in the prospectus to induce investment in the concession.

97. Claimant, in any event, necessarily had expectations at the time it became an indirect owner of the TECO group of companies' interest in EEGSA in 2005. It drew those expectations from the specific representations that Guatemala had made to the TECO group of companies in 1998 during EEGSA's privatization process, and also from the prevailing legal and regulatory framework, all of which Respondent admits were made available to Claimant[366] and had not been disavowed by Respondent. In addition, Claimant derived its expectations from the manner in which Guatemala had adhered to that framework from 1998 to 2005. Following EEGSA's privatization in 1998, Guatemala repeatedly *confirmed* its prior representations regarding the legal and regulatory framework through its statements and conduct, further strengthening Claimant's legitimate expectations.[367]

98. In particular, the manner in which EEGSA's 2003-2008 tariff review was conducted served to strengthen Claimant's legitimate expectations, as it reinforced the specific representations that Guatemala made regarding the manner in which EEGSA's VAD would be recalculated every five years. There is no dispute that EEGSA's VAD in 2003 was established based upon the VAD study prepared by EEGSA's consultant.[368] In addition, as noted above, EEGSA's 2003 VNR was not depreciated, nor did the FRC formula in EEGSA's ToR calculate

[365] *Id*. ¶ 227.

[366] Rejoinder ¶ 262 ("Both the legal framework and the promotion material described above were available to TGH when it made its investment."); *see also* Tr. (21 Jan. 2013) 359:16-360:2 (Claimant's Opening) (quoting same).

[367] As the tribunal recently affirmed in *Franck Charles Arif v. Republic of Moldova*, a legitimate expectation to a secure legal framework can be strengthened over time. *See Arif v. Moldova* ¶¶ 541-544 **(CL-103)**. In that case, the tribunal found that the claimant "had a legitimate expectation, created by Respondent, that there was a secure legal framework to operate a duty free store in his leased premises in Chisinau Airport," which was "strengthened over time," as the claimant made investments in his duty-free store over a period of 16 months. *Id*. ¶¶ 541-542. As the tribunal observed, "[a]s the investment increased and matured, the consequences of any failure to fulfil the legitimate expectations became increasingly severe. The implications for the state's obligations under the fair and equitable treatment standard are not the same when a legitimate expectation is breached at the commencement of an investment, as when the investment is well advanced." *Id*. ¶ 543.

[368] *See* Resolution No. CNEE-66-2003 dated 30 July 2003 **(C-78)**; Resolution No. CNEE-67-2003 dated 1 Aug. 2003 **(C-79)**; *see also* Giacchino I ¶ 13 **(CWS-4)**; Calleja I ¶ 10 **(CWS-3)**; Gillette I ¶ 18 **(CWS-5)**.

EEGSA's VAD off of a depreciated VNR.[369] In those same ToR, the CNEE confirmed the role of the Expert Commission, as well as the distributor's right to object to the CNEE's observations on its VAD study, providing in Article A.6.5 that, "[i]n the event that the intermediate results redrafted by the CONSULTANT should be rejected by the DISTRIBUTOR on reasonable grounds, a clear, concrete, and express written statement shall be drafted containing the amounts or values related to such intermediate results where discrepancies or disagreement exist," and that "[i]t is regarding these intermediate differences, where the same have been identified in writing as discrepancies, that the Expert Commission mentioned in [Article] 75 of the Law shall issue its decision if, upon completion of the tariff review process, discrepancies should still exist between the CNEE and the DISTRIBUTOR *which should be reconciled by the aforementioned Expert Commission*."[370] In November 2003, the CNEE again confirmed the role of the Expert Commission, stating in its own pleading to the Guatemalan Constitutional Court that, "[i]n the event of discrepancies [between the CNEE and the distributor], pursuant to [A]rticle 98 of the [RLGE] and [Article] 75 of the [LGE], an Expert Commission shall be constituted, which *shall resolve* [the dispute] in a term of 60 days."[371]

99. Similarly, the CNEE's actions during the beginning of EEGSA's 2008-2013 tariff review also served to validate Claimant's legitimate expectations. The CNEE, for example, agreed to remove from its first draft of the operating rules the provisions stating that the Expert Commission's decisions would not be binding, to which EEGSA strenuously had objected.[372] In its second draft, the CNEE thus referred to the Expert Commission members as "arbitrators," and made clear in Rule 3 that the Expert Commission's decisions would be binding upon both parties: "The EC shall decide the discrepancies and the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and

[369] *See supra* ¶ 82; Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Arts. B, I **(C-59)**.

[370] Resolution No. CNEE-88-2002 dated 23 Oct. 2002, Art. A.6.5 (emphasis added) **(C-59)**. Once again, Professor Aguilar simply refused to acknowledge the plain language of this document, asserting that the 2003 ToR did not grant the distributor the right to reject the CNEE's observations, but only granted it "the power to disagree but not to reject because that would be to diminish the authority of the National Commission, Electricity Commission." Tr. (4 Mar. 2013) 1253:3-6 (Aguilar Cross).

[371] CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 (emphasis added) **(C-81)**.

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

must deliver it to CNEE, which shall review the incorporation of the decision of the [EC], and which shall approve the Tariff Study."[373] As Mr. Calleja has explained, under those draft rules, the CNEE "did not have discretion to reject the VAD study after it had been corrected by EEGSA's consultant to incorporate the decisions of the Expert Commission, as Articles 75 and 76 of the LGE make clear."[374] This also was the general understanding in Guatemala, as reflected in a 1 July 2008 article published in *El Periódico*.[375] As that article reported, the "[m]anager of the CNEE Sergio Velásquez recognized that 'discrepancies arose because EEGSA did not meet all technical aspects,'" and that "[a]ccording to the General Electricity Law . . . an expert commission will now need to be convened with three experts – two to be named by each of the parties, with the third member to be designated by mutual agreement – to resolve the discrepancies and fix the applicable VAD cost within a term of 60 days."[376] That the role of the Expert Commission was to resolve the differences between the CNEE and the distributor relating to the distributor's VAD study likewise was the understanding of the CNEE's and the MEM's own consultants.[377]

100. As the record reflects, if Guatemala had represented in 1998 that the CNEE would

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

[374] Calleja II ¶ 31 **(CWS-9)**; *see also* Maté II ¶ 22 ("Rule 3 also makes clear that the CNEE understood that the decision of the Expert Commission would be binding upon the parties, as the consultant was to recalculate the VAD study 'strictly adhering to what is resolved by the EC' and deliver the study to the CNEE 'which shall review the incorporation of the decision of the CNEE, and which *shall approve* the Tariff Study.'") (emphasis added) **(CWS-12)**.

[375] El Periódico, *Distribution tariff assessment pits EEGSA against the CNEE* dated 1 July 2008 **(C-492)**.

[376] *Id*.

[377] *See, e.g.*, Letter from Maria Bonilla to the MEM dated 31 May 2012, at 1 (observing that, "[p]ursuant to Article 75 [of the LGE], *the CNEE and the distributor had to settle their differences through this [expert] commission to determine the applicable tariff* and the adjustments which would be applicable this quarter") (emphasis added) **(C-618)**; Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 (noting that, "[o]n May 5, 2008 EEGSA submitted the Stage 1.2 Report, the Final and amended version of the previous report, which gave rise to Resolution CNEE 96-2008, detailing the CNEE's disagreements with the report and ordering the formation of the Expert Commission that is referred to in Article 75 of the LGE and that will be responsible for *resolving disagreements between EEGSA and the CNEE*") (emphasis added) **(C-494)**; Letter from I. Coral Martinez to the CNEE dated 31 Aug. 2002, at 1-2 (stating that, under the LGE, the CNEE "*reviews* and comments on the distributors' studies" and that, "[i]n the case of discrepancies, the Law provides for arbitration proceedings to be conducted by an Expert Commission rather than *negotiators*, inasmuch as, according to the spirit of the Law, the Commission must render a decision based on technical criteria and grounds instead of subjective criteria, agreements, or mere negotiations") (emphasis in original) **(C-446)**.

have complete discretion to ignore the decisions of the Expert Commission and the results of the distributor's VAD study, and to set the distributor's VAD unilaterally at whatever level it deemed appropriate in the circumstances, as Respondent now asserts, neither the TECO group of companies, nor the other Consortium members, would have invested in EEGSA, as the risk of arbitrary regulatory interference would have been too high.[378] Similarly, if Guatemala had adopted the steady-state model applied in Brazil, rather than the model efficient company approach using the VNR method applied in Chile, the bids that Guatemala received and the amount that the Consortium paid for 80.1 percent of EEGSA in 1998 would have been substantially lower, as those bids would have been calculated based upon a depreciated asset base, rather than a new asset base.[379] The actions that Guatemala took during EEGSA's 2008-2013 tariff review to substantially decrease EEGSA's VAD violated Claimant's legitimate expectations arising from the specific representations that Guatemala made to induce Claimant's investment in EEGSA, and thus breached Article 10.5.1 of the DR-CAFTA.

B. Guatemala's Actions Fundamentally Changed The Legal And Regulatory Framework Upon Which Claimant Relied In Deciding To Invest In EEGSA

101. The actions that Guatemala took during EEGSA's 2008-2013 tariff review to substantially reduce EEGSA's VAD fundamentally changed the legal and regulatory framework upon which Claimant's investment in EEGSA was premised, eviscerating the basic principles established by the LGE and RLGE for the tariff review process, and subjecting Claimant's investment to the arbitrary intervention of the regulator, in violation of Claimant's legitimate expectations and the fair and equitable treatment obligation.[380] As Respondent itself has admitted, the fair and equitable treatment obligation contained in Article 10.5.1 of the DR-CAFTA "prohibits changes to the regulatory framework that are fundamental and that affect the legitimate expectations of an investor."[381] Guatemala in this case fundamentally changed not only the manner in which the distributor's VAD is recalculated every five years, but also the procedure for resolving disputes between the CNEE and the distributor during that process, thus

[378] Tr. (22 Jan. 2013) 425:6-11 (Gillette Direct).

[379] *See, e.g.*, Tr. (5 Mar. 2013) 1491:12-15 (Kaczmarek Direct) (testifying that "clearly one is going to place a higher value on a company that's regulated with an asset base that is new versus depreciated").

[380] Reply ¶¶ 89-227; Memorial ¶¶ 84-227.

[381] Counter-Memorial ¶ 567 (subheading b).

removing guarantees and safeguards that, as also was the case in *CMS v. Argentina*, "were crucial for the investment decision."[382]

102. As set forth above, in deciding to invest in EEGSA, Claimant relied upon the legal and regulatory framework established by the LGE and RLGE, which guaranteed both fair returns and a depoliticized tariff review process, by adopting the model efficient company approach using the VNR method for the calculation of EEGSA's VAD, and by limiting the role of the CNEE in the VAD-calculation process.[383] As Mr. Gillette testified, "[i]t was [Claimant's] understanding that the basic principles that were set within the electricity law would stand . . . because that was obviously the basis for [its] investment."[384] As he explained, those "basic principles" included "the concept that the value of the system is based on new replacement value;" that "there's a range of 7 to 13 percent real rate of return;" that EEGSA would "hire a consultant to do the study to determine the VAD;" that the "CNEE has the opportunity to comment on the VAD;" and that "if we can agree, we have a VAD," but "[i]f we can't, we have the arbitration/Expert Commission option."[385] As he noted, those were "the basic things that [Claimant] understood and thought would be in place for [its] 50-year franchise time period."[386] Mr. Calleja similarly confirmed that the tariff review process established by the LGE and RLGE removed "any arbitrariness [from] the establishment of tariffs. An independent consultant did the study. The [CNEE], of course had the power of control and to make observations . . . And if

[382] *CMS v. Argentina* ¶ 275 **(CL-17)**.

[383] *See supra* Sections III.A.1-2; Reply ¶¶ 52-57; Memorial ¶¶ 27-35.

[384] Tr. (22 Jan. 2013) 560:20-561:12 (Gillette Tribunal Question); *see also* Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (stating that "[t]he 2008 VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework") **(C-305)**; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. (EEGSA) 'BB-' Rating Affirmed; Off CreditWatch" dated 1 Dec. 2008 (noting "the discretionary role of CNEE in the setting of tariffs" during EEGSA's 2008 VAD review) **(C-606)**; Moody's Investors Service, "Moody's Affirms EEGSA's Ratings, Outlook Changed to Stable from Negative" dated 13 Dec. 2010 (remarking on the "lack of predictability during the last review of the . . . (VAD) in 2008") **(C-607)**.

[385] Tr. (22 Jan. 2013) 560:20-561:12 (Gillette Tribunal Question); *see also* Tr. (5 Mar. 2013) 1292:9-16 (Barrera Direct) ("[T]he New Replacement Value, is a method that has its flaws, has its advantages, but at the end of the day, the only guarantee that an Investor has in investing in a Regulatory Framework like this is that the regulator is going to behave in a predictable manner. He's going to behave in a way that is predictable and that is basically behaving in line with the objectives of the Regulation.").

[386] Tr. (22 Jan. 2013) 560:20-561:12 (Gillette Tribunal Question).

there [were] differences . . . an Expert Commission would be created."[387]

103. As also set forth above, from the very beginning of EEGSA's 2008-2013 tariff review, the CNEE was intent on decreasing EEGSA's VAD and tariffs, by "prevent[ing] EEGSA from continuing pricing a network that [had] depreciated over the years at its replacement value."[388] The CNEE thus devised an improper FRC formula with Mr. Riubrugent based upon the steady-state model applied in Brazil, rather than the VNR method applied in Guatemala, for the express purpose of depreciating EEGSA's regulatory asset base by 50 percent and achieving the lowest tariff.[389] As Mr. Kaczmarek observed, this "was a substantial economic change in the regulatory scheme in 2008, when the replacement value of the assets was treated as depreciated rather than new . . . . [I]t's a pillar of the regulatory scheme that it was new."[390] After the Expert Commission ruled against the CNEE on that and other key discrepancies, the CNEE proceeded to ignore both the Expert Commission's decisions and EEGSA's revised VAD study, and to impose a depreciated VAD on EEGSA, which had been calculated by the CNEE's own consultant, Sigla, without any input from EEGSA or its consultant, Bates White.[391]

104. As Mr. Colom candidly observed in an April 2010 presentation to the *Asociación Iberoamericana de Entidades Reguladoras de la Energía*, the 2008-2013 VAD-setting process was "exhausting, but *highly rewarding for the regulator*," and succeeded in eliminating alleged "*[h]istorical distortions* from the VAD (the user pays what it should pay)."[392] In so doing, the CNEE did not merely fail to comply with the provisions of the LGE and RLGE, but eviscerated the fundamental principles and protections set forth in the legal and regulatory framework

[387] Tr. (22 Jan. 2013) 614:15-20 (Calleja Direct).

[388] El Periódico, *Distribution tariff assessment pits EEGSA against the CNEE* dated 1 July 2008 **(C-492)**.

[389] *See supra* ¶¶ 73-74; Email chain from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez Yat, and A. Garcia dated 13 Dec. 2007 (recommending, "first and foremost," the "steady-state" model for the FRC formula used by the Brazilian regulator, ANEEL, "due to its simplicity (*it yields the lowest tariff*)) (emphasis added) **(C-490)**; Tr. (4 Mar. 2013) 1015:14-20 (Moller Cross) ("As I understood, what Consultant Riubrugent explained to us, the concepts of the "2", the "2" denominator were based on his study, and there was an exchange of documents where he actually explained to us how he got to "2" and its meaning, and I understand there was a study or an analysis because it gets to a 50 percent [depreciation]").

[390] Tr. (5 Mar. 2013) 1514:16-21 (Kaczmarek Direct).

[391] *See supra* Section III.A.3; Reply ¶¶ 181-199; Memorial ¶¶ 189-199.

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

established by Guatemala to induce foreign investment in EEGSA, calculating EEGSA's VAD on the basis of its own VAD study, instead of the study of EEGSA's prequalified consultant; calculating that VAD on a depreciated regulatory asset base, rather than a new regulatory asset base; and reducing the three-member Expert Commission to a mere advisor to the CNEE whose decisions are non-binding and always can be ignored.[393] Indeed, as the CNEE's current flowchart for EEGSA's 2013-2018 tariff review reflects, the CNEE has removed the Expert Commission from the tariff review process entirely, replacing the Expert Commission with the CNEE itself.[394]

105. At the Hearing, Guatemala continued to argue that its actions did not fundamentally change the legal and regulatory framework upon which Claimant's investment was premised, because the CNEE always had the authority under LGE Article 5 to set the distributor's VAD unilaterally.[395] This argument not only contravenes all of the express, specific representations outlined above that Respondent made during EEGSA's privatization regarding the CNEE's limited role in the calculation of EEGSA's VAD, but also ignores the fact that, in ruling that the CNEE's actions were lawful under Guatemalan law, the Guatemalan Constitutional Court expressly relied upon Guatemala's 2007 amendment to RLGE Article 98, which allowed the CNEE *for the very first time* to rely upon its own VAD study in certain limited circumstances to calculate the distributor's VAD.[396] Undoubtedly recognizing this, Respondent, at the Hearing, repeatedly asserted that the Constitutional Court *did not* rely upon amended RLGE Article 98 as a justification for the CNEE's actions.[397] As shown at the Hearing and as the Constitutional Court's decisions clearly reflect, this is demonstrably incorrect. The amendment to RLGE Article 98, and the manner in which it was relied upon by the CNEE and

[393] *See supra* Section III.A.3.

[394] EVAD Methodology dated Sept. 2012, at 16 **(C-619)**; *see also* Tr. (4 Mar. 2013) 1165:16-1166:1 (Alegría Direct).

[395] *See, e.g.*, Tr. (21 Jan. 2013) 249:8-21 (Respondent's Opening); Rejoinder ¶ 129.

[396] Reply ¶ 32, ¶¶ 91-100; Memorial ¶¶ 84-93; Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) **(C-104)**.

[397] Tr. (21 Jan. 2013) 248:22-249:7 (Respondent's Opening) ("[T]his morning we were led to believe that it was the opposite, that the decision of the Constitutional Court was based on Article 98, and that is not true. You can read the decisions, Article 98 is not there. I invite you to do so. They are not based on Article 98. They are based on Article 4. They are based on Article 60, of 61, 71 of the law; but not on Article 98."); *see also id*. at 269:19-21.

the Constitutional Court, constituted a fundamental change to the regulatory framework, in violation of the fair and equitable treatment obligation.

1. The 2007 Amendment To RLGE Article 98 Fundamentally Changed The Regulatory Framework Established By Guatemala To Induce Foreign Investment In EEGSA

106. As the evidence demonstrates, shortly before EEGSA's 2008-2013 tariff review was scheduled to commence, Guatemala amended RLGE Article 98 to allow the CNEE to rely upon its own VAD study in certain limited circumstances to calculate the distributor's VAD,[398] a possibility not contemplated in the LGE or RLGE. Respondent, moreover, deliberately excluded this amendment from the drafts circulated by the MEM to the electricity industry, thereby preventing EEGSA and other distributors in Guatemala from raising any objections before the amendment went into effect.[399] To date, Respondent has not proffered any explanation as to why the MEM failed to disclose this amendment in the drafts it circulated to the electricity industry,[400] or during the meetings that it held with distributors to discuss the proposed amendments to the RLGE.[401]

107. Instead, at the Hearing, Respondent attempted to create the misimpression that the amendment to RLGE Article 98 did not fundamentally change the law, by arguing that Article 54 in the draft LGE, which provided that the VAD must be calculated by distributors through a study prepared by its prequalified consultant, had been removed from the final version of the LGE.[402] Respondent thus argued: "Where is it that the VAD has to be determined based on the tariff study of the distributor? It's not there. The law doesn't have it. It was expressly removed

[398] Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) **(C-104)**.

[399] *See* Tr. (22 Jan. 2013) 659:13-660:5 (Calleja Cross); Letter from MEM to the CNEE dated 18 Jan. 2007 (attaching draft resolution with proposed amendments to the RLGE) **(C-101)**; Letter No. CNEE-13063-2007 from the CNEE to the President of Guatemala dated 22 Jan. 2007, at 1-3 **(C-102)**; *see also* Reply ¶¶ 91, 99; Memorial ¶¶ 84-93; Maté II ¶ 6 **(CWS-12)**; Maté I ¶ 6 **(CWS-6)**; Calleja II ¶ 9 **(CWS-9)**; Calleja I ¶ 12 **(CWS-3)**.

[400] *See* Letter from MEM to the CNEE dated 18 Jan. 2007 (attaching draft resolution with proposed amendments to the RLGE) **(C-101)**; Letter No. CNEE-13063-2007 from the CNEE to the President of Guatemala dated 22 Jan. 2007, at 1-3 **(C-102)**.

[401] *See* Minutes of the Meeting with Distributors dated 15 Feb. 2007 **(C-479)**.

[402] Tr. (21 Jan. 2013) 367:9-12 (Respondent's Opening); *see also* Tr. (4 Mar. 2013) 1190:13-1197:19 (Alegría Cross).

from the law."[403] Respondent's argument is deliberately misleading, as LGE Article 74 expressly provides that the distributor's consultant shall calculate the VAD.[404] As Professor Alegría testified, the removal of draft Article 54 from the final version of the LGE thus did not change this principle in any way, as it remained in LGE Article 74.[405]

108. Respondent at the Hearing then sought to minimize the importance of the amendment to RLGE Article 98, by arguing that the amendment did not take away any right or benefit granted to distributors.[406] Thus, Respondent argued that the distributor's right, under LGE Article 74 and the original RLGE Article 98, to calculate the VAD through a study prepared by its prequalified consultant existed solely to benefit the CNEE: "Why do we give the distributor the power to calculate [the VAD]? The answer is simple and obvious if we think about it. The distributor has all the [] information necessary to the methodology to create a fictitious company, which is the formation of the real company plus . . . market to do benchmarking. That is the advantage of having the consultant do the calculation."[407] Respondent's attempt to dismiss the impact of amended RLGE Article 98 on Guatemala's regulatory system is belied by the evidence, which shows that granting the distributor the right to calculate the VAD through its own prequalified consultant provided an important protection to distributors, by limiting the role of the regulator and thus ensuring that the tariff-setting process no longer would be politicized.[408] It also is further contradicted by Respondent's own characterization of amended RLGE Article 98 as imposing a "penalty" on distributors, which do not submit a VAD study, as required under LGE Article 74.[409] The fact that the CNEE hired its own consultant to conduct a parallel VAD study during EEGSA's 2008-2013 tariff review,

[403] Tr. (21 Jan. 2013) 367:9-12 (Respondent's Opening).

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

[405] Tr. (4 Mar. 2013) 1192:13-22 (Alegría Cross) (testifying that this principle "wasn't taken out. It's in Article 74" of the LGE).

[406] *See, e.g.*, (21 Jan. 2013) 249:8-10 (Respondent's Opening) ("The reform to Article 98, we will explain it in a moment, does not change the powers of the CNEE [or] of the Expert Commission.").

[407] *Id*. at 292:6-13.

[408] *See* Tr. (4 Mar. 2013) 1157:3-1158:4 (Alegría Direct).

[409] Tr. (22 Jan. 2013) 656:3-6 (Calleja Cross) ("[Q.] . . . But if you would deliver the study – and this is something that you controlled – in that case, you would not be subject to the penalty applied by the article.").

which it then used to set EEGSA's VAD and tariffs, further undermines Respondent's assertion that the distributor's consultant conducts the study, because the regulator lacks the necessary information to do so.

109. As Mr. Calleja confirmed, the 2007 amendment to RLGE Article 98 "was the first time that the norms included the possibility of the [CNEE] establishing a VAD based on its own study. That was a change in conditions."[410] It also was "of great concern to [EEGSA] because this [was] the first time that it was possible to establish the VAD outside the procedures set forth in the law."[411] While EEGSA thus seriously considered challenging the 2007 amendment in the Guatemalan courts, EEGSA ultimately decided not to do so, because it did not believe that the amendment would apply to its tariff review, and because it did not want to strain its relationship with the CNEE before its 2008-2013 tariff review began.[412] As Mr. Calleja explained, "[i]t was [his] responsibility to issue these studies, and [EEGSA] knew [it] would comply with the deadlines," which meant that the CNEE would not be empowered under amended RLGE Article 98 to set EEGSA's VAD unilaterally based upon its own study.[413] EEGSA also was informed by its counsel that, even if it challenged the amendment to RLGE Article 98, the issue "could not be resolved prior to the deadline for submitting or delivering the study," and so EEGSA "gained nothing in doing it [*i.e.*, challenging the amendment] at the time."[414] Moreover, and as discussed further below, although EEGSA did not challenge the 2007 amendment to RLGE Article 98 at the time it was enacted, EEGSA "did challenge the application of this article through the Terms of Reference."[415] Guatemala's assertion that the amendment to RLGE Article 98 did not fundamentally alter the legal and regulatory regime, because EEGSA did not immediately challenge it in court,[416] thus is blatantly erroneous.

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[410] Tr. (22 Jan. 2013) 614:21-615:2 (Calleja Direct).

[411] Tr. (22 Jan. 2013) 654:19-655:1 (Calleja Cross).

[412] Tr. (22 Jan. 2013) 615:12-18 (Calleja Direct); Tr. (22 Jan. 2013) 659:13-660:13 (Calleja Cross); *see also* Calleja II ¶ 10 **(CWS-9)**; Maté II ¶ 7 **(CWS-12)**.

[413] Tr. (22 Jan. 2013) 615:14-18 (Calleja Direct); *see also* Tr. (4 Mar. 2013) 1167:19-1168:12 (Alegría Direct).

[414] Tr. (22 Jan. 2013) 660:6-13 (Calleja Cross).

[415] *See infra* ¶¶ 118-121; Tr. (22 Jan. 2013) 656:18-657:1 (Calleja Cross).

[416] Tr. (21 Jan. 2013) 228:10-14 (Respondent's Opening).

110. Indeed, as Mr. Colom himself acknowledged in an August 2008 interview,[417] the 2007 amendment to RLGE Article 98 fundamentally changed the legal and regulatory framework for the calculation of EEGSA's VAD, because it subverted the requirement in LGE Article 74 that the distributor calculate the VAD through its own consultant prequalified by the CNEE, and introduced the possibility for the very first time that the CNEE could calculate the distributor's VAD itself on the basis of its own study.[418] As Professor Alegría has explained, the 2007 amendment to RLGE Article 98 not only fundamentally altered the balance struck in the LGE and RLGE between the CNEE and the distributor with respect to the calculation of the distributor's VAD, but also blatantly violated Guatemala's own prior representation in the Memorandum of Sale that "VADs *must be calculated by Distributors* by means of a study commissioned [by] an engineering firm."[419] While Mr. Colom testified at the Hearing that the 2007 amendment "did not add or take away anything within the authority assigned by law to the [CNEE],"[420] that testimony is belied by Mr. Colom's own contemporaneous statements. As Mr. Colom's August 2008 interview reflects, when asked why the CNEE had not relied upon its own study to set EEGSA's VAD in 2003, Mr. Colom responded as follows: "At that time, this is what the regulation and the law established; that is, the Distributor was supposed to conduct its own study. However, *the Regulations were modified in March last year, and now the CNEE is allowed to conduct a parallel study*."[421] When confronted with this evidence, Mr. Colom disingenuously tried to walk away from his prior statement. Despite being quoted in the article, he asserted that the reporter must not have "interpret[ed]" what he said correctly,[422] although he

[417] SIGLO XXI, *EEGSA needs to be efficient* dated 21 Aug. 2008, at 2 ("Five years ago, the CNEE accepted only the study by the distributor, didn't they? [Carlos Colom:] At that time that is what the regulation and the law established; that is, the distributor was supposed to conduct its own study. However, the regulations were modified in March last year and now the CNEE is allowed to conduct a parallel study.") **(C-603)**.

[418] *See infra* Section III.B.2; Tr. (22 Jan. 2013) 614:14-615:2 (Calleja Direct) ("[T]he law that was changed to privatize in '96, it took out any political arbitrariness out of the establishment of tariffs. An independent consultant did the study. The Commission, of course had the power of control and to make observations, it doesn't have to accept them. And if there are differences, the -- an Expert Commission would be created, in which the Commission uses those VADs. In [RLGE Article 98], that was the first time that the norms included the possibility of the commission establishing a VAD based on its own study. That was a change in conditions."); *see also* Tr. (4 Mar. 2013) 1167:10-19 (Alegría Direct).

[419] Tr. (4 Mar. 2013) 1164:10-22 (Alegría Direct); Sales Memorandum, at 53 (emphasis added) **(C-29)**.

[420] Tr. (4 Mar. 2013) 1105:6-8 (Colom Cross).

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

[422] Tr. (4 Mar. 2013) 1107:7-11 (Colom Cross).

was compelled to admit that he never contacted the reporter, or the newspaper in which this interview was published, to make any correction to his statement.[423] Mr. Colom's testimony also is belied by his April 2010 presentation to the *Asociación Iberoamericana de Entidades Reguladoras de la Energía*.[424] As that presentation reflects, Mr. Colom stated that the CNEE had "[l]earned from past mistakes," that "[t]here was a clear need for the regulator to have a technical study (not just the distributor . . ."), and that the "RLGE was amended in 2007 so that the regulator has a technical study."[425] Under these circumstances, Mr. Colom's statement, as quoted in the newspaper, must be accepted as an admission by Respondent that Guatemala fundamentally changed its legal and regulatory regime when it amended RLGE Article 98.[426]

2. The Constitutional Court Relied Upon The 2007 Amendment To RLGE Article 98 To Justify The CNEE's Actions Under Guatemalan Law

111. As Claimant has explained, although the CNEE did not invoke amended RLGE Article 98 as the legal basis for its actions at the time it imposed its own VAD on EEGSA,[427] the CNEE subsequently invoked this amendment in defending its actions before the Guatemalan courts, and the Guatemalan Constitutional Court expressly relied upon it in ruling that the CNEE's actions were lawful under Guatemalan law.[428] As the record reflects, the CNEE's Legal

[423] *Id*. at 1107:22-1108:4.

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

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

[426] *See, e.g.*, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award dated 27 March 2007 ¶ 244 ("Eastern Sugar points to various newspaper interviews of government officials and to a statement by the agriculture ministry before the time of Mr. Palas. These documents, the Czech Republic objects, are neither attributed nor signed. It seeks to discredit these sources as mere political pronouncements, but in the Arbitral Tribunal's view, not properly so. It does happen that the views and the pronouncements of governments are on occasion distorted. However, governments then invariably set the record straight. The Czech Republic did not point to any correction by anybody of political pronouncements, both the earlier governments and the more recent governments down to those of today's Czech government. Under these circumstances, the Arbitral Tribunal must accept this [*sic*] allegations by Eastern Sugar as to the position taken by the then government to be correct.") **(CL-101)**.

[427] Reply ¶¶ 188, 214.

[428] *Id*. ¶¶ 214-215; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 14, 15-20 **(C-331)**.

Department initially justified the CNEE's decision to approve Sigla's VAD study based upon RLGE Article 99 and the impending expiration of EEGSA's existing tariff schedules, rather than amended RLGE Article 98.[429] The Legal Department observed that, "as [EEGSA's] tariff schedule now in place is set to expire on 31 July 2008," and in accordance with the principle stated in RLGE Article 99 that "no distributor may operate without an applicable tariff schedule in place," the CNEE is entitled to approve the VAD study prepared by its own consultant, Sigla, and to establish EEGSA's new tariff schedule on the basis of that study.[430]

112. Although the CNEE later abandoned its reliance on RLGE Article 99 before the Guatemalan courts as a justification for its actions, emphasizing instead the purportedly non-binding nature of the Expert Commission's decisions and its alleged authority under amended RLGE Article 98 to approve its own VAD study,[431] Guatemala in this arbitration has resurrected that argument in order to deflect attention from the fundamental change that it made to its regulatory framework with the amendment of RLGE Article 98.

113. While Respondent argued that RLGE Article 99 justified the CNEE's actions, because that Article allegedly requires the CNEE to ensure that new tariff schedules are in place for each distributor at the end of each five-year tariff period,[432] as Professor Alegría has explained, RLGE Article 99 does not provide any support for Guatemala's assertion.[433] To the contrary, RLGE Article 99 expressly provides that, "[i]f the [CNEE] has not published the new tariffs, the tariffs of the previous tariff schedule shall continue to apply with their adjustment

[429] CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 5, 9-10 **(C-503)**; *see also* Tr. (4 Mar. 2013) 1168:22-1170:8 (Alegría Direct); Alegría II ¶ 79 **(CER-3)**.

[430] Alegría II ¶ 79 **(CER-3)**; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 4-5 **(C-503)**.

[431] Constitutional Court Decision regarding Amparo C2-2008-7964 dated 18 Nov. 2009, at 14 (noting that "the tariff scheme for Empresa Eléctrica de Guatemala, Sociedad Anónima, was assessed based on the independent study prepared by [Sigla]," and that, "[t]o do so, the [CNEE] claimed to have based its decision on [Article] 98 of the General Electricity Law [Regulations]") **(C-331)**.

[432] *See* Tr. (21 Jan. 2013) 270:3-272:10 (Respondent's Opening); *see also* Tr. (4 Mar. 2013) 1255:18-1258:3 (Aguilar Cross); Colom I ¶ 37 **(RWS-1)**; Rejoinder ¶ 126; Counter-Memorial ¶ 70.

[433] Tr. (4 Mar. 2013) 1169:15-1170:8 (Alegría Direct).

formulas."[434] The CNEE thus is under no legal obligation to ensure that the distributor's new tariff schedules are in place at the end of each five-year tariff period, as Guatemala contends. And, in fact, in its Opening Statement, Respondent essentially acknowledged as much.[435]

114. Despite this admission, Respondent's expert, Professor Aguilar, testified that the CNEE's directors would be "liable under the law because they have not observed a legal mandate," if they were to allow the distributor's previous tariff schedule to continue to apply under RLGE Article 99.[436] That testimony not only contradicts Respondent's own admission, but also is illogical, as LGE Article 78 expressly provides that, "[i]n the event that upon the expiration of the period of validity of the rates, the rates have not been set for the next period on account of the [CNEE], they may be adjusted by the awardees according to the automatic adjustment formulas."[437] The CNEE's Directors thus could not possibly incur any liability under the LGE, if they were to allow the distributor's previous tariff schedule to continue to apply under RLGE Article 99, as that also is expressly provided for in the LGE itself.

115. Respondent at the Hearing then wrongly and repeatedly insisted that the Guatemalan Constitutional Court did *not* rely upon amended RLGE Article 98 in ruling that the CNEE's actions were lawful under Guatemala law.[438] That is belied by the Court's decisions and the CNEE's pleadings in those cases.[439] In its 18 November 2009 decision, the Court thus notes that "the tariff scheme for Empresa Eléctrica de Guatemala, Sociedad Anómina, was

[434] Government Accord No. 787-2003 dated 5 Dec. 2003, entered into force on 16 Jan. 2004, Art. 2 (amending RLGE Art. 99) **(C-82)**; *see also* Tr. (4 Mar. 2013) 1169:21-1170:6 (Alegría Direct); Alegría II ¶ 29 **(CER-3)**; Calleja II ¶ 8 **(CWS-9)**.

[435] *See* Tr. (21 Jan. 2013) 324:5-8 (Respondent's Opening) (in arguing that the CNEE would not have had sufficient time to review Bates White's revised VAD study, remarking that, "let's leave to the side whether it was five days or not [that the CNEE had between the time the study was delivered on 28 July 2008 and the date the tariffs expired on 31 July 2008]. *Perhaps the CNEE could have taken [a few weeks more], as they said this morning*.") (emphasis added).

[436] Tr. (4 Mar. 2013) 1258:2-3 (Aguilar Cross).

[437] LGE, Art. 78 **(C-17)**.

[438] Tr. (21 Jan. 2013) 248:22-249:7 (Respondent's Opening) ("[T]his morning we were led to believe that it was the opposite, that the decision of the Constitutional Court was based on Article 98, and that is not true. You can read the decisions, Article 98 is not there. I invite you to do so. They are not based on Article 98. They are based on Article 4. They are based on Article 60, of 61, 71 of the law; but not on Article 98."); *see also id*. at 269:19-21.

[439] Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 14 **(C-331)**; Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 17 **(C-345)**.

assessed based on the independent study prepared by [Sigla]," and that, "*[t]o do so, the [CNEE] claimed to have based its decision on [Article] 98 of the [RLGE]*."[440] 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 . . . .*"[441]

116. The actions that Guatemala took during EEGSA's 2008-2013 tariff review to prevent an increase in EEGSA's VAD fundamentally changed the legal and regulatory framework upon which Claimant's investment in EEGSA was premised, and thus breached Article 10.5.1 of the DR-CAFTA. Respondent's last-ditch attempt to evade responsibility for the fundamental change that it made to the legal and regulatory framework that it adopted to induce foreign investment in EEGSA, by asserting that the Tribunal cannot consider the amendment to RLGE Article 98, because Claimant failed to mention this amendment in its Notice of Intent,[442] also is meritless. At the time Claimant filed its Notice of Intent in January 2009,[443] the CNEE had not invoked amended RLGE Article 98 as the legal basis for approving its own VAD study, nor had the Constitutional Court relied upon that amendment as the legal basis for validating the CNEE's actions under Guatemalan law.[444] In any event, a claimant is not required under the DR-CAFTA to identify every measure about which it complains in its notice of intent, but rather is required to identify only the articles of the DR-CAFTA which it alleges have been breached,

[440] Resolution of the Constitutional Court regarding *Amparo* C2-7964-2008 dated 18 Nov. 2009, at 14 (emphasis added) **(C-331)**.

[441] Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 17 (emphasis added) **(C-345)**.

[442] Tr. (21 Jan. 2013) 267:16-268:15 (Respondent's Opening); Rejoinder ¶ 41.

[443] *See* Notice of Intent.

[444] CNEE-144-2008 dated 29 July 2008 **(C-272)**; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 14 **(C-331)**; Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010, at 17 **(C-345)**.

as well as the legal and factual basis for the dispute.[445] Because the amendment was raised in Claimant's Notice of Arbitration,[446] which was submitted less than three years from the date upon which Claimant learned of Respondent's breach and that it had sustained damages on account of that breach, Guatemala's argument that Claimant's challenge is "time-barred" under Article 10.18.1 of the DR-CAFTA is manifestly erroneous.[447] Respondent's objection is untimely, in any event, as Claimant failed to raise a jurisdictional objection in its Memorial on Jurisdiction and Admissibility and Counter-Memorial on the Merits,[448] as it was required to do under ICSID Arbitration Rule 41(1) and DR-CAFTA Article 10.16.[449]

C. Guatemala Manipulated The Outcome Of EEGSA's 2008-2013 Tariff Review Through A Series Of Arbitrary And Unjustified Actions

117. The CNEE's refusal to accept the Expert Commission's resolution of the VAD dispute that arose between the CNEE and EEGSA during EEGSA's 2008-2013 tariff review, and its decision to impose, in the face of the Expert Commission's adverse rulings, its own VAD on EEGSA that was calculated on the basis of an undervalued and depreciated VNR, constitute manifestly arbitrary treatment by Guatemala in violation of the fair and equitable treatment obligation.[450] As Claimant's witnesses and experts have explained, at the time of EEGSA's 2008-2013 tariff review, several factors indicated that EEGSA's VAD would increase significantly, including that the cost of materials used in electricity distribution, such as copper and aluminum, had far outpaced the rate of inflation from 2003 to 2008, EEGSA's network had

[445] Rejoinder on Jurisdiction ¶ 23; DR-CAFTA, Art. 10.16(2)(b-c) **(CL-1)**.

[446] Notice of Arbitration ¶¶ 44-45; *see also* Memorial ¶¶ 84-93; Rejoinder on Jurisdiction ¶¶ 23-24.

[447] Tr. (21 Jan. 2013) 267:16-268:15 (Respondent's Opening); Rejoinder ¶ 41.

[448] *See* Email from Claimant to the Tribunal dated 25 Oct. 2011; Email from Respondent to the Tribunal dated 27 Oct. 2011.

[449] Rejoinder on Jurisdiction ¶ 24; ICSID Rule 41(1) ("Any objection that the dispute . . . is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General *no later than the expiration of the time limit fixed for the filing of the counter-memorial* . . . unless the facts on which the objection is based are unknown to the party at that time.") (emphasis added); DR-CAFTA Art. 10.16(3) ("Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim . . . (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings . . . . "); DR-CAFTA Art. 10.16(5) ("The arbitration rules applicable under paragraph 3 . . . shall govern the arbitration except to the extent modified by this Agreement.") **(CL-1)**.

[450] *See* Reply ¶¶ 261-271; Memorial ¶¶ 259-280.

grown considerably, and electricity prices had increased (requiring the use of wider, more expensive cables to decrease electricity losses).[451] In order to prevent what would have been an inevitable increase in EEGSA's VAD, the CNEE undertook from the very beginning of EEGSA's 2008-2013 tariff review to manipulate and to control its outcome, culminating in the CNEE's decision to ignore both the Expert Commission's rulings and EEGSA's revised VAD study, and to approve its own VAD study, which neither EEGSA nor Bates White had ever been given the opportunity to review.[452] As in *Cargill*, the CNEE's actions "constitute[] an unexpected and shocking repudiation of [the] very purpose and goals" of the legal and regulatory framework, and "grossly subvert[ed]" that framework "for an ulterior motive."[453]

1. The CNEE Granted Itself Unfettered Discretion In EEGSA's ToR To Ignore EEGSA's VAD Study Under Newly-Amended RLGE Article 98, If It Disagreed With The Results

118. As the record reflects, after Guatemala amended RLGE Article 98, which allowed the CNEE for the very first time to rely upon its own VAD study in certain limited circumstances to calculate the distributor's VAD (including when a VAD study was "not received" from the distributor),[454] the CNEE proceeded to devise a ToR for EEGSA's 2003-2008 tariff review that granted itself unlimited discretion to declare EEGSA's VAD study as "not received," if the

[451] *See* Tr. (4 Mar. 2013) 909:17-910:1 (Giacchino Cross); Tr. (5 Mar. 2013) 1310:19-1311:2 (Barrera Direct); Tr. (5 Mar. 2013) 1511:8-1512:7 (Kaczmarek Direct); Tr. (22 Jan. 2013) 524:5-9 (Gillette Tribunal Question) ("[I]n 2008, my general business expectation was that the rate would likely go up because we had added more assets to the system over time, and the new replacement value of the system as a result had increased."); Giacchino I ¶¶ 73-75, 77, 80 **(CWS-4)** (stating that "there was a tremendous increase in the cost of raw materials" in the intervening period, "particularly copper and aluminum, which impacted the cost of electrical materials;" that there was a significant "increase in demand that occurred between the two tariff reviews;" and that "[t]he significant increase in the price of oil also accounted for some of the increase in the VNR" because "it becomes economically efficient for the distributor to expand its network using materials that minimize losses (such as wider cables and more expensive transformers)"); Kaczmarek I ¶¶ 105-106, 109-110 (noting all three factors) **(CER-2)**. As also explained, the CNEE's decision to compensate the distributor for working capital through the VNR, rather than treat it as a compensable cost, further contributed to an increase in EEGSA's 2008 VNR as compared to its 2003 VNR. Giacchino I ¶ 78 **(CWS-4)**; Kaczmarek I ¶¶ 107-108 **(CER-2)**; Tr. (5 Mar. 2013) 1569:10-14 (Abdala Cross) (acknowledging the same).

[452] *See* Reply ¶¶ 89-207; Memorial ¶¶ 84-199.

[453] *Cargill v. Mexico* ¶ 293 **(CL-12)**; *see also RDC v. Guatemala* ¶ 227 (finding a fair and equitable treatment violation when the President exercised his "discretion and used it with the approval of his Government for a purpose different from that for which it was justified . . . .") **(CL-92)**.

[454] *See supra* Section III.B; Government Accord No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) **(C-104)**.

CNEE disagreed with the results. As Mr. Calleja testified, under ToR Article 1.9,[455] the CNEE "could decide whether or not [EEGSA] had sent [its VAD study] regardless of the fact that [EEGSA] had . . . sent it [or not]."[456] Article 1.9 thus "radically change[d] the scenario, because the [CNEE] unilaterally could decide to approve the study regardless of what we did or the consultant or any of the parties [did]."[457] EEGSA consequently challenged these ToR, and, as Mr. Calleja testified, it obtained a provisional "Amparo that protected [it] from these Terms of Reference."[458]

119. As EEGSA's action for legal protection (*amparo*) reflects, EEGSA argued, among other things, that, although the LGE authorized an Expert Commission to resolve any disagreements between the CNEE and the distributor, EEGSA's ToR provided, in effect, that "if CNEE does not like the study, it considers it not delivered and issues its own VAD without any study" by the distributor, and that the ToR thus would enable the CNEE to obtain "the VAD it wants, something the legislat[ure] wished to avoid."[459] Although this ultimately would be the position adopted by the CNEE—and by Guatemala before this Tribunal—in order to persuade EEGSA to withdraw its provisional *amparo*, the CNEE agreed to amend certain objectionable provisions in the ToR, including Article 1.9, which gave the CNEE authority that it did not have under the LGE and RLGE.[460] As Mr. Calleja testified, the CNEE "recognized that [EEGSA was] right in many cases," and "modified the Terms of Reference and allowed [them] to move forward in the tariff processes."[461] The CNEE thus agreed, among other things, to replace Article 1.9 with Article 1.8, which limited the CNEE's authority to making observations on

[455] CNEE Terms of Reference dated Apr. 2007 ToR, Art. 1.9 (providing that the CNEE could consider EEGSA's VAD study as "not received if, in its own judgment, the results requested in the ToR were not included, such that the Study may be deemed to be incomplete, or to provide a partial or distorted portrayal") **(C-106)**.

[456] Tr. (22 Jan. 2013) 656:10-12 (Calleja Cross).

[457] *Id*. at 655:18-21.

[458] *Id*. at 636:20-21; *see also id*. at 631:21-633:2, 655:14-21 (testifying that EEGSA was "trying to put a stop to what [it] thought was noncompliance, was a breach of the legal framework"); Decision of the Sixth Civil Court of First Instance dated 4 June 2007 **(C-114)**; Decision of the Sixth Civil Court of First Instance Confirming Amparo C2-2007-4329 dated 11 June 2007 **(C-115)**.

[459] EEGSA Amparo Request to the First Civil Court dated 29 May 2007, at 6 **(C-112)**.

[460] Tr. (22 Jan. 2013) 616:3-8 (Calleja Direct); Tr. (22 Jan. 2013) 627:1-17 (Calleja Cross).

[461] Tr. (22 Jan. 2013) 633:18-21 (Calleja Cross).

EEGSA's VAD study in accordance with LGE Article 74, and provided that "the CNEE shall have a period of two (2) months to evaluate the Study's Final Report submitted by the Distributor"; that, "[a]s a result of the evaluation, *the CNEE shall make such observations as it may deem necessary*"; and that "*[t]he Distributor shall analyze said observations, make any corrections it deems appropriate* and send the corrected final report of the study to the CNEE within fifteen (15) days of receiving the observations."[462]

120. As Messrs. Calleja and Maté have explained, although EEGSA was able to reach agreement with the CNEE on several issues, including Article 1.9, the ToR still contained numerous objectionable articles regarding the manner in which the VAD was to be calculated.[463] As Mr. Calleja noted, "what the law says is the recognized costs are those of an efficient company, and that is why someone who is independent has to come and determine, not someone from the government."[464] And, yet, the ToR contained provisions that predetermined the results of the VAD study, in violation of LGE Article 74, which provided that the VAD should reflect the costs of an efficient company and that those costs should be determined on the basis of an independent study conducted by the distributor's consultant.[465] At the Hearing, Messrs. Calleja and Giacchino offered several examples where the ToR ran afoul of the law in this respect. For example, rather than the consultant determining the appropriate level of the efficient company's contingency for costs, the ToR stipulated that contingency for costs must not exceed 5 percent.[466] As another example, the ToR stipulated that 2006 reference prices must be used in calculating the model company's costs,[467] ignoring the fact that more recent reference prices were available

[462] 2007 Terms of Reference dated Jan. 2008, Art. 1.8 (emphasis added) **(C-417)**.

[463] Tr. (22 Jan. 2013) 679:1-4, 680:10-13 (Calleja Tribunal Question) (confirming that EEGSA saw "many contradictions between the Terms of Reference and the law," when the parties agreed to Article 1.10, and that it was "impossible to negotiate article by article").

[464] Tr. (22 Jan. 2013) 628:12-15 (Calleja Cross).

[465] LGE, Art. 74 **(C-17)**.

[466] *See* 2007 Terms of Reference dated Jan. 2008, Art. 3.6 ("The percentages that duly justified could be considered as maximum limit for some construction units are listed as follows: . . . Unforeseen events: five percent (5%) of the cost of materials, labor, vehicles and assembly and engineering equipment.") **(C-417)**; Tr. (22 Jan. 2013) 692:7-9 (Calleja Tribunal Question) ("[E]stablishing this 5 percent is not a guideline. It is a specific – a specific line."). The Expert Commission ruled that a contingency of 15 percent should be used for labor costs. *See* EC Report, at 47 **(C-246)**.

[467] *See* Tr. (Mar. 4, 2013) 850:20-851:6 (Giacchino Cross) ("the Terms of Reference said that you have to use 2006 as the base year to calculate the prices in the VNR. . . . Bates White proposed to use [ToR Articles] 1.5

and that the relevant prices had increased significantly since 2006.[468]

121. Consequently, as a condition for withdrawing its provisional *amparo*, EEGSA also insisted on the addition of a new Article 1.10, which expressly provided that the ToR were "guidelines to follow in preparation of the Study," and thus were subject to and did not amend the LGE or RLGE,[469] and that EEGSA's consultant could deviate from the ToR if it provided a reasoned justification for doing so.[470] Consistent with LGE Article 74 and Article 1.8 of the ToR, Article 1.10 further provided that the CNEE could make observations with respect to those deviations, "as it deems necessary, confirming that they are consistent with the guidelines for the Study."[471] Thus, "in good faith, [EEGSA] withdrew the Amparo, [after the CNEE agreed to] the inclusion of [Article] 1.10."[472]

122. The written and oral testimony of Claimant's witnesses regarding Article 1.10 is fully consistent with the interpretation of that Article given by all three members of the Expert Commission in its 25 July 2008 Report, including the CNEE's own appointee, Mr. Riubrugent.[473] As that Report reflects, the Expert Commission concluded that EEGSA's consultant had authority under Article 1.10 "to deviate from the guidelines in the TOR."[474] As the Expert Commission observed, "[c]onsidering that the TOR constitute guidelines related to

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and 1.10 and use the most current prices for the calculation of the VNR"); 2007 Terms of Reference dated Jan. 2008, Art. 3.3 **(C-417)** ("[R]eference prices shall derive from information sources corresponding to actual purchases. [S]aid purchases must have been made within the base year, if not, purchases of previous years may be used."); *id.*, Art. 1.2 (defining "Base Year" as the "[t]ime period to be computed from January 1 to December 31 of two thousand and six (2006)").

[468] As the Expert Commission's Report reflects, the Expert Commission concluded that "to determine the VNR of the grid, the effective prices for all goods and services must be taken at the latest possible time since by definition, the intent is to determine the cost of replacement of the grid of that model company under study." *See* EC Report, at 33 **(C-246)**.

[469] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[470] Tr. (22 Jan. 2013) 627:1-628:4, 633:22-634:7 (Calleja Cross); *see also id*. at 627:19-628:1 (testifying that "[A]rticle 1.10 of the Terms of Reference allowed the consultant, who is the consultant established under the law who has to calculate [the VAD,] in cases of conflict between the Terms of Reference and the law, the law prevailed"); 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[471] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

[472] Tr. (22 Jan. 2013) 637:1-17 (Calleja Cross).

[473] EC Report, at 11-13 **(C-246)**.

[474] *Id*., at 11.

the manner in which the Consultant must perform the Tariff Study, and that the TOR themselves indicate that: a) the Consultant may deviate from [the] same justifiably, with [the] CNEE able to make observations to such deviations when [the] same are not consistent with the Study and b) that the TOR incorporate all the terms of the LGE and RLGE," the issue to be resolved by the Expert Commission is "whether the Consultant's justification in the Tariff Study is in accordance with the Law and the Regulations of the General Law of Electricity."[475] Contrary to Guatemala's current position in this arbitration,[476] the Expert Commission further observed that it did not "consider that the decision about the discrepancies is reduced to determining if in each of them, the Consultant deviated from the TOR or not, and if it was justified in doing so or not," because "[e]very deviation, by definition, presupposes a deviation from the TOR guidelines."[477] As the Expert Commission explained, "[t]he issue is to discern whether the Consultant's Tariff Study, considering the TOR as guidelines, has performed a task that is in accordance with the requirements of the Law and the Regulations, or otherwise determine if given the justifications of the deviations, CNEE maintained and certifies that the requirements of the TOR better reflect the requirements of the Law."[478]

123. Understanding full well the agreement that it had reached with EEGSA regarding Article 1.10, the CNEE, after it received adverse rulings from the Expert Commission on several key discrepancies, proceeded to impose its own VAD on EEGSA and justified its actions—and is attempting to justify those same actions before this Tribunal—by interpreting Article 1.10 in a manner that is contrary to its plain meaning, at odds with the context in which it was negotiated, and illogical. Respondent thus asserts that the ToR issued by the CNEE were final and binding, that EEGSA's only recourse was to challenge the ToR in the Guatemalan courts, and that, once

[475] *Id*., at 12 (emphasis removed).

[476] *See, e.g.*, Tr. (4 Mar. 2013) 1040:6-1044:6 (Moller Cross) (testifying that the Expert Commission's role is to determine whether or not the distributor's consultant did or did not deviate from the Terms of Reference); Tr. (4 Mar. 2013) 1264:22-1265:8 (Aguilar Tribunal Question) ("The Commission is the one to determine whether the Terms of Reference and the observations were complied with. If there is no compliance, based on Article 98 and the fifth article of the law, the tariff scheme shall be issued always based on a study and in this case on an independent study.").

[477] EC Report, at 13 **(C-246)**.

[478] *Id*., at 13.

EEGSA withdrew its provisional *amparo*, the ToR had to be complied with in full.[479] Respondent further contends that Article 1.10 could not be used by EEGSA's consultant to deviate from the ToR, unless the CNEE had expressly approved its deviation in advance,[480] and that, because EEGSA's consultant deviated from the ToR without the CNEE's express prior approval, the CNEE was entitled to reject its VAD study, irrespective of the Expert Commission's rulings, and to use its own study to set EEGSA's VAD.[481]

124. The contemporaneous evidence does not support, and indeed contradicts, Guatemala's assertions. Article 1.10 does not grant the CNEE authority to approve or to reject the consultant's deviations from the ToR; to the contrary, Article 1.10 provides that "*the CNEE shall make such observations regarding the changes as it deems necessary, confirming that they are consistent with the guidelines for the Study*."[482] Making observations on the consultant's deviations is not the same as approving those deviations. Nor does Article 1.10 provide that the CNEE's observations on the consultant's deviations are mandatory; rather, Article 1.10 provides that the CNEE shall make such observations "*as it deems necessary*." If, as Guatemala and its witnesses contend, EEGSA's consultant was permitted to deviate from the ToR only when the CNEE had expressly approved its deviation, Article 1.10 would *require* the CNEE's approval of each and every deviation, which it plainly does not.

125. There also is no contemporaneous evidence showing that the CNEE ever disputed EEGSA's use and interpretation of Article 1.10 at the time, or otherwise informed EEGSA that it

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[479] *See, e.g.*, Tr. (4 Mar. 2013) 1042:20-1043:11 (Moller Cross) ("There is a period of time in which the Commission draws up the Terms of Reference. It's a period of time that document is known to the Distributor, and at that moment, if the Distributor has any issues with what is set forth in the Terms of Reference, it can so note, it can oppose it, it can submit an appeal and it goes to the Ministry of Energy and Mines which hears the appeal. The Ministry of Mines resolves--or rules on to whether it's the Distributor or the Commission that's right. After there's a resolution by the Ministry, there's a next instance, which is the Courts. But having completed the process, the Terms of Reference are firm. And they are mandatory."); *see also* Tr. (21 Jan. 2013) 291:13-292:3 (Respondent's Opening); Tr. (4 Mar. 2013) 1150:2-8 (Colom Tribunal Question); Tr. (4 Mar. 2013) 1252:19-1253:6 (Aguilar Cross).

[480] *See, e.g.*, Tr. (4 Mar. 2013) 1144:6-18 (Colom Cross); *id*. at 1150:22-1151:3 (Colom Tribunal Question) ("I understand that if there was an exceptional circumstance and the need to include a deviation, and it was approved by the Commission, the consultant could do so.").

[481] *See, e.g.*, Tr. (21 Jan. 2013) 382:11-385:19 (Respondent's Opening); Tr. (4 Mar. 2013) 1040:6-22 (Moller Cross); *id*. at 1055:11-21.

[482] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 (emphasis added) **(C-417)**.

needed its prior approval to deviate from the ToR under Article 1.10. To the contrary, what the contemporaneous evidence shows is that, consistent with Mr. Calleja's testimony, the CNEE responded to Bates White's deviations by making observations,[483] which in turn gave rise to discrepancies that were submitted by the CNEE to the Expert Commission for resolution.[484]

126. Moreover, contrary to Respondent's argument at the Hearing, the last phrase in Article 1.10, providing that "the CNEE shall make such observations regarding the changes as it deems necessary, *confirming that they are consistent with the guidelines for the Study*," does not mean that the CNEE has authority to reject the consultant's deviations from the ToR, if it determines that those deviations are inconsistent with the ToR, which, as the Tribunal noted, would be circular.[485] Rather, as Mr. Giacchino confirmed, the last clause of Article 1.10 must be interpreted to require that the CNEE's observations be consistent with the ToR, *i.e.*, the CNEE's observations could not be used as an opportunity to insert new and different criteria, but had to be consistent with the ToR.[486]

127. Respondent's interpretation also is illogical. Article 1.10, as now interpreted by Respondent, would have provided no benefit to EEGSA that would have induced it to withdraw its provisional *amparo* against the ToR: as the Expert Commission observed, the very nature of

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

[484] Resolution No. CNEE-96-2008 dated 15 May 2008 **(C-209)**.

[485] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**; Tr. (4 Mar. 2013) 1149:17-1150:8 (Colom Tribunal Question) ("[Q.] So, we need to read that phrase meaning the consistency with the guidelines under the Terms of Reference. So, do you think that this is a circular reference, so we're talking about Terms of Reference that have to be consistent with the Terms of Reference themselves? [A.] Well, we were saying that the Terms of Reference cannot be changed. Once the Terms of Reference are final, the consultant cannot change them. Why? Because the law is clear at Article Number 4 that it is the Commission the one that determines the methodology for the fixing of the rates.").

[486] The ToR, for example, required the consultant to use a factor of no more than 12 percent for engineering costs. Bates White relied on ToR Article 1.10 to justify using a 15 percent factor. In its observations, the CNEE then argued that an 8 percent factor should be used. This was an example where the CNEE's observations were inconsistent with the ToR, in violation of the last clause of Article 1.10. The Expert Commission ultimately ruled that a 12 percent factor should be used. *See* 2007 Terms of Reference dated Jan. 2008, Art. 3.6 **(C-417)**; Letter No. 15553-2008 from the CNEE to EEGSA dated 8 Feb. 2008, at 10 (asserting that "the maximum percentage recognized by the SIGET [General Superintendence of Electricity and Telecommunications (SIGET) of El Salvador] is 8%, a value which is far below the 15% suggested by EEGSA," and that "[t]he Distributor must consider for the engineering, monitoring and management items, a benchmark value of 8%, and only in those cases where it is duly justified and supported, the percentage may be higher") **(C-160)**; EC Report, at 45-46 **(C-246)**; Tr. (4 Mar. 2013) 952:6-953:5 (Giacchino Redirect).

the deviations presupposes that they are inconsistent with the ToR,[487] and, as Mr. Calleja confirmed at the Hearing, EEGSA withdrew its provisional *amparo* only because the CNEE modified the ToR to permit EEGSA's consultant to deviate from them.[488] Likewise, it would have been unnecessary to constitute an Expert Commission to determine whether Bates White's VAD study complied with the ToR, because Bates White expressly indicated in its study that it was deviating from the ToR based upon Article 1.10, so its compliance with the ToR never was in dispute.[489] Mr. Moller's oral testimony that it was his "understanding" that the Expert Commission's role was to rule "on whether the consultant did or did not divert from the Terms of Reference," and that it "has to make a determination as to whether Factor 1 or Factor 2 or what have you, is or is not in keeping with the Terms of Reference,"[490] thus is implausible. So too was his testimony that he was unaware that there was no dispute that Bates White had invoked Article 1.10 to depart from the ToR.[491] In fact, Respondent repeatedly has emphasized the number of times that Bates White invoked Article 1.10;[492] it simply is not credible that there was any dispute as to whether Bates White had complied with the ToR.

128. Respondent's argument at the Hearing that the ToR are part of the law and, thus,

[487] EC Report, at 13 **(C-246)**.

[488] Tr. (22 Jan. 2013) 647:11-14 (Calleja Cross) (confirming that Article 1.10 was "the tool to eliminate the Amparo" and that, if EEGSA "had not been protected by the amendment of [Article] 1.10, [the tariff review] would have never happened"); *see also id*. at 683:18-21 (Calleja Tribunal Question) (testifying that "had we not prevailed with Amparo, we would never have -- we would not have accepted Terms of Reference to reduce the rights that we had by law").

[489] *See, e.g.*, Bates White Stage D Report: Annuity of the Investment dated 5 May 2008, at 4 (invoking ToR Article 1.10 as the basis for Bates White's departure from the FRC formula set forth in the ToR) **(C-199)**.

[490] Tr. (4 Mar. 2013) 1042:2-19 (Moller Tribunal Question); *see also* Tr. (4 Mar. 2013) 1044:9-15 (Moller Cross) (Q. "So, just to confirm, Mr. Moller, your position is that the only discrepancy that can be decided by the Expert Commission is whether or not the Distributor's consultant complied with the Terms of Reference; is that correct? A. Fundamentally, we understand that that is the role of the Expert Commission."); Tr. (4 Mar. 2013) 1044:17-22 (Moller Cross) ("Q. And the discrepancies are only whether or not the Distributor's consultant complied with the ToR, the Terms of Reference? A. The discrepancy comes about as to whether or not the Terms of Reference were or were not abided by, and this is determined by three Experts.").

[491] *See* Tr. (4 Mar. 2013) 1046:1-8 (Moller Cross).

[492] *See, e.g.*, Tr. (21 Jan. 2013) 306:3-4 (Respondent's Opening); Tr. (22 Jan. 2013) 650:13-16 (Calleja Cross). In any event, as Mr. Calleja noted, Respondent's allegation that Bates White departed from the ToR 423 times entails multiple double-counting, as there are nowhere near 423 items in the ToR. Tr. (22 Jan. 2013) 650:2-4 (Calleja Cross). Moreover, given that 69 discrepancies were submitted to the Expert Commission for resolution, if Bates White had departed from the ToR 423 times, that would mean that the CNEE agreed that it was justified in having done so 354 times, or 84 percent of the time. *See* Tr. (4 Mar. 2013) 842:14-843:8 (Giacchino Cross).

because EEGSA's VAD study must comply with the law, it must comport with the ToR, similarly is illogical.[493] The ToR themselves expressly state that they are guidelines and subject to the LGE and RLGE, and that there may be "changes in the methodologies set forth in the Study Reports, which must be fully justified."[494] Neither the LGE nor the RLGE was designed to grant the CNEE unilateral discretion to ignore its provisions simply by drafting ToR that deviate from them and, yet, that is the consequence of accepting Guatemala's argument.

129. The CNEE's actions in persuading EEGSA to withdraw its provisional *amparo* against the ToR; in agreeing to Article 1.10; and then in adopting the position that the ToR were final and could not be challenged by EEGSA unless it returned to the Guatemalan courts, and that EEGSA's deviations from the ToR justified the CNEE's decision to approve its own VAD study evidence not only Respondent's manifestly arbitrary conduct, but also the CNEE's bad faith. As Mr. Calleja confirmed, if the CNEE had not agreed in Article 1.10 to allow EEGSA's consultant to deviate from the ToR, EEGSA never would have withdrawn its provisional *amparo*.[495] The CNEE thus persuaded EEGSA to withdraw its provisional *amparo* by agreeing to amend the ToR to permit EEGSA's consultant to deviate from them, and then used EEGSA's deviations from the ToR as the very basis for approving its own VAD study.[496] Respondent, once again, induced EEGSA to take action—*i.e.*, withdraw its provisional *amparo* and proceed with the tariff review process—and then, after the CNEE had gained the benefit of that action, arbitrarily reneged on its commitments by using EEGSA's deviations from the ToR—the very thing that the CNEE had granted in exchange for EEGSA withdrawing its provisional *amparo*—as the basis for approving its own VAD study. This is the epitome of arbitrary, bad faith action by the State against which the fair and equitable treatment obligation is designed to protect.

[493] *See, e.g.*, Tr. (21 Jan. 2013) 382:11-20 (Respondent's Opening) (arguing that the "CNEE fixes the Terms of Reference," and that the distributors "then have to prepare their study based on the Terms of Reference").

[494] 2007 Terms of Reference dated Jan. 2008, Art. 1.10 **(C-417)**.

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

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

2. The CNEE Inserted An Improper FRC Formula Into EEGSA's ToR, Arbitrarily Invoked Newly-Amended RLGE Article 98, And Failed To Engage In Good Faith Discussions With EEGSA And Its Consultant During The Tariff Review Process

130. Respondent also acted in a manifestly arbitrary manner by adding an FRC formula to EEGSA's 2008-2013 ToR that was inconsistent with the regulatory framework that Guatemala had adopted to induce foreign investment; by invoking newly-amended RLGE Article 98 in a bad faith attempt to derail the tariff review process and to grant itself unfettered discretion to set EEGSA's VAD without any input from EEGSA or its consultant; and by failing to engage with EEGSA or its consultant during the tariff review process. The testimony at the Hearing confirmed the arbitrary, unfair, and, indeed, bad faith nature of each of these actions.

131. After EEGSA and the CNEE had reached agreement on Article 1.10, the CNEE issued a revised ToR in January 2008, which included for the very first time an FRC formula.[497] As noted above, the CNEE inserted the FRC formula with the "2" into the ToR without any explanation,[498] leading Bates White to conclude that, in fact, the "2" was an inadvertent error. As also noted above, the evidence establishes that the CNEE devised this FRC formula with Mr. Riubrugent based upon the steady-state model applied in Brazil, rather than the VNR method applied in Guatemala, for the express purpose of depreciating EEGSA's regulatory asset base by 50 percent and thus achieving the lowest tariff.[499]

132. Neither Mr. Colom nor the members of the CNEE's Tariff Division understood the FRC formula that the CNEE included in the ToR, and thus specifically asked Mr. Riubrugent to explain the purpose of the "2" in the denominator.[500] As Mr. Moller confirmed on cross-

[497] 2007 Terms of Reference dated Jan. 2008, Art. 8.3 **(C-417)**.

[498] *Id.*; *see also* Tr. (4 Mar. 2013) 959:14-21 (Giacchino Tribunal Question) ("[Q.] . . . there is nothing in the Terms of Reference saying what is the reference period for the depreciation, or am I wrong? [A.] No, there is nothing there, and all it has is the formula, the Factor 2, and then another factor, TA minus one . . . . ").

[499] *See supra* ¶¶ 73-74, 103; Email exchange between J. Riubrugent and M. Peláez dated 13 Dec. 2007, at 1 ("If feasible, I would first and foremost suggest using the 'steady-state' model due to its simplicity (*it yields the lowest tariff*)") (emphasis added) **(C-490)**; Email exchange between J. Riubrugent to M. Peláez dated 19 Dec. 2007 **(C-491)**; Email exchange between M. Peláez to J. Riubrugent dated 9 Jan. 2008, at 2 ("In the final formula we defined for the CRF based on the 'steady-state' model") **(C-567)**.

[500] Email exchange between M. Peláez to J. Riubrugent dated 9 Jan. 2008, at 2 ("Jean, sorry to bother you, but Eng. Colom has asked us a question we can't answer and we will therefore appreciate your assistance. In the

examination, he "wasn't familiar with this," and he "understood that Mr. Colom was not familiar with this, and [they therefore] asked for an explanation of what that really represented, what was it, what was its effect . . . ."[501] In his email to Ms. Peláez, Mr. Riubrguent explained that the "2" in the denominator had the effect of reducing EEGSA's VNR by half, in blatant violation of LGE Articles 67 and 73: "[T]he aggregate depreciation of the whole of these assets totals half of the new value (NRV) and, naturally, the residual value is half the new value of that fraction (that is the '2' in the denominator on the second term of the formula's second member!)."[502]

133. As Respondent acknowledged at the Hearing, however, in a regulatory system using the model efficient company approach and the VNR method, the regulatory asset base is valued as if it were new:

> Once the model company has been built with all of these optimal facilities, we have to value it. How do we value it under Guatemalan law? We said it this morning: It is on the basis of the VNR, which is very well known in this arbitration, the New Replacement cost. What does it mean to value the VNR or new value? In practical terms it means that each facility will be given the price that it would have in the market today if it had to be replaced by the best asset in the market that would replace that function. That is all it is. It is [nothing] more than a price updating system similar to the ones we know based on inflation. But this one has the advantage that it includes the market price of the best asset at the time.[503]

134. And, yet, Respondent's expert conceded that the effect of the CNEE's FRC formula was to depreciate that regulatory asset base by half.[504] Moreover, as Respondent's witnesses and experts testified, the "2" in the formula was meant to approximate the actual depreciation level of the distributor's assets and, in fact, could be replaced by its actual level of

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final formula we defined for the CRF based on the 'steady-state' model . . . what does 2 mean? Or what is the concept for it? Thanks a lot in advance for your invaluable cooperation) (emphasis removed) **(C-567)**.

[501] Tr. (4 Mar. 2013) 1021:8-15 (Moller Cross).

[502] Email exchange between M. Peláez to J. Riubrugent dated 9 Jan. 2008, at 1 **(C-567)**. Neither Ms. Peláez nor Mr. Riubrugent has been presented as a witness in this arbitration, and no explanation was offered at the Hearing by Respondent or by any of its witnesses for their absence.

[503] Tr. (21 Jan. 2013) 293:17-294:9 (Respondent's Opening).

[504] Tr. (5 Mar. 2013) 1418:1-8 (Damonte Direct) (testifying that "the Commission [*i.e.*, the CNEE] said '2' which is 50 percent of accumulated depreciation, thinking that this was a mature company and the average value was 50 percent").

depreciation, if it were made available by the distributor.[505] It makes no sense, however, to go through the exercise of calculating the new replacement value of the assets, only to depreciate that value by the amount by which the distributor's *actual* assets have depreciated or, in lieu of that, by 50 percent. As an initial matter, the actual assets are not the assets that are being valued; the assets that are being valued are those of "optimal facilities." Even Mr. Damonte recognized that "[t]he key idea here is to understand the model, is that this is *forward-looking*."[506] None of Respondent's experts offered a cogent explanation as to why the distributor should value the assets of a model company, and then depreciate those "optimal" assets by the amount that the distributor's actual assets have depreciated. Furthermore, if the LGE and RLGE intended the regulatory asset base to be depreciated, not only would they not expressly provide that the *New Replacement Value* of the assets should be used, but they also would provide some guidance as to how the depreciation rate should be calculated. Again, none of Respondent's experts or witnesses offered any explanation as to why the LGE and RLGE are silent in this regard.

135. Nor did any of Guatemala's experts contest the fact that the distributor must be compensated for maintenance capital expenditures, either as a cost or through the VNR. As Mr. Kaczmarek observed, "if the network was old, if it was depreciated, [the CNEE] would have to recognize a Model Company would incur maintenance CAPEX, and they should be putting that into the VNR, but they do not. They explicitly do not put it in there, so that is the major contradiction in the way they're arguing why the network ought to be depreciated because they're not compensating for maintenance CAPEX in the tariff."[507] In response, Respondent and

[505] Tr. (4 Mar. 2013) 1027:10-1028:19 (Moller Cross).

[506] Tr. (5 Mar. 2013) 1394:14-15 (Damonte Tribunal Question) (emphasis added); *see also* Tr. (5 Mar. 2013) 1397:10-17 (Damonte Tribunal Question) (testifying that the VNR method "does not take into account what happened, if you will, in connection with the life of the asset"); Tr. (5 Mar. 2013) 1398:2-5 (Damonte Tribunal Question) (testifying that, under the VNR method, "[o]f course, we're talking about new – a new good. We're not talking about a secondhand market").

[507] Tr. (5 Mar. 2013) 1510:16-1511:1 (Kaczmarek Direct). Unlike *maintenance* CAPEX (*i.e.*, expenditures to maintain or replace old assets), the VNR does include *expansion* CAPEX (*i.e.*, expenditures to build new assets to expand the coverage of the network to service new customers). This is because, under the VNR method, the distribution network is valued at what it would cost a new company to enter the market and service the area with efficient technology. Thus, for each tariff period, the distributor must first calculate the area of demand and any anticipated expansion of the network, and then model an efficient company to service that area. *See* Kaczmarek II ¶¶ 86-87 **(CER-5)**; Kaczmarek I nn.24 & 144 **(CER-2)**; Tr. (22 Jan. 2013) 526:1-10 (Gillette Tribunal Question) (explaining that the distributor is not compensated for its actual capital expenditures, but the VNR increases when the size of the physical network and/or number of customers increases).

its experts resurrected earlier arguments, asserting that the return of capital payment (or 1/To) in the FRC formula compensates the distributor for maintenance capital expenditures.[508] Consistent with LGE Article 73, however, the 1/To simply provides the distributor with a return of its investment over the life of its investment in equal annual installments; thus, for example, the distributor may receive a return of 1/30 of its investment each year for 30 years.[509] If a portion of this amount was used by the distributor for maintenance capital expenditures, the distributor never would receive back its investment, which, as Mr. Kaczmarek has noted, would be equivalent to never receiving the principal payment on a bond.[510] Including an FRC formula that calculated EEGSA's return off of a depreciated asset base, when Guatemala adopted the VNR method in the LGE and RLGE, was manifestly arbitrary and unjust, as it contravened prior specific representations, was antithetical to the regulatory regime adopted by Guatemala to attract foreign investment, and cut the distributor's return on capital by half.

136. In addition, as Bates White was preparing EEGSA's VAD study, the CNEE refused to hold any meaningful discussions with EEGSA and Bates White regarding EEGSA's VAD study, despite EEGSA's repeated requests.[511] Although the CNEE and its consultants had

[508] *See* Tr. (21 Jan. 2013) 287:4-7 (Respondent's Opening) (arguing that "the tariff pays the distributor depreciation what is known as the return of capital invested that is done in quotas over the useful life of the facilities"); Tr. (5 Mar. 2013) 1406:17-22 (Damonte Direct) (arguing that depreciation is mentioned implicitly in LGE Article 73, which provides that "the cost of capital shall be calculated as an annuity that will be calculated on the typical life of the distribution facilities"); Abdala I ¶ 56 ("The Cost of Capital ('CoC') is composed of two factors: the return on capital, and replacement of capital (*i.e.*, depreciation). There are two of the VAD's main components. . . . The return on capital is the benefit received by the firm on its immobilized capital. On the other hand, capital replacement costs are the funds needed to maintain the company's assets in an optimal condition, or replace them when they reach the end of their useful life.") **(RER-1)**; *see also* Tr. (5 Mar. 2013) 1407:20-22 (Damonte Direct) (arguing that LGE Article 83 excludes depreciation as an expense, "because that is part of the WACC, and it shouldn't be introduced anywhere else"). Under this interpretation of LGE Article 83, the distributor never will receive its cost of capital, because it will have to use a portion of its return on capital – or profit – which is calculated as the WACC to maintain the network. *See* Tr. (5 Mar. 2013) 1511:2-6 (Kaczmarek Direct) ("[W]hat that does is that leaves the utility with less profit, and in fact, what they have to do is use their profit to cover the maintenance CAPEX, never really getting any kind of return out of the company at all.").

[509] *See* Tr. (5 Mar. 2013) 1506:21-1507:3 (Kaczmarek Direct) ("One over To, as I said, is a return of your investment. You've invested in the utility, you acquired it, you need to get your money back, of course. . . . It's not depreciation."); Kaczmarek I ¶ 116 **(CER-2)**. Respondent's assertion that the distributor's return of capital is depreciation also directly contradicts RLGE Article 83, which provides that depreciation cost is *not* part of the VAD.

[510] Kaczmarek II ¶ 39 **(CER-5)**.

[511] Calleja II ¶ 21 **(CWS-9)**; Giacchino II ¶ 14 **(CWS-10)**; Giacchino I ¶ 25 **(CWS-4);** Maté II ¶ 16 **(CWS-12)**.

worked directly with EEGSA and its consultant during EEGSA's 2003-2008 tariff review, with almost daily email communications regarding EEGSA's VAD study,[512] the CNEE held only one meeting with EEGSA and Bates White during EEGSA's 2008-2013 tariff review to discuss EEGSA's Stage A Report, following which neither the CNEE nor its consultants submitted any comments.[513] As Dr. Barrera has noted, in his experience, "this is extremely unusual and at odds with what [he] would expect from a regulator acting in good faith."[514]

137. As Mr. Colom confirmed at the Hearing, one of the first decisions that he took as President of the CNEE was to communicate with EEGSA only through "formal" means, such as official letters and resolutions, rather than through meetings or email correspondence, as the CNEE previously had done.[515] Mr. Colom testified that, in his view, the dialogue that the CNEE had had with EEGSA and its consultant during EEGSA's 2003-2008 tariff review evidenced that the CNEE at the time lacked the necessary expertise and support to analyze EEGSA's VAD study on its own.[516] Mr. Colom's hearsay testimony, which is based solely upon what he allegedly was told by individuals who did not participate in EEGSA's 2003-2008 tariff review,[517] and whom Respondent deliberately decided *not* to proffer as witnesses or experts, should be rejected. As Messrs. Calleja, Maté, and Giacchino, all of whom participated in EEGSA's 2003-2008 tariff review, consistently have testified, the members of the CNEE involved in EEGSA's 2003-2008 tariff review, as well as the CNEE's consultant at the time, PA Consulting, were highly experienced in electricity distribution and fully capable of analyzing EEGSA's VAD study.[518] This is further reflected in the nature and content of the CNEE's e-mail

[512] Tr. (22 Jan. 2013) 609:7-12 (Calleja Direct); Email from J. Orozco to L. Giacchino dated 28 Jan. 2003 (noting that "[t]his communication is the first in what will most likely be a daily communication process" and that "I hope it will not be of much inconvenience to you") **(C-599)**.

[513] *See* Giacchino I ¶ 22 **(CWS-4)**; Calleja I ¶ 24 **(CWS-3)**.

[514] Barrera ¶ 71 **(CER-4)**; *see also* Giacchino I ¶¶ 10-11 **(CWS-4)**.

[515] Tr. (4 Mar. 2013) 1078:14-21 (Colom Cross).

[516] *Id*. 1079:5-14; Colom I ¶ 49 **(RWS-1)**.

[517] Tr. (4 Mar. 2013) 1068:1-1071:22 (Colom Cross) (testifying that he spoke with Carmen Urízar, the former Minister of Energy and Mines, about EEGSA's 2003-2008 tariff review, although she did not participate in that tariff review); *see also* Tr. (4 Mar. 2013) 1074:3-7 (Colom Cross) (confirming that "none of the [members] of the CNEE team that worked on EEGSA's 2003[-2008] rate Tariff Review [has] presented any statement to support Guatemala's position in this arbitration").

[518] Tr. (22 Jan. 2013) 610:9-611:17 (Calleja Direct); Tr. (4 Mar. 2013) 827:9-828:12 (Giacchino Direct); Maté II ¶ 4 **(CWS-12)**; Maté I ¶ 4 **(CWS-6)**.

communications with EEGSA and its consultant at the time.[519] The CNEE's decision not to engage with EEGSA and Bates White during EEGSA's 2008-2013 tariff review does not reflect any superior level of expertise, as Mr. Colom erroneously contends, but rather the CNEE's deliberate intent to evade its legal obligation to set EEGSA's VAD on the basis of the distributor's study.

138. Indeed, this was made apparent when one full month after the sole meeting between the CNEE, EEGSA, and Bates White to discuss EEGSA's first stage report, the CNEE advised EEGSA that it deemed the report "not received," in accordance with newly-amended RLGE Article 98, because it had not been "formal[ly] deliver[ed]" with a notarized power of attorney indicating that Mr. Calleja, who delivered the study and who had interacted with the CNEE on EEGSA's behalf for years, was EEGSA's authorized representative.[520] Clearly, the report had been received, as the parties had held a meeting discussing that very report one month earlier;[521] Respondent's willingness to manipulate its laws to achieve unintended results and to engage in this type of abusive conduct, plainly evidenced the CNEE's determination to unilaterally set EEGSA's VAD on the basis of its own study at an unreasonably low rate, and violated its obligation to accord Claimant's investment fair and equitable treatment.

3. After Calling For An Expert Commission, The CNEE Enacted RLGE Article 98 *Bis* And Attempted To Apply It Retroactively And To Issue Operating Rules That Would Render The Expert Commission's Decisions Merely Advisory

139. Four days after the CNEE called for the establishment of an Expert Commission to resolve the discrepancies that had arisen between the CNEE and EEGSA with respect to its VAD study, the Government enacted RLGE Article 98 *bis*. That amendment granted the Government the right to select the presiding member of the Expert Commission if the parties failed to agree on the selection within three days. [522] The CNEE then attempted to apply this

[519] *See, e.g.*, Email from J. Orozco to L. Giacchino dated 28 Jan. 2003 **(C-599)**; Email from J. Orozco to L. Giacchino dated 3 Feb. 2003 **(C-600)**.

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

[521] Calleja I ¶ 26 **(CWS-3)**; Maté I ¶ 16 **(CWS-6)**; Giacchino I ¶ 25 **(CWS-4)**.

[522] Resolution No. CNEE-96-2008 dated 15 May 2008 **(C-209)**.

amendment retroactively to EEGSA's tariff review.[523] As Messrs. Calleja and Maté have explained, only after EEGSA threatened to bring a legal action in the Guatemalan courts did the CNEE relent and agree not to apply RLGE Article 98 *bis*.[524]

140. Just as it has throughout these proceedings, Respondent at the Hearing continued to ignore RLGE Article 98 *bis*, arguing that it was irrelevant because it never was applied to EEGSA.[525] As Claimant has explained, however, RLGE Article 98 *bis* constituted yet another fundamental change to the regulatory framework established by the LGE and RLGE, as it subverted the requirement in LGE Article 75 that the third member of the Expert Commission be appointed by "mutual agreement" of the parties, and gave the Government the power to secure a majority, undermining the impartial nature of the Expert Commission.[526] Significantly, the enactment of RLGE Article 98 *bis* also demonstrates the lengths that Respondent was willing to go to manipulate and to control the outcome of EEGSA's 2008-2013 tariff review, and further undermines Respondent's argument that the CNEE's actions in this case were based upon a good faith interpretation of the law.[527]

141. RLGE Article 98 *bis*, as well as the CNEE's attempt to apply it retroactively to EEGSA's 2008-2013 tariff review, are entirely inconsistent with the notion advanced by Guatemala in this arbitration that the Expert Commission's decisions merely are advisory opinions that do not bind the CNEE or limit its discretion in any way.[528] If this were correct, there would have been no reason for the Government to attempt to secure a majority on the Expert Commission, because the decisions of the Expert Commission always could be ignored

[523] Government Accord No. 145-2008 dated 19 May 2008, published 26 May 2008, at 2 ("If the three-day term for the selection of the third member expires without an agreement by the parties, the [CNEE] shall forward the respective dossier to the Ministry, for the latter to definitively select, within a maximum term of three days after receiving the dossier, the third member of the Expert Commission, from among the proposed candidates.") **(C-212)**.

[524] *See* Calleja I ¶ 38 **(CWS-3)**; Maté I ¶ 38 **(CWS-6)**.

[525] Tr. (21 Jan. 2013) 247:20-249:10 (Respondent's Opening); Rejoinder ¶ 41; Counter-Memorial ¶ 59.

[526] Rejoinder on Jurisdiction ¶ 21; Reply ¶¶ 142-144, 249.

[527] *See, e.g.*, Counter-Memorial ¶¶ 29, 58.

[528] *See, e.g.*, Tr. (21 Jan. 2013) 241:19-242:7 (Respondent's Opening); Tr. (4 Mar. 2013) 1245:13-1248:5 (Aguilar Cross).

by the CNEE, as Professor Aguilar testified.[529] What RLGE Article 98 *bis* shows is that—contrary to the CNEE's position before the Guatemalan courts and Guatemala's position before this Tribunal—when Guatemala enacted RLGE Article 98 *bis*, it understood, just like Claimant, that the Expert Commission's decisions would be binding. Similarly, Guatemala's argument that RLGE Article 98 *bis* was necessary to prevent an indefinite delay in the calculation of the distributor's VAD in the event of discrepancies, further contradicts its position that the CNEE always had discretion to calculate the distributor's VAD unilaterally under LGE Article 5, irrespective of any ruling by an Expert Commission.[530]

142. Immediately after the CNEE called for the establishment of an Expert Commission under LGE Article 75, the CNEE and EEGSA also began negotiating the operating rules that would govern the Expert Commission's procedure.[531] The CNEE indicated in its first draft of the operating rules that the Expert Commission's decisions would not be binding, but agreed to remove this language after EEGSA strenuously objected.[532] While Mr. Colom testified that the removal of this language did not mean that the Expert Commission's decisions would be binding, because, in his view, "Article 75 of the law was sufficiently clear" that they were not,[533] Mr. Colom's testimony is inconsistent with the text of the CNEE's own second draft of the operating rules. The CNEE's second draft not only referred to the Expert Commission members

[529] Tr. (4 Mar. 2013) 1265:9-13 (Aguilar Tribunal Question) (testifying that, if there is a decision by the Expert Commission, "it could be ignored because the information issued by the Expert Commission is technical in nature"); *see also* Tr. (4 Mar. 2013) 1247:15-1248:5 (Aguilar Cross) (testifying that "the regulating body with authority to calculate and define the tariffs is the CNEE. This is a power granted to it by the law, and it cannot be delegated . . . ."); Tr. (4 Mar 2013) 1265:14-22 (Tribunal Question) (questioning why, if the Expert Commission's decision could be ignored, the law would provide a procedure for appointing the three experts and why it "would be modified through regulations" to appoint the presiding member, if no agreement is reached).

[530] *See, e.g.*, Tr. (4 Mar. 2013) 1106:18-1107:2, 1107:7-14 (Colom Tribunal Question); Rejoinder ¶¶ 212, 213.

[531] *See* E-mail from M. Quijivix to M. Calleja, attaching Rules Proposed by the CNEE dated 15 May 2008 **(C-210);** Email from M. Quivivix to M. Calleja attaching Proposed Operating Rules for the Operation of the Expert Committee dated 21 May 2008 **(C-213)**; Email from M. Quijivix to L. Maté and M. Calleja attaching Proposed Rules for the Expert Committee with comments dated 23 May 2008 **(C-214)**; Email from M. Calleja to G. Perez forwarding Email from M. Quijivix to L. Maté and M. Calleja dated 28 May 2008 **(C-217)**; Email from M. Calleja to L. Giacchino, forwarding Email from M. Quijivix to L. Maté and M. Calleja dated 28 May 2008 **(C-218)**.

[532] Calleja II ¶ 30 **(CWS-9)**; Maté II ¶ 21 **(CWS-12)**.

[533] Tr. (4 Mar. 2013) 1117:21-1118:2 (Colom Cross); *see also id*. at 1118:7-10 (testifying that "[p]erhaps at the time it would have been easier to say this clearly and expressly, but we were convinced that that was the interpretation of [LGE Article 75]").

as "arbitrators," but also made clear in Rule 3 that the Expert Commission's decisions would be binding upon both parties.[534] By sending this second draft to EEGSA, the CNEE thus indicated its understanding that the Expert Commission's decisions would be binding, consistent with the plain language of LGE Article 75,[535] as well as Guatemala's prior representations to potential investors in EEGSA through the Memorandum of Sale and to its own Constitutional Court through its pleadings.[536] Professor Aguilar's testimony that this draft was not prepared by the CNEE, because "there is no resolution by the CNEE that supports that statement,"[537] also is untenable and further undermines the reliability of the entirety of his testimony: As the draft reflects, it was prepared by Mr. Quijivix, who at the time was the Head of the CNEE's Tariff Division, and was sent directly to EEGSA from Mr. Quijivix's CNEE email account.[538] There thus cannot be any question that this document was prepared by the CNEE and sent directly to EEGSA.

143. As Messrs. Calleja and Maté have explained, after the CNEE submitted its second draft of the operating rules, the parties continued negotiating for several days, until agreement was reached at a meeting held at the CNEE on 28 May 2008.[539] As the drafts of the operating rules reflect, one of the main issues that the CNEE and EEGSA were negotiating at the time was who would review the revised VAD study prepared by Bates White after the Expert Commission had rendered its decisions on the discrepancies—the CNEE or the Expert Commission—as this

[534] Email from M. Quijivix to M. Calleja dated 15 May 2008, Rule 3 ("The EC shall decide the discrepancies and the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and must deliver it to CNEE, which shall review the incorporation of the decision of the [EC], and which shall approve the Tariff Study.") **(C-210)**.

[535] Indeed, it is telling that Respondent objected to the certified interpreters' repeated translation during the Hearing of the Spanish verb "*pronunciarse*" as "to rule." Email from Respondent to Tribunal dated 26 Apr. 2013; *see also* Alegría II ¶¶ 37-39 **(CER-3)**; Alegría I ¶¶ 76-78 **(CER-1)**.

[536] Sales Memorandum **(C-29)**; Resolution No. CNEE-88-2002 dated 23 Oct. 2002 **(C-59)**; CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003 **(C-81)**.

[537] Tr. (4 Mar. 2013) 1243:12-16 (Aguilar Cross).

[538] *See* Email from M. Quijivix to M. Calleja dated 15 May 2008 **(C-210)**; Tr. (4 Mar. 2013) 1086:13-19 (Colom Cross) (confirming that Mr. Quijivix was Head of the CNEE's Tariff Division during EEGSA's 2008-2013 tariff review, and that he continues to hold that position at the CNEE today).

[539] Calleja II ¶ 33; Maté II ¶ 24; *see also* Tr. (22 Jan. 2013) 693:11-700:14 (Calleja Tribunal Question).

issue is not expressly regulated by the LGE or RLGE.[540] As Messrs. Calleja and Maté have explained, after nearly two weeks of negotiations, the parties agreed to Rule 12, according to which the Expert Commission, and not the CNEE, would review and confirm that Bates White had fully incorporated the Expert Commission's decisions into its revised VAD study.[541] As Mr. Calleja explained, EEGSA would not have proceeded to constitute the Expert Commission if agreement on the Operating Rules had not been reached, because it was rightly concerned that the CNEE was intent on manipulating the Expert Commission process and would not, in good faith, approve the incorporation of the Expert Commission's rulings into the VAD study.[542]

144. While Guatemala and its witnesses continue to assert that the CNEE never agreed to the Operating Rules set forth in Mr. Quijivix's 28 May 2008 email,[543] the record demonstrates that these Operating Rules were sent to Mr. Bastos with the full knowledge of the CNEE, and were referenced in his economic offer as third member of the Expert Commission;[544] that the CNEE never objected in any way to their application by the Expert Commission;[545] and that the Expert Commission not only applied the Operating Rules, but incorporated them into its 25 July 2008 Report, which the CNEE's own appointee to the Expert Commission, Mr. Riubrugent,

[540] *See* E-mail from M. Quijivix to M. Calleja, attaching Rules Proposed by the CNEE dated 15 May 2008, Rule 3 ("The EC shall decide the discrepancies and the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and must deliver it to CNEE, which shall review the incorporation of the decision of the CNEE, and which shall approve the Tariff Study.") **(C-210)**; Email from M. Quivivix to M. Calleja attaching Proposed Operating Rules for the Operation of the Expert Commission dated 21 May 2008, Rule 13 ("The Distributor shall inform its consultant of the decision of the Expert Commission, and the Consultant shall perform all the changes requested in the EC's decision, and remit the new version to CNEE for its review and approval.") **(C-213)**; Email from M. Quijivix to L. Maté and M. Calleja attaching Proposed Rules for the Expert Committee with comments dated 23 May 2008, Rule 12 ("The Distributor shall inform its consultant of the decision of the Expert Commission, and the Consultant shall perform all the changes requested in the EC's decision, and remit the new version to the EC for its review and approval.") **(C-214)**.

[541] Calleja II ¶ 33; Maté II ¶ 24; Email from M. Calleja to L. Giacchino, forwarding Email from M. Quijivix to L. Maté and M. Calleja dated 28 May 2008, Rule 12 ("The Distributor shall inform its consultant of the decision of the Expert Commission, and the Consultant shall perform all the changes requested in the EC's decision, and remit the new version to the EC for its review and approval.") **(C-218)**.

[542] Calleja II ¶ 34 **(CWS-9)**.

[543] Tr. (21 Jan. 2013) 251:14-252:1 (Respondent's Opening); Tr. (4 Mar. 2013) 1108:5-1109:11 (Colom Cross).

[544] Tr. (22 Jan. 2013) 665:12-666:13; 667:7-668:14 (Calleja Cross); Tr. (1 Mar. 2013) 727:3-728:18 (Bastos Direct); Tr. (1 Mar. 2013) 752:18-753:21 (Bastos Cross); Letter from C. Bastos to M. Calleja and M. Quijivix dated 6 June 2008 **(C-225)**.

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

signed.[546] As Mr. Bastos testified, "at no time did [he] perceive any discrepancy as between the Parties regarding these rules. When [he] spoke with [Messrs.] Calleja and Quijivix, at no time did either of them give [him] to understand that there was any discrepancy with respect to the Operating Rules;"[547] to the contrary, "everyone understood that those were the Operating Rules that were going to guide the operation of the [Expert] Commission."[548]

145. Indeed, throughout the Hearing, Respondent adopted inconsistent positions regarding the parties' agreement or lack thereof on the Operating Rules. Respondent, in its Opening Statement, asserted and affirmed in response to the Tribunal's questions, for instance, that no agreement was reached on *any* of the Operating Rules.[549] Yet, in response to questioning from the Tribunal, Mr. Colom testified that the CNEE had agreed to the "Procedural Rules."[550] Mr. Colom attempted to reconcile these contradictory positions by asserting that "the agreement that we put forth in these meetings was oral," but that, under Guatemalan law, "a formal agreement could only have existed if it was put in writing."[551] Once again, however, Respondent cannot rely upon its own domestic law to avoid international liability arising from the arbitrary actions that the CNEE took in disavowing the Operating Rules, after it had expressly agreed to them.[552] For all of these reasons, Guatemala's assertion that there was no agreement between the parties, and that the issue of the Operating Rules simply moved into the background, after Mr.

[546] *Id*. at 747:1-10; EC Report **(C-246)**.

[547] Tr. (1 Mar. 2013) 745:14-21 (Bastos Cross); *see also* Tr. (1 Mar. 2013) 727:12-19 (Bastos Direct) (testifying that "almost the whole conversation [with Messrs. Quijivix and Calleja] revolved around the Operation Rules" and that the three of them "discussed every single one of them.").

[548] Tr. (1 Mar. 2013) 747:4-6 (Bastos Cross).

[549] Tr. (21 Jan. 2013) 251:21-252:1 (Respondent's Opening) ("[T]he Operating Rules were never accepted, never. They were discussed, yes, they were. But they were never accepted."); Tr. (21 Jan. 2013) 253:7-10 (Tribunal Question) ("[Q.] Your position is that none of the 12 Operating Rules had been accepted or only Rule 12? [A.] None of them. None of them.").

[550] Tr. (4 Mar. 2013) 1120:3-18 (Colom Tribunal Question) ("[A.] . . . [W]e basically, said, well, we have no problem in you meeting here or there, or how long. [Q.] So some of those rules were [agreed], Procedural Rules[]? [A.] Yes. . . . [Q.] Yes, so you're [talking] in your statement about the ones that there was an agreement for. [A.] Yes, during the discussions. [Q.] So there was an agreement in connection with the Procedural Rules? [A.] Yes.").

[551] *Id*. at 1121:4-7.

[552] *See supra* ¶ 84.

Bastos was appointed as the third member of the Expert Commission, is baseless.[553]

146. Despite the evidence showing that an agreement was reached between the CNEE and EEGSA on the Operating Rules, Guatemala now argues that, not only did it not agree to Rule 12, but that the CNEE *itself* had no legal authority to review EEGSA's revised VAD study, and that the sole purpose of the Expert Commission merely was to confirm whether or not Bates White had fully complied with the ToR.[554] Indeed, as Mr. Moller testified, when EEGSA's 28 July 2008 revised VAD study "was submitted, [the CNEE] did not look at it in detail immediately because, according to the recommendation of lawyers, this was a study that was not within the law, that departed from the powers that the Experts had," and that "it was not a study that [the CNEE] had to assess or evaluate because this study was a study that departed from the Regulations and the law."[555]

147. Guatemala's argument is absurd. If the CNEE actually had believed at the time that it had no legal authority to review EEGSA's revised VAD study after the Expert Commission had rendered its decisions, and that the sole purpose of the Expert Commission simply was to confirm whether or not Bates White had fully complied with the ToR—which never was in dispute between the parties—the CNEE would not have negotiated with EEGSA for nearly two weeks over whether the Expert Commission or the CNEE would be responsible for reviewing EEGSA's revised VAD study. Nor would the CNEE have included specific provisions in its own draft operating rules proposing that *it* review and approve EEGSA's revised VAD study, as the CNEE did.[556] As Mr. Bastos testified, "[u]p to July 25th, when [the Expert

[553] Tr. (21 Jan. 2013) 251:14-252:1 (Respondent's Opening); Tr. (4 Mar. 2013) 1108:5-1109:11 (Colom Cross); Colom I ¶ 130 (**RWS-1**).

[554] *See* Tr. (21 Jan. 2013) 225:13-16 (Respondent's Opening); Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross); Tr. (4 Mar. 2013) 1265:3-8 (Aguilar Tribunal Question) ("The Commission is the one to determine whether the Terms of Reference and the observations were complied with. If there is no compliance, based on Article 98 and the fifth article of the law, a tariff scheme shall be issued always based on a study and in this case an independent study.").

[555] Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross).

[556] *See, e.g.*, E-mail from M. Quijivix to M. Calleja, attaching Rules Proposed by the CNEE dated 15 May 2008, Rule 3 ("**The EC must decide exclusively on the discrepancies that are resolved:** The EC shall decide the discrepancies and *the Distributor's consultant shall be the one who does the recalculation of the Study, strictly adhering to what is resolved by the EC, and must deliver it to CNEE, which shall review the incorporation of the decision of the CNEE, and which shall approve the Tariff Study*.") (emphasis added) **(C-210)**; Email from M. Quijivix to M. Calleja attaching Proposed Operating Rules for the Operation of the

Commission] actually delivered the report, there had been no dispute or discrepancy between the Parties" regarding the "scope of [their] task and also what [they] were doing;" however, "after July 25th, [they] had all of this new interpretation as to the scope of the review or the lack of the review of the results by the [Expert Commission]. Up to then . . . the Experts clearly understood as well as the [CNEE], and also the company, that [their] task was going to conclude with the review of the study; that is to say the application of the results derived from the study."[557] As Mr. Bastos thus confirmed, the CNEE's position on Rule 12 shifted only *after* the Expert Commission had rendered its decisions on 25 July 2008, demonstrating the manifestly arbitrary and grossly unfair nature of the CNEE's conduct.

4. The CNEE Undertook To Influence The Expert Commission Through *Ex Parte* Communications With Mr. Riubrugent, The Architect Of Its Improper FRC Formula

148. During the Expert Commission process, the CNEE and its appointee to the Expert Commission, Mr. Riubrugent, did not respect the independence or impartiality of the Expert Commission, but rather engaged in a series of *ex parte* communications that undermined the integrity of the Expert Commission process, as well as the spirit of the LGE and RLGE.[558] As Mr. Bastos affirmed at the Hearing, at the beginning of the Expert Commission process, he "specifically asked . . . that [Messrs. Giacchino and Riubrugent] should act as independent experts, and they should not communicate with the Parties," and that "[b]oth of them committed to this," including Mr. Riubrugent.[559] Mr. Giacchino similarly affirmed that, in accordance with the experts' agreement, he acted independently and impartially, and refrained from communicating with EEGSA during the Expert Commission process.[560] While Guatemala continues to deny that any such agreement was reached,[561] Guatemala inexplicably has failed to adduce any witness or documentary evidence in support of its position. In addition, Guatemala's

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Expert Commission dated 21 May 2008, Rule 13 ("The Distributor shall inform its consultant of the decision of the Expert Commission, and *the Consultant shall perform all the changes requested in the EC's decision, and remit the new version to CNEE for its review and approval*.") (emphasis added) **(C-213)**.

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

[558] *See, e.g.*, Reply ¶¶ 138-140.

[559] Tr. (1 Mar. 2013) 730:1-14 (Bastos Direct).

[560] Tr. (4 Mar. 2013) 914:22-915:12 (Giacchino Cross).

[561] Tr. (21 Jan. 2013) 278:7-279:6 (Respondent's Opening).

ipse dixit statement that the "emails between [the] CNEE and [Mr. Riubrugent were] simply seeking information,"[562] is squarely contradicted by the documentary record, which shows that the CNEE, in fact, was attempting to influence the Expert Commission through Mr. Riubrugent, sending him information and material to defend the CNEE's positions, and expressly requesting that he not share the source of that information with the other two members of the Expert Commission, in violation of the experts' agreement.

149. For instance, in a 13 June 2008 email exchange, Ms. Peláez of the CNEE forwarded to Mr. Riubrugent EEGSA's Financial Statements as of 31 March 2008, which, she remarked, showed that EEGSA was "depreciating 42.8% of their assets."[563] A few hours later, Ms. Peláez sent another email to Mr. Riubrugent, noting as follows: "One more thing . . . this information was not provided to the CNEE by EEGSA. We obtained it by 'alternative' means, so please don't present it very straightforwardly to the Expert Commission. It's better to ask *them* to submit the Financial Statements. We'll keep in touch."[564] Mr. Riubrugent responded to Ms. Peláez, stating that, "[g]iven that this material is available to the public, I don't think there will be any problem using it in our arguments within the Expert Commission, *as long as doing so is convenient for defending our position*."[565] As this email exchange shows, the CNEE was not simply providing information to help Mr. Riubrugent understand the discrepancies, as Guatemala and its witnesses contend,[566] but rather was providing information to Mr. Riubrugent for the express purpose of defending its positions within the Expert Commission, specifically, the CNEE's improper FRC formula through which it sought to depreciate EEGSA's regulatory asset base by 50 percent in order to decrease EEGSA's VAD.[567] Not only did this email exchange thus violate the experts' agreement, but it further demonstrates that the CNEE could not have understood at the time that the Expert Commission's role was merely to determine whether Bates

[562] *Id*. at 279:18-21.

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

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

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

[566] *See* Tr. (21 Jan. 2013) 278:17-279:6 (Respondent's Opening); Tr. (4 Mar. 2013) 1130:1-6 (Colom Cross) (testifying that "this was normal for us to communicate with the other members of the EC to obtain information. I see nothing unduly here in this communication. So, it is a natural for Mr. Riubrugent to go to the Commission and ask for information and other things").

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

White had complied with the ToR or that the Expert Commission's decisions merely were advisory opinions that could be ignored by the CNEE. If that were correct, there would have been no reason for Ms. Peláez to seek to obtain information regarding EEGSA's actual level of depreciation by "'alternative' means," or to ask that Mr. Riubrugent not present that information "very straightforwardly to the Expert Commission."[568]

150. As the record further reflects, Mr. Riubrugent discussed the Expert Commission's decisions with the CNEE well before the Expert Commission issued its 25 July 2008 Report on the discrepancies.[569] By email dated 7 July 2008, Mr. Riubrugent forwarded to Mr. Quijivix the opinions that he had prepared thus far, noting as follows: "I'm sending the files as promised. I hope you can read them and make any comments by tomorrow. I think I can have a telephone conversation with Mr. Colom tomorrow afternoon; please find out what time suits him best."[570] On cross-examination, Mr. Colom denied ever speaking with Mr. Riubrugent, or discussing these files internally at the CNEE,[571] asserting that "[t]his was a very technical issue, and this was looked at by those people in charge of the Tariff Review and by our consultants from SIGLA,"[572] who, notably, are not witnesses or experts in this arbitration. Mr. Colom's testimony that he was not involved in discussions regarding the results of the Expert Commission's deliberations, moreover, is not credible, particularly in view of Mr. Bastos's statement, which stands unrebutted by Respondent, that Mr. Riubrugent mentioned to him before the Expert Commission's 18 July 2008 meeting in Buenos Aires that "the CNEE was not happy with the

[568] *Id.* This is further confirmed by the Supporting Report prepared in May 2008 for Mr. Riubrugent by the CNEE's consultant, Sigla, the purpose of which, according to its own terms, was to enable Mr. Riubrugent to "*endorse and sustain the rejection of the Distributor's Proposal*" in his role on the Expert Commission. Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 (emphasis added) **(C-494)**. Mr. Colom's testimony that he does not "know why SIGLA wrote to sustain the rejection of the Distributor's proposal," and that the purpose of this Supporting Report simply "was to provide information and to give information to the party-appointed Expert to the EC, but this was not to influence the Expert in such or such a way," is belied by the evidence discussed above. Tr. (4 Mar. 2013) 1123:6-7, 1125:7-9 (Colom Cross).

[569] Reply ¶¶ 138-140.

[570] Email from J. Riubrugent to M. Quijivix dated 7 July 2008 **(C-500)**.

[571] Tr. (4 Mar. 2013) 1133:13-16 (Colom Cross) ("I think that we did not communicate. That telephone call never happened. I don't remember if we had any other exchange with him in a direct manner.").

[572] Tr. (4 Mar. 2013) 1133:21-1134:1 (Colom Cross).

numbers and wanted a reduced tariff."[573] In addition, having learned the results of the Expert Commission process from Mr. Riubrugent, the CNEE, in late July 2008, began to lay the groundwork for disregarding the Expert Commission's decisions, publicly announcing for the very first time that the Expert Commission's rulings would not bind the CNEE.[574]

151. Guatemala's repeated attempts to justify its improper *ex parte* communications and grossly unfair conduct by insisting that Mr. Giacchino could not act as an independent expert on the Expert Commission because he was the author of the VAD study also are misplaced. It is undisputed that both EEGSA and the CNEE appointed experts who were involved in EEGSA's tariff review; that both parties were well aware that the appointed experts had these roles, and there was no objection raised by either party at the time; and that this practice is common for these types of expert commissions.[575] It likewise remains uncontested that Mr. Riubrugent was the only member of the Expert Commission to engage in prohibited *ex parte* communications; Guatemala's attempt at the Hearing to equate Mr. Giacchino's expressly authorized communications with Bates White, which enabled the consulting firm to revise EEGSA's VAD study in the limited time available, with Mr. Riubrugent's conduct,[576] is patently misplaced.[577]

152. Guatemala's repeated assertion that the fact that Claimant has no complaint against the Expert Commission's Report itself demonstrates that Respondent did not engage in

[573] Bastos II ¶ 13 **(CWS-7)**.

[574] *See* Eduardo Smith, Prensa Libre, *Distribution Rate not yet determined* dated 23 July 2008 **(C-242)**; Fernando Quiñónez, Siglo 21, *CNEE shall receive the expert report today* dated 24 July 2008 **(C-243)**.

[575] *See* Tr. (4 Mar. 2013) 921:7-11 (Giacchino Cross) (explaining that "it's very common to have an expert coming from the – from the consulting team to be part of an Experts Committee, it's done in Mexico in telecommunications. It's done in Chile also in telecommunications.").

[576] *See, e.g.*, Tr. (1 Mar. 2013) 761:21-762:16 (Bastos Cross); Tr. (4 Mar. 2013) 933:7-936:1 (Giacchino Cross). Respondent's further assertion that Mr. Giacchino was the one who engaged in *ex parte* communications – with himself – is nonsensical. *See* Tr. (21 Jan. 2013) 279:7-19 (Respondent's Opening) ("If there is somebody who is involved in ex parte communications, it was Giacchino, with himself. Why? Because Giacchino, let us not forget, Giacchino is the Bates White consultant who had drafted the report. . . . . That is ex parte involvement . . . not some emails between CNEE and Jean . . . . ").

[577] *See, e.g.*, Tr. (1 Mar. 2013) 781:20-782:15 (Bastos Redirect) ("These are really two different subjects. . . . [T]he Expert Commission, obviously myself as Chair, invited Giacchino to share those decisions with Bates White so that the study could be corrected as we were going along, in view of the limited time we had. The prohibition on contacting the Parties refers to not engaging in discussions with the Parties about the substantive aspect of each of the discrepancies, and that the discussion should be limited to within the Expert Commission. There are two different aspects."); Bastos II ¶ 11 **(CWS-7)**; Giacchino II ¶ 23 **(CWS-10)**.

arbitrary conduct in connection with Mr. Riubrugent's role on the Expert Commission,[578] also is demonstrably wrong. As Claimant explained in its Rejoinder on Jurisdiction, despite the CNEE's repeated attempts to manipulate the results of the Expert Commission process, the Expert Commission, by majority vote, ultimately ruled in favor of EEGSA on several key discrepancies, confirming, for instance, that the CNEE's FRC formula, demand methodology, and reference pricing date all were inconsistent with the LGE's requirements that the VAD reflect the average cost of capital, corresponding to the new replacement value of the distribution network, of a model efficient company operating in a given density area.[579] In such circumstances, Claimant's failure to criticize the result of the Expert Commission process in no way supports Respondent's assertion that it did not act arbitrarily or in bad faith in attempting to improperly influence the Expert Commission through Mr. Riubrugent.

5. Having Failed To Influence The Expert Commission Through Mr. Riubrugent, The CNEE Disregarded Both The Expert Commission's Rulings And Bates White's Revised VAD Study, And Arbitrarily Imposed Its Own VAD on EEGSA

153. After receiving the Expert Commission's 25 July 2008 Report and concluding that respecting the Expert Commission's decision on the FRC formula alone would increase EEGSA's VAD by approximately 25 percent,[580] and that respecting its other decisions would further increase EEGSA's VAD,[581] the CNEE arbitrarily and unfairly interfered with the Expert Commission process and proceeded to disregard both the Expert Commission's decisions and Bates White's 28 July 2008 revised VAD study.

154. As set forth above, the evidence demonstrates that the CNEE agreed to Operating Rule 12, whereby the Expert Commission would review Bates White's revised VAD study to

[578] Tr. (21 Jan. 2013) 279:22-280:11 (Respondent's Opening).

[579] *See* Rejoinder on Jurisdiction ¶ 18; Reply ¶¶ 161-164; Memorial ¶¶ 158-164; LGE, Arts. 67, 71 & 73 **(C-17)**.

[580] *See supra* Section III.A.3; Analysis of the Expert Commission Opinion (undated), at 9 (concluding that "[t]he effect of the [FRC] formula increases the [VNR's] Annuity [by] 47% compared to the formula set forth in the ToR"; and that, "[a]ssuming that neither SIGLA's [VNR] nor the costs are changed and that the new [FRC] formula is applied, the [VAD] would be increased [by] approximately 25%") **(C-547)**.

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

determine whether that study fully incorporated all of the Expert Commission's decisions.[582] Yet, despite this agreement, once the CNEE determined that respecting the Expert Commission's decisions would result in a substantially increased VAD, the CNEE proceeded to prevent the Expert Commission from completing its task, by threatening Mr. Riubrugent with criminal action if he met with the other members of the Expert Commission to review Bates White's 28 July 2008 revised VAD study,[583] and by trying to persuade Mr. Bastos that he ought not to review Bates White's revised VAD study, in accordance with Rule 12.[584]

155. Moreover, at the Hearing, Mr. Moller admitted that the CNEE did not even review or analyze Bates White's 28 July 2008 revised VAD study when it was submitted to the CNEE.[585] Instead, after confirming that the Expert Commission had ruled against the CNEE with respect to key discrepancies, and that setting EEGSA's VAD in accordance with the Expert Commission's rulings would result in a substantial increase, the CNEE simply approved its own VAD study.[586] As noted above, that study had been prepared by Sigla using the CNEE's own improper FRC formula, as well as the demand density calculation and reference prices that were

[582] *See supra* ¶¶ 143-146.

[583] *See* Email from J. Riubrugent to C. Bastos and L. Giacchino, forwarding Email from J. Riubrugent to C. Bastos and L. Giacchino dated 30 July 2008, dated 31 July 2008 **(C-281)**; Email from J. Riubrugent to M. Quijivix, A. Brabatti, S. Velasquez, E. Cua dated 31 July 2008 **(C-504)**; Email from J. Riubrugent to M. Quijivix, A. Arnau, and R. Sanz, forwarding Letter from EEGSA to J. Riubrugent dated 1 Aug. 2008, dated 2 Aug. 2008 **(C-505)**.

[584] *See* Bastos I ¶ 34 **(CWS-1)**. Mr. Colom's testimony, where he tried to distance himself from these emails and purported not to know whether the CNEE ever responded to Mr. Riubrugent's demands that he be indemnified for any liability arising from his failure to abide by his obligations under Rule 12, was not credible, given his position as President of the CNEE. *See* Tr. (4 Mar. 2013) 1137:17-1142:13 (Colom Cross).

[585] *See supra* ¶ 146; Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross) (testifying that, when EEGSA's 28 July 2008 VAD study "was submitted, [the CNEE] did not look at it in detail immediately because, according to the recommendation of lawyers, this was a study that was not within the law, that departed from the powers that the Experts had," that "it was not a study that [the CNEE] had to assess or evaluate because this study was a study that departed from the Regulations and the law," and that the CNEE "evaluated the study much further down the line but not at that time"); Tr. (4 Mar. 2013) 1054:7-8 (Moller Cross) (acknowledging that the presentation prepared by the CNEE analyzing the Expert Commission's rulings "does not mention" the Bates White July 28 revised study); Analysis of the Expert Commission Opinion (undated), at 9 (including no mention of Bates White's 28 July 2008 VAD study) **(C-547)**.

[586] *See supra* Section III.A.3; Analysis of the Expert Commission Opinion (undated), at 9 **(C-547)**; Resolution No. CNEE-144-2008 dated 29 July 2008 **(C-272)**.

rejected by the Expert Commission.[587]

156. The use of the CNEE's improper FRC formula had a significant impact on EEGSA's resulting VAD. The CNEE's own internal documents concluded that, if Sigla's costs and VNR were used, but the Expert Commission's FRC formula also was used, EEGSA's VAD would increase by 25%.[588] Considered from another perspective, if Bates White's VNR is used, the difference between using the Expert Commission's FRC formula and the CNEE/Sigla FRC formula accounts for an approximate 42% difference in EEGSA's VAD.[589] As Mr. Barrera confirmed, Sigla's refusal to abide by the Expert Commission's decision on reference prices also had a significant impact on the resulting VNR,[590] because Sigla used poorly adjusted 2004 reference prices, rather than the most recently available reference prices as the Expert Commission ordered.[591] While Mr. Damonte did not contest that Sigla used poorly adjusted 2004 prices (unlike Bates White) or that the market prices of relevant materials such as copper and aluminum increased significantly through 2008,[592] at the Hearing, Mr. Damonte asserted that the Sigla and Bates White reference prices were very similar.[593] That is incorrect. The Sigla model, for example, uses the price of US$ 1934.26 for a 50kVA transformer,[594] while the Bates

[587] *See supra* Section III.A.3; Resolution No. CNEE-144-2008 dated 29 July 2008 **(C-272)**; SIGLA Report dated 28 July 2008 **(C-267)**.

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

[589] At the Hearing, Mr. Damonte testified that 59.9 percent of the difference between the Sigla VAD and the Bates White VAD is attributable to the VNR, and 24.0 percent is attributable to the FRC. *See* Damonte Direct Presentation, Slide 23. Mr. Damonte's analysis, however, is affected by the order in which he chose to implement the changes. Mr. Damonte made the change to the VNR first and the change to the FRC second. Had he made the change to the FRC first, the percentage of the difference attributable to the FRC would be close to double. This is because Mr. Damonte calculates the difference attributable to the FRC on a VNR that already incorporates a 60 percent reduction. Therefore, the difference attributable to the VAD is muted, because the starting point for his calculation already is significantly lower. *See also* Tr. (22 Jan. 2013) 400:2-21 (Tribunal Question) (asking how much of the difference between the Sigla VAD and the 28 July 2008 Bates White VAD is attributable to the FRC formula and how much is attributable to other factors, such as the increase in the price of materials, such as copper and aluminum).

[590] Barrera Direct Presentation, Slide 33; Tr. (5 Mar. 2013) 1315:1-10 (Barrera Direct).

[591] *See* Barrera ¶¶ 54, 262-269, Figures 1 & 2 at ¶¶ 55, 56 **(CER-4)**; Barrera Direct Presentation, Slide 33; Tr. (5 Mar. 2013) 1315:4-10 (Barrera Direct), 1466:19-22 (Barrera Tribunal Question).

[592] *See* Tr. (5 Mar. 2013) 1444:20-1445:6 (Damonte Cross); Damonte II ¶¶ 381-398 **(RER-5)**.

[593] Tr. (5 Mar. 2013) 1417:8-11, 1419:3-6 (Damonte Direct); Damonte Direct Presentation, Slide 18.

[594] *See* Sigla model, folder "EEGSA Archivos de Soporte Jul08," subfolder "EEGSA Etapa B - Precios de Referencia," file "Precios Guatemala.xls," tab "Costo Materiales," cell F792 (listing the price of US$ 1,934.26 for the transformer "TRANSFORMADOR MONOFASICO AEREO CONVENCIONAL DE 50 KVA 10 /

White model uses the price of US$ 2913.51,[595] which is 51 percent higher.[596]

157. Furthermore, the contemporaneous evidence, confirmed by the testimony of Respondent's own witnesses at the Hearing, that Guatemala failed even to consider Bates White's 28 July 2008 revised VAD study before setting EEGSA's VAD on the basis of Sigla's study renders irrelevant Respondent's arguments in this arbitration that it could not have used the Bates White study to set EEGSA's VAD, because that study failed to fully incorporate the Expert Commission's decisions. This argument is yet another of Respondent's *post-hoc* justifications for its internationally unlawful actions. Moreover, as the Hearing testimony confirmed, not only are Respondent's criticisms of the Bates White study misplaced,[597] but the Sigla study upon which Respondent relied, as well as the Quantum VAD studies for DEORSA and DEOCSA, which were accepted by the CNEE, suffered from the same defects as those

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0.38-0.22 KV") **(C-589)**. This reference price is used in Sigla's VNR calculation as follows. Cell F792 is linked to the file "Costos2006-Urbano VF.xls," tab "Costo Materiales," cell F789, in turn linked to tab "Armados," cell K16076, in turn linked to tab "CostosdeInversión," cell S8934. Cells S8935 and S8936 in the same spreadsheet list the prices of the supporting pole and grounding for this transformer, *i.e.*, US$ 1,032.21 and US$ 31.36, respectively. The sum of these three figures, *i.e.*, US$ 2,997.83, is used as a "pasted value" in tab "Resumen CostosdeInversion," cell J4888. At cell Q4888 in the same tab, other cost components such as materials, labor, and transportation are added, for a total of US$ 4,077.91. This figure is included in the calculation of the costs of the low voltage network in tab "Inputs MODELO URBANO," cell E107. Cell E107 is used in the VNR calculation in the folder "EEGSA Etapa C - Optimización Red Distribuidor," files "VNR-Redes Urbanas EEGSA.xls/.xlsx", tab "Inputs MODELO URBANO," cell E77.

[595] *See* 28 July 2008 Bates White model delivered to the CNEE, file "COSTOS_BASICOS.xls," tab "CT con Trafo," cell AN16 (listing the price of US$ 2,914 for the transformer "TRANSFORMADOR MONOFASCIO CONVENC. 50 KVA") **(C-564)**. Cell AN16 is linked to cell AF17, in turn linked to cell AD17, in turn used in the calculation in cell O61, in turn used in the calculation of the cost of the low voltage network in the file "BT muy alta densidad 1MTa.xls," tab "Datos componentes," cells E24 and F24. The value at cell F24 is used in the selected VNR scenario, Scenario 4, in tab "Cálculos 4," cell F26.

[596] It is not possible to quantify the exact effect of this on the respective VNRs, just as it is impossible to calculate the precise effect of the cost of materials on the VNRs, because the costs for materials that are used in the model will dictate how the network is structured, as well as what type of and how many assets are used to construct the model efficient company. For the same reason, it is not possible to quantify the precise effect on the VNR attributable to Sigla's failure to abide by the Expert Commission's ruling on the demand density calculation, but as Mr. Bastos testified, this would have had a significant effect. Bastos I ¶¶ 23-26 **(CWS-1)**.

[597] Tr. (5 Mar. 2013) 1289:1-4 (Barrera Direct) (testifying that he "can confirm that the changes that were made by the consultant were in full compliance with the Expert Commission's rulings"); Tr. (5 Mar. 2013) 1359:19-1360:1 (Barrera Tribunal Question) (confirming that all of "the calculations, the modifications that were made were linked"); Barrera ¶¶ 65-192 **(CER-4)**; Tr. (1 Mar. 2013) 772:21-773:1 (Bastos Cross) (rejecting suggestion that he performed a "summary" review of Bates White's July 28 report, and stating that "it was a conscientious[] review that I conducted").

allegedly contained in Bates White's 28 July 2008 study.[598]

158. At the Hearing, counsel for Respondent also attempted to cast doubt upon the authenticity of the Bates White 28 July 2008 tariff model (Claimant's Exhibit C-564) on the grounds that some of the Excel files in Exhibit C-564 have a date modified of 2011, that one of the files is different from Respondent's version of the model (Exhibit R-182), and that Claimant's version contains more files.[599] There is no basis to doubt the authenticity of Exhibit C-564. A comparison of the Excel files in Claimant's exhibit that have the 2011 "Date Modified" against the corresponding files in Respondent's exhibit using the Spreadsheet Compare function in Microsoft Office Professional Plus 2013[600] shows that the spreadsheets are identical, including as regards the data, formulas, and links that they contain, with the exception of a single file containing a difference that does not impact the ultimate VNR and VAD figures.[601] Respondent had ample opportunity to review Claimant's version of the model since it

[598] *See* Tr. (5 Mar. 2013) 1430:22-1431:15 (Damonte Cross) (testifying that the Sigla study "[o]f course" had pasted values and that he "wouldn't do it like that. I probably would have made some indication or simply linked this to the original sheet."); Tr. (5 Mar. 2013) 1442:8-14 (Damonte Cross) (testifying with regard to the Quantum studies that "there must be a spreadsheet in which this calculation is made" and that "then what happened was that somebody pasted that value from the other spreadsheet."); Tr. (5 Mar. 2013) 1424:1-8 (Damonte Cross) (testifying that Dr. "Barrera is right" that "[m]any links between formulas and spreadsheets in the SIGLA model appear broken with the consequence that changes in one spreadsheet are not automatically carried over into subsequent files."); Tr. (5 Mar. 2013) 1434:16-1436:2 (Damonte Cross) (agreeing that the reference prices for Peru included in the Sigla tariff model are "pasted values"). While Mr. Damonte testified that he could not ascertain whether one of the pasted values, cell K1171, was used in subsequent calculations, the "Trace Dependents" reveals that it is indeed used. *See* Tr. (5 Mar. 2013) 1436:9-1437:13 (Damonte Cross) (questioning whether the cell at issue was used in further calculations); Damonte II ¶ 163 **(RER-5)** (acknowledging that formulas in Excel can be audited using the "Trace Dependents" function); Tr. (5 Mar. 2013) 1436:3-8 (Damonte Cross) (showing that, when one applies the "Trace Dependents" function to cell K1171, pointers appear from cell K1171 to the neighboring cells M1171, N1171, and O1171 that calculate the reference prices for Panama, Nicaragua, and Ecuador (Quito), respectively). In addition, when one clicks on cells M1171, N1171, and O1171, formulas appear that refer back to cell K1171, as expected. Further, applying the "Trace Dependents" function to cells M1171, N1171, and O1171 confirms that each of these cells in turn is used in other calculations in the Sigla model.

[599] Tr. (5 Mar. 2013) 1368:10-16, 1371:21-1372:3, 1378:16-1379:8 (Barrera Cross).

[600] Spreadsheet Compare is a program that compares the contents of Excel spreadsheets, including as regards formulas, values, links, and other features. *See* BASIC TASKS IN SPREADSHEET COMPARE, *available at http://office.microsoft.com/en-us/support/basic-tasks-in-database-compare-HA102834118.aspx*.

[601] The file is "Costos_Contratas_y_Servicios.xls." Claimant's version of the file contains additional columns with cost references. Nevertheless, the cost figures adopted for the VNR calculation in Claimant's and Respondent's versions of the file are identical. *See* 28 July 2008 Bates White model delivered to the CNEE, file "Costos_Contratas_y_Servicios.xls," tab "Lista Costos Contratas," column Z entitled "Costo Unitario Adoptado en US$ 29-12-06" **(C-564)** (listing the cost figures adopted in the model); *compare* Respondent's version of the model, folder "INFORME EVAD," subfolder "Modelo 4," file

received the model with Claimant's Memorial dated 23 September 2011, and to raise any concerns prior to the Hearing.[602] Respondent nevertheless did not bring up its alleged concerns until *after* the examination of Mr. Giacchino, the author of the model, thus depriving Mr. Giacchino of an opportunity to respond. Accordingly, Respondent's belated and baseless assertions regarding Exhibit C-564 must be rejected.

159. As the record reflects and as the testimony at the Hearing confirmed, the CNEE's actions in disregarding both the Expert Commission's decisions and Bates White's 28 July 2008 revised VAD study do not reflect a mere misapplication or misinterpretation of the law by a regulatory agency acting in good faith, as Guatemala would have this Tribunal believe.[603] To the contrary, the actions that the CNEE took during EEGSA's 2008-2013 tariff review are the actions of a regulatory agency, which, from the very beginning of EEGSA's tariff review, was determined to eliminate what it perceived to be alleged "historical distortions from the VAD," by inserting accumulated depreciation into EEGSA's VAD calculation and lowering EEGSA's VNR through other illegitimate means.[604] While the CNEE first attempted to achieve this result by manipulating 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.[605] The CNEE's actions in doing so were not motivated by any good faith interpretation of the law, but rather by the

"Costos_Contratas_y_Servicios.xls," tab "Lista Costos Contratas," column Z entitled "Costo Unitarios en US$ 29-12-06" **(R-182)** (listing the same cost figures adopted in the model as in Claimant's version of the exhibit).

[602] Respondent's assertion at the Hearing that it only had the model since May 2012 is incorrect. *See* Tr. (5 Mar. 2013) 1380:14-17 (Barrera Cross) (Respondent's counsel asserting that "[t]he model that we are reviewing now and with a modification date after the 28th July was submitted by Claimant in this arbitration in May 2012"); *id*. at 1380:19-22 (Barrera Cross) (Respondent's counsel asserting that "we hadn't brought this issue before because . . . we hadn't seen it before"). The model submitted with Claimant's May 2012 Reply as Exhibit C-564 is identical to the model submitted as Exhibit C-265 with Claimant's September 2011 Memorial, including as regards the 2011 "Date Modified" information; the only difference between the two exhibits is that Exhibit C-564 is presented as a compressed or "zipped" file to preserve links within the model when the model is copied between computers or folders.

[603] *See, e.g.*, Tr. (21 Jan. 2013) 280:9-281:4 (Respondent's Opening); Rejoinder ¶¶ 12-14; Counter-Memorial ¶¶ 29, 52-78, 113-128.

[604] *See supra* Sections III.A.3-4.

[605] *See id*.

CNEE's objective of imposing a low VAD for political gain.[606] This is why the CNEE's publication of EEGSA's new tariff rates was celebrated by the President of Guatemala as a significant "achievement,"[607] and why the CNEE included newspaper articles discussing the 25 percent decrease in EEGSA's electricity rates in its 2008 annual report.[608]

160. Guatemala's evolving and *post-hoc* justifications for the CNEE's actions in subverting the tariff review process further demonstrate their arbitrary nature. As discussed above, while the CNEE's Legal Department initially justified the CNEE's decision to approve Sigla's VAD study based upon RLGE Article 99,[609] the CNEE, before the Guatemalan courts, abandoned that position, arguing instead that the Expert Commission's decisions were not

[606] *See id.*; Colom Bickford, Carlos E., Presidente CNEE, *Evolucion de la Methodología del Calculo Tarifario en Guatemala* dated Apr. 2010, at 47 (remarking that the VAD imposed on EEGSA in 2008 ensures that "the user pays what it should pay.") **(C-348)**.

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

[608] CNEE Labor Report, *Energy Tariff Reduced By 25%* dated Apr. 2009, at 20 ("In one year, the electric energy tariff has been reduced by 25 percent for the users of EEGSA.") **(C-327)**. Although the Government touted the purported 25 percent decrease in electricity tariffs for political gain, most customers, in fact, saw their electricity bills decrease by a lesser amount. *See, e.g.*, Sigla model, folder "EEGSA Archivos de Soporte Jul08," subfolder "EEGSA Etapa I - Cuadro Tarifario," file "Cuadro Tarifario EEGSA 31jul.ajust.xls," tab "Cuadro Tarifario" (showing that a residential customer consuming 50 kW per month and eligible for the social tariff would have seen its monthly electricity charge decrease from Qz 77.50 in July 2008 to Qz 71.15 in August 2008, a reduction of approximately 8.2 percent) **(C-589)**; *id.* (showing that the monthly electricity charge for a residential customer consuming 700 kW per month and ineligible for the social tariff would have increased from Qz 1,157.41 in July 2008 to Qz 1,185.35 in August 2008, an increase of approximately 2.4 percent). Assuming that the Bates White study had been used to set EEGSA's VAD, and the same tariff design formula had been used by the CNEE to set electricity tariffs, electricity rates for a residential customer consuming 50 kW per month and eligible for the social tariff would have seen its monthly electricity charge increase from Qz 77.50 in July 2008 to Qz 88.05 in August 2008, an increase of approximately 13.6 percent, and the monthly electricity charge for a residential customer consuming 700 kW per month and ineligible for the social tariff would have increased from Qz 1,157.41 to Qz 1,184.43, an increase of approximately 2.3 percent. *See* Bates White Stage E Report dated 28 July 2008, at 175, 189 **(C-263)**. The CNEE could have reallocated this cost in any number of ways during the tariff design process. For example, despite the increase in EEGSA's VAD in 2003 to US$ 110 million from US$ 70 million (which was the 1998 VAD as adjusted during the five-year period and in place the month prior to the 2003 VAD coming into effect), electricity rates for residential customers eligible for the social tariff remained unchanged and decreased for residential customers not eligible for the social tariff, because the CNEE shifted all of the increase to the industrial consumers. *See* NERA Stage G Report dated 30 July 2003, Tables 1, 2 at 19-20 **(C-77)**; *see also* NERA Model Delivered to the CNEE dated 31 July 2003, file "MODELO AJUSTE Y TARIFAS alternativa 110 MM.xls," tab "COMPARA," cells B63 to F69 for peak and B75 to F81 for off-peak rates **(C-70)**.

[609] *See supra* Section III.B.2; CNEE Legal Department Opinion Nos. GJ-DICTAMEN-1287 and GJ-DICTAMEN-1288, EEGSA's Social Tariff Base Schedule and EEGSA's Non-Social Tariff Base Schedule dated 29 July 2008, at 5, 9-10 **(C-503)**.

binding and that amended RLGE Article 98 allowed it to approve its own VAD study.[610] Guatemala's argument, made before the Guatemalan courts and in this arbitration, that the Expert Commission's decisions are non-binding, however, is inconsistent not only with the specific representations that it made to potential investors in EEGSA, including the TECO group of companies,[611] and to its own Constitutional Court,[612] and with the contemporaneous documents received from its very own experts,[613] but also with its own actions in this case.

161. As set forth above, Guatemala simply would not have gone to the lengths that it did to influence the Expert Commission process—by, among other things, enacting RLGE Article 98 *bis* and engaging in a series of *ex parte* communications with Mr. Riubrugent—if the decisions of the Expert Commission merely were advisory and could be ignored by the CNEE.[614] Similarly, Respondent's contention that the sole purpose of the Expert Commission was to determine whether or not Bates White's 5 May 2008 VAD study had fully complied with the ToR is belied by the documentary record.[615] As set forth above, it never was in doubt that Bates White had relied upon Article 1.10 to deviate from the ToR, which is what gave rise to the very discrepancies that were submitted to the Expert Commission for resolution.[616] As the Expert Commission itself observed in its Report, "[e]very deviation, by definition, presupposes a deviation from the TOR guidelines."[617] Moreover, if Respondent's assertion were correct, the CNEE's *ex parte* communications with Mr. Riubrugent during the Expert Commission process would have focused on identifying Bates White's deviations from the ToR, rather than on defending the CNEE's positions on the discrepancies, including its improper FRC formula,

[610] *See supra* Section III.B.2; Constitutional Court Decision regarding Amparo C2-7964-2008 dated 18 Nov. 2009, at 14 **(C-331)**.

[611] Sales Memorandum **(C-29)**.

[612] CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003 **(C-81)**.

[613] *See, e.g.*, Letter from Maria Bonilla to the MEM dated 31 May 2012, at 1 **(C-618)**; Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 **(C-494)**; Letter from I. Coral Martinez to the CNEE dated 31 Aug. 2002, at 1-2 **(C-446)**.

[614] *See supra* Sections III.C.3-4.

[615] *See supra* ¶ 146; Tr. (21 Jan. 2013) 225:13-16 (Respondent's Opening); Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross); Tr. (4 Mar. 2013) 1265:3-8 (Aguilar Tribunal Question).

[616] *See supra* ¶¶ 121-129.

[617] EC Report, at 13 **(C-246)**.

within the Expert Commission.[618] The CNEE's review and analysis of the Expert Commission's Report also would have focused on EEGSA's compliance with the ToR, rather than on the quantitative effect of applying the Expert Commission's decisions to Sigla's VAD study.[619] As the evidence demonstrates, the CNEE, like EEGSA, understood that the Expert Commission's decisions on the discrepancies would be binding upon both parties, and only changed its position *after* it determined that applying the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD.

162. Guatemala's contention that the Expert Commission merely provides a non-binding advisory opinion to be considered by the CNEE in setting the distributor's VAD and tariffs unilaterally, moreover, is illogical.[620] Both parties' experts on Guatemalan law at the Hearing agreed that the CNEE is empowered under LGE Article 5 to hire consultants to assist it in the tariff review process.[621] As the Tribunal's question indicated,[622] given that there is no dispute that the CNEE may engage consultants, there would be no reason for the distributor to participate in the appointment and funding of an Expert Commission constituted pursuant to LGE Article 75,[623] if the role of that Expert Commission were to be no different than that of any other consultant hired by the CNEE itself under LGE Article 5.

163. Respondent's *post-hoc* reliance on amended RLGE Article 98 for the CNEE's actions also is manifestly arbitrary and grossly unjust, because it undermines the very objective

[618] *See supra* Section III.C.4.

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

[620] *See, e.g.*, Tr. (21 Jan. 2013) 242:4-6 (Respondent's Opening) (arguing that the Expert Commission's decision "is an expert opinion that provides support and helps and assists the regulatory authority, the deciding entity"); Tr. (21 Jan. 2013) 272:15-20 (Respondent's Opening) (arguing that the enactment of RLGE Article 98 *bis* was necessary, because the system depends on having an Expert Commission "that can help the CNEE"); *see also* Tr. (4 Mar. 2013) 1265:9-13 (testifying that, if there is a decision by the Expert Commission, "it could be ignored because the information issued by the Expert Commission is technical in nature") (Aguilar Tribunal Question).

[621] LGE, Art. 5 ("The Commission may request professional counsel, consulting and experts that it requires for its functions.**")** **(C-17)**; Tr. (4 Mar. 2013) 1271:10-1275:6 (Legal Expert Tribunal Question).

[622] Tr. (4 Mar. 2013) 1271:10-1275:6 (Legal Expert Tribunal Question).

[623] LGE, Art. 75 **(C-17)**; RLGE, Art. 98 ("If discrepancies between the Commission and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed. The cost of this contracting shall be covered by the Commission and the Distributor in equal parts.") **(C-21)**.

of the LGE and RLGE, which was to depoliticize the process of setting electricity tariffs.[624] As discussed above, the witness and documentary evidence makes clear that, before the LGE was adopted, electricity tariffs were set on the basis of political considerations,[625] and that the LGE and RLGE depoliticized the process by providing that tariffs were to be calculated based upon technical and economic considerations; that the distributor's consultant was to prepare the VAD study; that the CNEE's role was limited to providing observations on that study; and that disputes were to be resolved by an independent Expert Commission comprised of technical experts appointed by the parties.[626] Mr. Colom's testimony that his own prior statement that the tariff review process was "especially sensitive" referred to political pressure placed on the Government by distributors,[627] is wholly unsupported and contradicted by the evidence. As the Tribunal observed, it is difficult to understand how the CNEE could be "independent," if it is a Government agency and not autonomous.[628] Nor could the objective of the LGE and RLGE be met by having the CNEE impose a VAD on EEGSA that was calculated by the CNEE's own consultant, when EEGSA not only was denied any opportunity to comment on that study but, as Mr. Colom testified, the CNEE's consultant was obligated to accept, without question, the entirety of the CNEE's ToR and to incorporate every single one of the CNEE's observations on the VAD study, even if they were inconsistent with the regulatory framework.[629] To insist that a study prepared under such circumstances is "independent" is to deprive that term of all meaning.

164. In summary, the actions that Guatemala took during EEGSA's 2008-2013 tariff review to manipulate and to control its outcome, culminating in its decision to impose its own unreasonably low VAD on EEGSA, reflect a willful and deliberate disregard of the legal and

[624] *See supra* Sections III.A.1-2.

[625] *See, e.g.*, Tr. (4 Mar. 2013) 1157:1-3 (Alegría Direct); Tr. (4 Mar. 2013) 1220:22-1222:12 (Aguilar Cross); Alegría II ¶¶ 2 **(CER-3)**; Alegría I ¶¶ 10-12, 14 **(CER-1)**.

[626] *See supra* Sections III.A.1-2; *see also* Tr. (4 Mar. 2013) 1157:21-1160:11 (Alegría Direct); Alegría I ¶¶ 30-31 **(CER-1)**.

[627] Tr. (4 Mar. 2013) 1088:18-1089:16 (Colom Cross).

[628] Tr. (4 Mar. 2013) 985:18-986:2 (Moller Tribunal Question).

[629] Tr. (4 Mar. 2013) 1145:1-5 (Colom Cross). Respondent's statement that Sigla "wasn't a CNEE consultant" and that Sigla did not "fully belong[] to the CNEE," because it was one of the firms that had been prequalified by the CNEE and had done some work for EEGSA in the past is wrong. *See* Tr. (21 Jan. 2013) 325:5-14 (Respondent's Opening). Sigla was retained solely by the CNEE to prepare a parallel VAD study, which EEGSA was not permitted to review or comment on, and Sigla modified its study per the CNEE's direction; under these circumstances, Sigla certainly was a CNEE consultant and did fully belong to the CNEE.

regulatory framework for an ulterior motive, and thus constitute manifestly arbitrary treatment by Guatemala in violation of Article 10.5.1 of the DR-CAFTA.

IV. DAMAGES

165. As confirmed at the Hearing, the parties' experts agree that damages should be calculated as the difference between EEGSA's actual value and the value that EEGSA would have had absent Respondent's breaches (*i.e.*, EEGSA's but-for value).[630] There also is no dispute that the parties' conclusions as to EEGSA's actual value are not significantly different and, thus, have no material impact on the calculation of damages.[631] Rather, the material difference between the parties' damages assessments lies in their calculation of EEGSA's but-for value.[632] Respondent's expert's testimony at the Hearing confirmed that Respondent failed to conduct a proper but-for valuation. That Respondent's calculation of EEGSA's but-for value is erroneous also was verified by the testimony of various other witnesses and experts. Finally, any dispute regarding the proper rate of interest has fallen away and, in fact, Respondent's expert endorsed an interest rate higher than that advocated by Claimant's expert in his written reports, with which Claimant and its expert express no disagreement.

A. EEGSA's Actual Value Is Not Disputed

166. As both experts have acknowledged, there is no material difference in their calculations of EEGSA's value in the actual scenario.[633] Specifically, as Mr. Kaczmarek summarized at the Hearing, there is an US$ 18 million difference between Claimant's and Respondent's calculation of EEGSA's actual historical cash flow between the time that the lower

[630] *See* Abdala I ¶ 25 ("[Navigant] estimates the alleged damages to Claimant through the difference between a *but-for* scenario and an *actual* scenario. The difference between both (*i.e.*, *but for* less *actual*) represents the presumed economic damages suffered by TGH. The methodology to calculate damages by difference between these two scenarios is standard and appropriate for this case . . . .") **(RER-1)**.

[631] Abdala II ¶ 2 ("There are no major differences with NCI [Navigant] in the valuation of EEGSA in the *actual* scenario.") **(RER-4)**; Kaczmarek Direct Presentation, Slide 13 (noting that "there is no material difference in the measurement of actual cash flows and actual value").

[632] *See* Kaczmarek Direct Presentation, Slide 12.

[633] Abdala II ¶ 2 ("There are no major differences with NCI [Navigant] in the valuation of EEGSA in the *actual* scenario.") **(RER-4)**; Kaczmarek Direct Presentation, Slide 13 ("[T]here is no material difference in the measurement of actual cash flows and actual value"); Rejoinder ¶ 496 ("Both parties in practice agree on what the actual value is . . . . Therefore, the question to be considered is why there are differences in the *but for* scenario).

Sigla VAD was imposed and the date that DECA II was sold, which accounts for a difference of approximately US$ 4 million in their respective damages calculations.[634] As also noted at the Hearing, Claimant's actual equity value for EEGSA falls well within the range calculated by Dr. Abdala, and Respondent has not presented any reason to accept a different number within that range.[635]

167. At the Hearing, several questions concerned the experts' calculations of EEGSA's actual value. For the completeness and clarity of the record, Claimant below answers those questions, while emphasizing that these issues do not explain the differences between the parties' damages calculations. That discrepancy, as noted above, is attributable to the vastly different calculations of EEGSA's but-for value by the parties' experts, and not to EEGSA's actual value.

168. First, concerning the evidence of EEGSA's value in the sale to EPM (which only is relevant in determining EEGSA's actual value),[636] Respondent's expert, using information from DECA II's financial statements, allocated a certain portion of DECA II's sales price to EEGSA. Using this approach, Dr. Abdala calculated EEGSA's actual enterprise value to be in a *range* between US$ 518 million and US$ 582 million.[637] Using all three accepted valuation approaches, namely, DCF, comparable public companies, and comparable transactions, Mr. Kaczmarek calculated EEGSA's actual value as US$ 562 million,[638] at the high end of Dr. Abdala's range (where the higher EEGSA's actual value, the lower Claimant's damages). Because the sale to EPM was for the holding company DECA II, and not for EEGSA, Mr. Kaczmarek did not value EEGSA based upon the sale but, rather, used the sales price as a reasonableness check for his valuation conclusions.[639] To do so, he conducted an exercise similar to that undertaken by Dr. Abdala, and concluded that EEGSA's value was US$ 498 million, based upon the EPM sale.[640] This amount was within 5 percent of the value calculated

[634] Tr. (5 Mar. 2013) 1496:8-10 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slides 12 & 13.

[635] Tr. (5 Mar. 2013) 1496:15-22 (Kaczmarek Direct).

[636] Letter from the Tribunal to the Parties dated 11 Mar. 2013 (requesting "[e]vidence of the value to EEGSA in the sale to [EPM]").

[637] Abdala II ¶ 32 **(RER-4)**; Abdala I ¶ 83 **(RER-1)**.

[638] Kaczmarek II ¶ 135 **(CER-5)**.

[639] *Id*. ¶¶ 134-135; Kaczmarek I ¶¶ 240-241 **(CER-2)**.

[640] Kaczmarek II ¶ 135 **(CER-5)**; Kaczmarek I ¶¶ 240-241 **(CER-2)**.

by Mr. Kaczmarek through his three valuation approaches, and thus served to validate Mr. Kaczmarek's valuation conclusions.[641] Although this amount is lower and outside of the range of values calculated by Dr. Abdala, this is irrelevant, because Mr. Kaczmarek only used the EPM sales price to *confirm* his valuation conclusions from the three valuation approaches; he used the US$ 562 million that he obtained from those approaches as EEGSA's actual value in his damages calculation.

169. Second, in determining EEGSA's actual value, all parties assumed that the CNEE would continue to calculate EEGSA's VAD using a VNR that has been depreciated by 50 percent, as the CNEE did in 2008, when it set EEGSA's VAD on the basis of Sigla's study. In his DCF analysis, Mr. Kaczmarek forecasted EEGSA's cash flow for ten years, and then assigned a terminal value to EEGSA after that point in time.[642] This comports with standard valuation methodology.[643] In preparing its Fairness Opinion, Citibank likewise forecasted EEGSA's future cash flows for ten years in its DCF analysis.[644] To be clear, in his DCF analysis, Mr. Kaczmarek did not assume that "the tariff, as established in 2008, would remain the same for future tariff periods."[645] Rather, in forecasting EEGSA's cash flows through the year

[641] Kaczmarek I ¶¶ 240-241 **(CER-2)**.

[642] *Id*. ¶ 197.

[643] *See, e.g.*, Tr. (5 Mar. 2013) 1532:12-14 (Abdala Tribunal Question) ("I don't disagree with the idea that because such a long horizon you can perfectly use a perpetuity model, so that's fine. I don't disagree with that idea."); Shannon P. Pratt & Alina V. Niculita, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES (McGraw-Hill 5th ed.), at 3 (explaining that in "the basic discounted economic income model, [there are] specific projections of economic income [] made over the life of the investment. However, as a practical matter, there are very few investments for which reliable projections can be made over the entire life of the investment. Variations of the model reflect this limitation. The most common multistage variation of the discounted economic income model is a two-stage model that projects economic income for a finite number of periods, usually one business cycle of somewhere between 3 and 10 years, and then assumes a *terminal value* at the end of the discrete projection period.") (emphasis in original) **(C-626)**; Tim Koller *et al.*, VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES (Wiley 5th ed.), at 4 ("In general, we recommend using an explicit forecast period of 10 to 15 years . . . . ") **(C-627)**. Submitting new evidence on this point is warranted, as it responds to a question from the Tribunal. *See* Tr. (22 Jan. 2013) 403:1-15 (Tribunal Question).

[644] Citibank Fairness Opinion dated 14 Oct. 2010, at 5 (explaining that to conduct its DCF, it projected EEGSA's VAD through 2018 relying on DECA II's financial documentation and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate) **(C-531)**.

[645] *See* Letter from the Tribunal to the Parties dated 11 Mar. 2013 (asking whether it is "right to assume for the purposes of loss assessment that the 2008-2013 tariff would remain in place forever? If not, what are the consequences on TECO's claim?"); Tr. (22 Jan. 2013) 402:22-403:15 (Tribunal Question) (quoting **R-133**).

2018, Mr. Kaczmarek took into account likely inflation in the costs of materials and other costs, expansion of the network, and a diminishing ability to continue decreasing electricity losses, all of which would have an effect on EEGSA's VNR and its resulting VAD.[646] Mr. Kaczmarek thus calculated EEGSA's VNR and VAD in 2018 to be US$ 1,863 million and US$ 321 million, respectively, as compared with EEGSA's 2008 VNR and VAD of US$ 1,102 million and US$ 240 million, respectively.[647]

170. What Mr. Kaczmarek—as well as Respondent, EPM, and Citibank—assumed would remain the same was Respondent's new interpretation of the LGE and RLGE, according to which it calculates the distributor's VAD off of a VNR that has been depreciated by 50 percent.[648] This was an entirely reasonable assumption, as Respondent throughout these proceedings has insisted that the law in Guatemala requires the VAD to be calculated in this manner, and thus it would have been unreasonable for Mr. Kaczmarek to assume that Respondent would act inconsistently with those statements (thereby undermining its position in this arbitration), and henceforth calculate EEGSA's VAD on an undepreciated VNR.[649] The reasonableness of this assumption is further borne out by the evidence: the Terms of Reference governing EEGSA's 2013-2018 tariff review contain the very same FRC formula that was

[646] Kaczmarek I ¶¶ 161-181 (explaining that Mr. Kaczmarek projected EEGSA's VNR based, among other things, on the implied growth of the network determined in the Sigla and Bates White VAD studies for the period after 2013, thus assuming that the network would grow between 2 to 3 percent annually; that "low tension consumers were projected to grow at the average rate of growth predicted during the last two years in the Third Rate Period while medium tension consumers were projected to remain flat"; that network maintenance and administrative costs would increase at the expected inflation rate and at the same rate as the projection for energy consumption and customer growth, respectively; that energy losses would continue to decline through 2013 at a quarter of the average rate observed from 2004 to 2010 and that, after 2013, energy losses would remain constant; and that maintenance capital expenditures would increase at the same rate as expansion capital expenditures) **(CER-2)**; Memorial ¶¶ 288-293.

[647] Kaczmarek II Appendix 3.B **(CER-5)**. The 2008 VNR is shown on the line "VNR (excluding donations)," and the 2018 VNR is equal to the VNR shown on the line "VNR (excluding donations)" multiplied by the inflation adjustment factor of 1.31 for 2018. *See id*., Appendix 3.B, at 10. The VADs for 2008 and 2018 are shown on the line "Inflation Adjusted VAD Total." *See id*.

[648] Tr. (5 Mar. 2013) 1603:12-1604:1 (Kaczmarek Tribunal Question).

[649] *Id*.

inserted into EEGSA's ToR in January 2008, which, as discussed above, resulted in the 50 percent depreciation of EEGSA's regulatory asset base.[650]

171. Similarly, Mr. Kaczmarek assumed that in the forthcoming 2013-2018 tariff review, the CNEE would set EEGSA's VAD on a VNR that was calculated in the same manner in which Sigla had calculated EEGSA's VNR, and not in the manner in which Bates White had calculated EEGSA's VNR, which would result in a large increase in the VNR in 2013. Again, it would have made no sense for Mr. Kaczmarek to assume otherwise. EPM likewise made these same assumptions. In this regard, EPM's statement highlighted by the Tribunal, that "[w]e bought on the basis that the current tariff model and layout is the one that exists. So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods,"[651] is correctly understood as an assumption that the CNEE would continue to calculate the VAD on a depreciated VNR, and that it would calculate EEGSA's VNR within the same range of values as it did in the 2008-2013 tariff review. Similarly, Citibank's Fairness Opinion, which calculated DECA II's value to be within the range of the sales price paid by EPM, relied on a DCF analysis for EEGSA, in which Citibank, like Mr. Kaczmarek, assumed that the VNR would change over time to account for inflation, material price increases, and network expansion, but also assumed that the VAD would continue to be calculated off of a depreciated VNR, and that the VNR itself would not change dramatically.[652]

172. Because Respondent calculated its actual value of EEGSA based solely on the EPM sales price,[653] it too made the same general assumptions as those made by EPM, described above. This explains how EEGSA's 2008-2013 VAD, which was referenced by EPM's CEO as

[650] *Compare* CNEE Resolution 161-2012 dated 23 July 2012, at 27 (containing the Terms of Reference for EEGSA's 2013 tariff review) **(R-205)** *with* CNEE Resolution 124-2007 dated Jan. 2008, at 79 (containing the Terms of Reference for EEGSA's 2008 tariff review, as amended to add the FRC formula) **(C-417)**.

[651] Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 **(R-133)**; *see also* Tr. (22 Jan. 2013) 403:8-12 (Tribunal Question).

[652] Citigroup Fairness Opinion dated 14 Oct. 2010, at 29 ("[T]he projections assume that CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013.") **(C-531)**; *id.* at 31 (same).

[653] Abdala II ¶ 32 **(RER-4)**; Abdala I ¶ 80 **(RER-1)**.

being low, was taken into account in fixing DECA II's sales price.[654] As recounted at the Hearing by both Claimant's and Respondent's experts and witnesses, the value of a distribution company is based upon its expected cash flows, which for EEGSA is the VAD.[655] Because EEGSA's VAD was significantly decreased in 2008, and because all parties properly assumed that EEGSA's VAD would continue to be calculated based upon a depreciated regulatory asset base going forward, EEGSA's value was diminished (just as it was enhanced when Guatemala adopted the VNR regulatory regime at privatization, resulting in proceeds far in excess of EEGSA's book value).[656] As Ms. Callahan succinctly put it, "[t]hey [*i.e.*, EPM] were buying damaged goods,"[657] and, thus, were paying less for those goods.

173. Dr. Abdala's testimony regarding these points was misleading. When explaining that he calculated EEGSA's actual value based solely on evidence concerning the purchase price paid by EPM and did not conduct a DCF, Dr. Abdala remarked that, by doing so, he did "not need to speculate what would be the new tariff outcome in, say, 2013, which as you said, it may be different, it may be higher, may be lower, but we don't know."[658] This is misleading, because even if he did not do so expressly, Dr. Abdala *implicitly* did make assumptions regarding EEGSA's future tariffs in order to calculate EEGSA's value in the actual scenario. If the sale to EPM had been for EEGSA, and not DECA II, all parties simply could—and would—have adopted that figure for EEGSA's actual value.[659] But because the sale was for DECA II, Dr.

[654] *See* Tr. (22 Jan. 2013) 403:16-20 (Tribunal Question) ("How was the 2008 tariff, which is in this interview referred to as being low, how was that taken into account in the sale—in fixing the sale—the sale price to Energía de Medellín?"); Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 **(R-133)**.

[655] Kaczmarek II ¶ 188 ("Most of the value paid and received through EEGSA's privatization was not for physical assets, but for being able to build a network and earn a rate of return on a Model Company using the VNR as a regulatory asset base.") **(CER-5)**; Tr. (4 Mar. 2013) 1002:12-18 (Moller Cross) (confirming testimony in *Iberdrola* that investors in electricity distribution companies "do not purchase the wires but rather purchase the rates, or the tariff rates"); Tr. (4 Mar. 2013) 1004:5-16 (Moller Cross) (testifying that EEGSA's tariff rates would directly impact the purchase price of EEGSA); Tr. (22 Jan. 2013) 551:12-14 (Gillette Tribunal Question) (testifying that "[DECA was buying] a cash flow, essentially"); Tr. (22 Jan. 2013) 614:11-13 (Calleja Direct) (explaining that "the legal framework for establishment of tariffs was the value of the company . . . .").

[656] *See* Kaczmarek I ¶ 62 (explaining that the EV/EBITDA multiple implied by the privatization price was 40x, whereas regulated utilities typically are valued in the range of 6x to 10x) **(CER-2)**.

[657] Tr. (22 Jan. 2013) 589:16-17 (Callahan Cross).

[658] Tr. (5 Mar. 2013) 1604:15-18 (Abdala Tribunal Question).

[659] Kaczmarek II ¶ 134 ("We agree with Compass Lexecon that the DECA II transaction should be considered in determining the actual value of EEGSA. However, since DECA II contained a portfolio of companies, the

Abdala had to make an assumption regarding the proportion of the sales price attributable to EEGSA and, to do so, had to make assumptions regarding EEGSA's future cash flows.[660] This is exactly what both EPM and Citibank did when they conducted a DCF to value EEGSA.[661] Dr. Abdala also misleadingly characterized Mr. Kaczmarek's testimony when he argued that there was "no reason to assume that the gap between tariffs that we are modeling for the 2008-2013 period should be prolonged over perpetuity . . . ."[662] As explained above, neither Mr. Kaczmarek, nor Citibank, projected EEGSA's tariffs into perpetuity: each of them projected tariffs only through 2018, as is the norm in valuations,[663] and as was endorsed by Dr. Abdala himself,[664] and then set a terminal value for EEGSA.[665]

174. At bottom, despite the different methodologies employed by the parties' experts to calculate EEGSA's value in the actual scenario,[666] the parties' conclusions are substantially similar and do not account for any material difference in the calculation of TECO's damages.

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price paid by EPM for DECA II does not yield a directly observable price for EEGSA. This is clearly reflected in Compass Lexecon's own analysis of the DECA II transaction from which they could only conclude that EPM paid between US$ 518.2 million and US$ 582.2 million for EEGSA rather than a definitive amount.") **(CER-5)**; *see also* Abdala I n.59 ("It is understood that the use of such transaction [the EPM sale] is not free of the appraiser's subjectivity, since it is necessary to allocate a portion of DECA II price paid by EPM to EEGSA's value.").

[660] DECA II's sales price (including EEGSA) was based upon future cash flows discounted at the company's cost of capital. *See* Kaczmarek II ¶ 182 **(CER-5)**.

[661] *See* Citibank Fairness Opinion dated 14 Oct. 2010 **(C-531)**; Non-binding Offer Letter from EPM to Iberdrola dated 26 July 2010 **(R-126)**.

[662] Tr. (5 Mar. 2013) 1605:2-5 (Abdala Tribunal Question).

[663] *See supra* ¶ 169 n.643.

[664] Tr. (5 Mar. 2013) 1532:12-14 (Abdala Tribunal Question) ("I don't disagree with the idea that because such a long horizon you can perfectly use a perpetuity model, so that's fine. I don't disagree with that idea.").

[665] Kaczmarek I ¶ 197 **(CER-2)**; Citibank Fairness Opinion dated 14 Oct. 2010, at 15 (explaining that to conduct its DCF, it projected EEGSA's VAD through 2018 relying on DECA II's financial documentation and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate) **(C-531)**.

[666] Mr. Kaczmarek calculated EEGSA's value in the actual scenario by using all three accepted valuation methods, namely, DCF, comparable public company, and comparable transactions, and, weighting the results of those methods in accordance with the reliability of the available data, he confirmed the accuracy of his valuation with reference to the sales price obtained for DECA II. Dr. Abdala, by contrast, relied solely on the DECA II sales price to establish EEGSA's value in the actual scenario. *See* Tr. (5 Mar. 2013) 1497:5-13 (Kaczmarek Direct); Kaczmarek II ¶¶ 132-135 **(CER-5)**; Kaczmarek I ¶¶ 17, 239-241 **(CER-2)**; Abdala II ¶ 32 **(RER-4)**; Abdala I ¶ 80 **(RER-1)**; Reply ¶¶ 302-303; Memorial ¶ 285 (explaining that Mr. Kaczmarek uses the same approaches to calculate damages in the actual and but-for scenarios, with the only difference

B. Respondent's But-For Valuation Is Deeply Flawed

1. Respondent's Expert Failed To Perform A Proper But-For Valuation

175. Although Respondent's expert recognized in his report that a proper but-for valuation requires calculating the value that EEGSA would have had, assuming that its VAD had been set on the basis of all of the Expert Commission's rulings,[667] Respondent failed to conduct such an analysis. At the Hearing, Dr. Abdala went to great lengths to avoid acknowledging this and, instead, sought to further obscure the fact that he did not calculate Claimant's damages assuming that Respondent had breached the DR-CAFTA by not adhering to the Expert Commission's rulings in setting EEGSA's VAD.

176. Dr. Abdala thus testified that he "was asked to assume that . . . Respondent was liable in the sense that the SIGLA report should not have been adopted for the tariffs and that instead the tariff should have been set according to . . . the rulings of the Experts Commission and then fully implemented by the Regulator."[668] Only after repeated questioning did Dr. Abdala admit that he did not calculate TECO's damages in this manner, but rather ignored the Expert Commission's ruling on the FRC and, instead, used Mr. Damonte's FRC formula to calculate EEGSA's but-for value:

> Q. So, did you calculate TECO's damages, assuming that TECO was entitled to the tariffs as if they were set according to the full implementation of the Expert Commission's report, including its decision on the FRC?
>
> . . .
>
> A: Well, yes, but [] with the caveat that we look at that in the particular case of the FRC, we understand that the . . . formula was incorrect. So, I made that caveat and said well, basically the Regulator, the CNEE, would have never approved even if the recommendation of the Commission was to use a different factor here, it should have never approved it because it would have been wrong from a regulatory point of view.

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being that for the period measuring lost cash flow in the actual scenario, no projections need to be made, because historical financial data is available).

[667] Abdala I ¶ 4(b) **(RER-1)**; Tr. (5 Mar. 2013) 1563:18-1564:18 (Abdala Cross).

[668] Tr. (5 Mar. 2013) 1527:22-1528:7 (Abdala Direct).

> . . .
>
> Q. But just to be entirely clear, in your calculation of TECO's damages, you did not calculate their damages according to the full implementation of the Expert Commission's decisions. And by 'full,' I mean respecting every single one of their rulings, including the ruling on the FRC; is that correct?
>
> . . .
>
> A. With that interpretation, and to me the full implementation.
>
> Q. . . . [By] the full implementation of the Expert Commission's decisions, by that I mean full, every single one, including the ones you don't like, including the decision on the FRC formula. So, you did not calculate damages in that respect, did you?
>
> A. Well, damages can be easily computed in my model.[669]

As Dr. Abdala finally confirmed, he "didn't do the calculation of damages using the FRC formula as recommended by the Expert Commission . . . ."[670]

177. And with respect to his decision to use Mr. Damonte's VNR, rather than Bates White's VNR, which had incorporated all of the Expert Commission's rulings, Dr. Abdala first testified, "I'm not sure whether [Mr. Damonte incorporated all of the Expert Commission's decisions into his VNR] or not. I don't know,"[671] although he later acknowledged that he was "aware that Mr. Damonte in his report has stated that there were some recommendations that were – he was unable to fully implement."[672]

178. Mr. Damonte was similarly evasive. With respect to his VAD calculation, which Dr. Abdala used to calculate Claimant's damages, Mr. Damonte testified: "The number is 184

[669] Tr. (5 Mar. 2013) 1557:5-1560:18 (Abdala Cross). Notably, the model that Dr. Abdala references also is misleading. *See* DAS-27, NCI ReportModel_23Sept Corrected_24Jan2012. Dr. Abdala's model 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. Moreover, after selecting the Navigant VNR, FRC, and Capital Expenditure assumptions, the model still does not reflect Navigant's capital expenditure assumption. Therefore, it is not possible to change just the VNR and FRC assumptions in Dr. Abdala's model to match Navigant's assumptions, contrary to what Dr. Abdala suggests.

[670] Tr. (5 Mar. 2013) 1560:22-1561:2 (Abdala Cross).

[671] *Id*. at 1570:9-10.

[672] *Id*. at 1571:12-14.

million per year. This is the value of the VAD taking into account *all the decisions by the CE*. There are certain changes that I disagree with because they contain technical errors. I *strictly applied everything that was relevant* and I got this figure."[673] Thus, according to Mr. Damonte, the Expert Commission's decision on the FRC formula apparently contained a "technical error" and was irrelevant. It is clear, however, that it was neither a technical error nor was it irrelevant.

179. Both Dr. Abdala and Mr. Damonte attempted to justify their use and calculation, respectively, of a VNR different from Bates White's VNR on the ground that Bates White allegedly had failed to implement all of the Expert Commission's decisions in its 28 July 2008 revised VAD study.[674] But, as confirmed at the Hearing and as explained above, it is undisputed that the CNEE failed even to consider Bates White's 28 July study when deciding to set EEGSA's VAD on the basis of the Sigla study.[675] Thus, if Respondent had not breached its Treaty obligations, it would have set EEGSA's VAD on the basis of Bates White's study, which therefore must be used to calculate EEGSA's value in the but-for scenario. Dr. Abdala, moreover, acknowledged that he could not conclude that the alleged lack of traceability of Bates White's model—which was the only example he gave of an alleged failure of the Bates White 28 July study to incorporate the Expert Commission's rulings—had any effect on the VNR.[676] And contrary to Mr. Damonte's testimony, Mr. Damonte's failure to implement all of the Expert Commission's decisions did affect his VNR. In particular, Mr. Damonte was wrong when he

[673] Tr. (5 Mar. 2013) 1415:21-1416:4 (emphasis added) (Damonte Direct); *see also* Counter-Memorial ¶¶ 603, 617(a) (remarking that Mr. Damonte took into account only the "feasible" rulings of the Expert Commission).

[674] Tr. (5 Mar. 2013) 1569:15-1570:1, 1570:11-1571:11 (Abdala Cross); Tr. (5 Mar. 2013) 1412:22-1416:4 (Damonte Direct); Damonte Direct Presentation, Slides 20-23; Abdala II ¶ 4 ("As shown by engineering expert Mario Damonte, the VNR of that exercise [the Bates White 28 July report] has errors and omissions in the implementation of the opinion provided by the Expert Commission ('EC') and, thus, the CNEE could not have used it as a valid and reasonable alternative to set tariffs.") **(RER-4)**; Damonte I ¶ 173 **(RER-2)**.

[675] Tr. (4 Mar. 2013) 1054:4-1055:3 (Moller Cross) (testifying that, when EEGSA's 28 July 2008 VAD study "was submitted, [the CNEE] did not look at it in detail immediately because, according to the recommendation of lawyers, this was a study that was not within the law, that departed from the powers that the Experts had[,]" that "it was not a study that [the CNEE] had to assess or evaluate because this study was a study that departed from the Regulations and the law," and that the CNEE "evaluated the study much farther down the line but not at that time"); Tr. (4 Mar. 2013) 1054:7-8 (Moller Cross) (acknowledging that the presentation prepared by the CNEE analyzing the Expert Commission's rulings "does not mention" the Bates White July 28 revised study); *see also* Tr. (5 Mar. 2013) 1570:2-10 (Abdala Cross) ("Q. Now, are you aware that when it set EEGSA's VAD and tariffs in 2008, the CNEE had not reviewed Bates White's July 28th study or analyzed whether that study had properly implemented the Expert Commission's rulings? . . . A. So, I'm not sure whether they have done so or not. I don't know.").

[676] Tr. (5 Mar. 2013) 1570:19-22 (Abdala Cross).

argued that his failure to comply with the Expert Commission's ruling on reference prices "had no impact whatsoever" on his VNR calculation, because "the prices set by Sigla were very similar to the prices set by Bates[.]"[677] As noted above, the Sigla model, for example, uses the price of US$ 1934.26 for a 50kVA transformer, while the Bates White model uses the price of US$ 2913.51, which is 51 percent higher.[678]

180. As Mr. Kaczmarek explained at the Hearing, if Dr. Abdala had used the Expert Commission's FRC formula and Bates White's VNR in its own model, it would have obtained a but-for value for TECO's equity share in EEGSA of US$ 376 million, which is *higher* than the value that Mr. Kaczmarek calculated using the DCF approach (US$ 320 million), and the value that Mr. Kaczmarek arrived at after weighting the values from the three different valuation approaches (US$ 338 million).[679] Using Dr. Abdala's model, but replacing the Expert Commission's FRC formula and Bates White's VNR, accordingly results in damages for Claimant in a range between US$ 272 million to US$ 277 million, which is higher than TECO's claimed damages of US$ 244 million.[680]

[677] Tr. (5 Mar. 2013) 1417:9-11 (Damonte Direct). Mr. Damonte gave the example of the price of an aluminum wire, for which he provided no citation. Tr. (5 Mar. 2013) 1417:8-11, 1419:3-6 (Damonte Direct); Damonte Direct Presentation, Slide 18.

[678] *See supra* ¶ 156.

[679] Tr. (5 Mar. 2013) 1499:9-19 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slide 18; Kaczmarek II Table 13 **(CER-5)**. Note that these figures represent TECO's equity value in EEGSA, whereas the discussion above relating to EEGSA's actual value used figures representing EEGSA's enterprise value (because the sale was for all of EEGSA and its affiliates, including their equity and debt). To arrive at Claimant's equity value in EEGSA, EEGSA's debt is subtracted from EEGSA's enterprise value and then Claimant's 24 percent shareholding is taken from that amount.

[680] Tr. (5 Mar. 2013) 1499:13-19 (Kaczmarek Direct); *id.* at 1515:15-19; Kaczmarek Direct Presentation, Slide 19. As Mr. Kaczmarek explained, the reason that Dr. Abdala's but-for value would be slightly higher than his but-for value is because Respondent's expert lowered the tax rate from 38 percent to 33 percent. Respondent failed to offer any explanation for this change, either in its reports or at the Hearing. As Mr. Kaczmarek surmised, Respondent's expert likely made this change to avoid obtaining even more "negative" damages in its model, which would further highlight the unreliability of Respondent's assumptions, in particular the assumed capital expenditures. Tr. (5 Mar. 2013) 1499:20-1500:5 (Kaczmarek Direct); *id.* at 1500:10-16. Dr. Abdala's model also is misleading, as it does not accurately reflect Mr. Kaczmarek's assumptions, when those assumptions are chosen. *See supra* ¶ 176 n.669.

2. Respondent Manipulated CAPEX To Obtain No Damages

181. Respondent compounds its error in calculating EEGSA's but-for value by using artificially high capital expenditures.[681] As explained at the Hearing and in Mr. Kaczmarek's second expert report, both experts use essentially the same amount of capital expenditures in the but-for scenario.[682] Mr. Damonte's VNR, used by Respondent in the but-for scenario, however, is US$ 441 million less than Bates White's VNR, used by Claimant in that same scenario.[683] As Mr. Kaczmarek emphasized at the Hearing, Respondent's capital expenditure assumption is unrealistic, because any company whose earnings were lowered by such a significant amount would spend less on capital expenditures.[684] Dr. Abdala did not dispute this unassailable fact,[685] but instead argued that the capital expenditures used by Mr. Kaczmarek were too low. In so testifying, Dr. Abdala disavowed statements made in his second expert report, where he acknowledged:

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[681] Dr. Abdala incorrectly testified that the dispute over the proper level of capital expenditures in EEGSA's but-for scenario accounts for US$ 364.6 million of the difference between the parties' but-for values of EEGSA, and that the remaining US$ 447.2 million difference is attributable to Respondent's refusal to use the Expert Commission's FRC formula or Bates White's VNR in the but-for scenario. Abdala Direct Presentation, Slide 4. As Mr. Kaczmarek showed, however, *all* of the difference between Claimant's and Respondent's respective damages calculations is attributable to the different VNR and FRC used by the experts in their but-for scenarios. *See* Kaczmarek Direct Presentation, Slide 16. Dr. Abdala has increased Mr. Kaczmarek's capital expenditure assumption in his version of Mr. Kaczmarek's model, and then concludes that the difference in the experts' capital expenditure assumptions accounts for a large percentage of the difference in their damages calculations. *See also supra* ¶ 176 n.669.

[682] Tr. (5 Mar. 2013) 1496:4-14 (Kaczmarek Direct); Kaczmarek II ¶ 55 & Table 11.

[683] Bates White's 2008 VNR, as calculated in the 28 July 2008 study, is US$ 1.102 million, and Mr. Damonte's VNR, used by Dr. Abdala, to calculate EEGSA's but-for value is US$ 661 million. Kaczmarek II Figure 3 **(CER-5)**; Abdala I ¶ 4(b) **(RER-1)**.

[684] Tr. (5 Mar. 2013) 1513:13-1514:3 (Kaczmarek Direct).

[685] Tr. (5 Mar. 2013) 1563:5-17 (Abdala Cross) ("Q. And if the Shareholders do actually dividend out more money or postpone making some capital expenditure expenses, the result of that would be the sales price to EPM would have been diminished; isn't that correct? A. It would have been affected, probably, yes. Q. And indeed, in Paragraph 72 of your Second Report, don't you, in fact, say that if [*sic*] capital expenditures can be postponed for a period of time, but if they are, that will be taken into account by purchasers such as EPM, and it will pay less for the value of the company? A. In principle, yes."); *see also* Abdala II ¶ 72 ("[T]hese investments can be delayed in the short run but have to be made sooner or later. An informed buyer, such as EPM, was probably aware of this fact and probably deducted the investments delayed between 2008 and 2010 from the purchase price.") **(RER-4)**; Abdala II Appendix B at n.96 ("These actions that delay investments and increase operating costs and penalties, while decreasing the quality of the offered product, are unsustainable in the medium term; therefore, investments will need to be made) **(RER-4)**.

> In its reply report, NCI made a correction in the EEGSA *but-for* investments that would have been made in the 2008-2013 tariff period and now they are virtually identical to those estimated in the Bates White study of May 2008 corrected by Damonte and used by us in our valuation exercise. *As a consequence, there are no longer any significant differences between the parties as to the amount of investments EEGSA would have made in such scenario*.[686]

Dr. Abdala thus confirmed in his second report that only "two relevant differences remain with NCI concerning two determinants of the value in the *but-for* scenario: the value of the asset base to be used for tariff purposes (measured through the Value of New Replacement or 'VNR'), and the consideration of the factor that accounts for depreciation of the asset base within the capital recovery factor ('CRF')."[687]

182. Dr. Abdala's insistence at the Hearing that Mr. Kaczmarek should have increased capital expenditures in his but-for scenario[688] thus contradicts his earlier written testimony, and was an evident attempt to salvage his unreasonable valuation conclusions in light of the fact that it makes no sense to value EEGSA in the but-for scenario using Mr. Damonte's FRC formula and VNR, as neither of those would have been used by Respondent to set EEGSA's VAD in August 2008. Dr. Abdala not only contradicted himself at the Hearing, but his testimony that the amount of capital expenditures used by Claimant in the but-for scenario is too low is proven wrong by two facts, neither of which Dr. Abdala was able to explain during his examination.

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[686] Abdala II ¶ 2 (emphasis added) **(RER-4)**.

[687] *Id*. ¶ 3 (emphasis removed).

[688] *See* Abdala Direct Presentation, Slide 3 (in the first bar, erroneously labeling the return of capital portion of the VAD (or 1/To) as "replacement"); Tr. (5 Mar. 2013) 1529:10-17 (Abdala Direct) (arguing that Mr. Kaczmarek should have used US$ 76.5 million as its capital expenditures number in the but-for scenario). In his second report, Mr. Kaczmarek explained that Bates White had estimated US$ 44 million in capital expenditures and that Dr. Abdala's US$ 76 million improperly included EEGSA's return of capital. Kaczmarek II ¶ 39 **(CER-5)**. Dr. Abdala, in his second report, accepted this correction by agreeing that there was no longer any dispute between the experts regarding the proper level of capital expenditures in the but-for scenario. Abdala II ¶ 2 **(RER-4)**. Tellingly, Dr. Abdala testified that he "explained this [*i.e.*, his criticism regarding Mr. Kaczmarek's capital expenditure assumptions] very well in the First Report," without referencing his Second Report where he conceded that he erroneously calculated the capital expenditures in Bates White's 28 July 2008 study and acknowledged that there was no longer a dispute between the parties regarding the proper amount of capital expenditures in the but-for scenario. Tr. (5 Mar. 2013) 1533:3-13 (Abdala Direct).

183. First, the amount of capital expenditures used by Mr. Kaczmarek in the but-for scenario is in line with that projected in Bates White's 28 July 2008 revised VAD study, as Dr. Abdala acknowledges,[689] and is *twice as high* as EEGSA's historical capital expenditures,[690] demonstrating that it is not understated. Moreover, as Mr. Kaczmarek also showed, the ratio of capital expenditures as a percentage of enterprise value that he calculated is in line with other distribution companies, while Dr. Abdala's ratio is more than three times the median.[691] Dr. Abdala's attempt to show otherwise is unavailing. While he claims to have relied on a larger sample of comparative distribution companies to reach a higher median ratio of capital expenditures to enterprise value, Dr. Abdala has taken all but two of the comparable companies used by Mr. Kaczmarek in his comparable company analysis, but has ignored the weightings that Mr. Kaczmarek assigned to the various companies to account for their significant differences from EEGSA, in terms of regulatory regime, size, company focus, and customer type and location.[692] As an example, Dr. Abdala is treating companies that focus on non-distribution activities, such as electricity generation, the same as companies that engage only in electricity distribution.[693] The impact of ignoring comparability and using a distorted benchmark is that Dr. Abdala pairs a low VNR with disproportionately high capital expenditures. Respondent therefore diminishes EEGSA's but-for value and wipes out the difference between the value of EEGSA in the actual and but-for scenarios and, consequently, TECO's damages.

184. Second, the fact that Respondent is using unrealistically high capital expenditures to erode EEGSA's value in the but-for scenario is evidenced by the results that Respondent obtains. Dr. Abdala uses Sigla's VNR and FRC formula to calculate EEGSA's actual value and Mr. Damonte's VNR and FRC formula to calculate EEGSA's but-for value. Mr. Damonte's VNR is more than US$ 200 million higher than Sigla's VNR,[694] and Mr. Damonte uses an FRC

[689] Abdala II ¶ 2 **(RER-4)**.

[690] Tr. (5 Mar. 2013) 1513:12-16 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slides 36 & 37; Kaczmarek II Figure 4 **(CER-5)**.

[691] Kaczmarek II Figure 2 **(CER-5)**; *see also* Kaczmarek Direct Presentation, Slide 37.

[692] *See* Abdala II Appendix B, Graph V **(RER-4)**.

[693] *See* Kaczmarek II Figure 2 and ¶ 41 n.22 **(CER-5)**.

[694] Mr. Damonte's VNR is US$ 661 million. *See* Abdala I Table II **(RER-1)**. Sigla's comparable VNR is US$ 451 million. *See* Abdala I ¶ 47 n.21 **(RER-1)**.

formula that calculates EEGSA's return on a VNR that is depreciated by 30 percent, whereas Sigla calculates its return on a VNR that is depreciated by 50 percent.[695] By all accounts, EEGSA's value in Dr. Abdala's but-for scenario thus should be significantly higher than EEGSA's value in his actual scenario. Yet, Dr. Abdala concludes otherwise, finding that there essentially is no difference between the two values and, hence, no damages.[696] As Mr. Kaczmarek explained at the Hearing, "they're just wiping away all that added value that would come from that by increasing capital expenditures."[697] Indeed, Dr. Abdala's error is further confirmed by the fact that, if Mr. Damonte had used Sigla's FRC formula in his model—leaving the VNR used by Sigla and that used by Mr. Damonte as the only difference in EEGSA's value in the actual and but-for scenarios—Dr. Abdala's model would have found that TECO had *benefitted* by US$ 44 million to US$ 60 million from having the lower Sigla VAD imposed on EEGSA.[698] This is patently absurd, and clearly shows that Dr. Abdala has manipulated the capital expenditures in his model to obtain the result he favors.

3. Respondent's Errors Are Confirmed By The Absurd Result It Obtained

185. The unreliability of Respondent's damages analysis is further evidenced by the fact that it concludes that Claimant actually *benefitted* by US$ 7 million from having the lower Sigla VAD imposed on it or, at most, suffered damages of US$ 8 million.[699] Dr. Abdala sought to explain this illogical conclusion when he testified that EEGSA could have profited by foregoing capital expenditures and increasing dividend payments to its shareholders during the two-year timeframe that EEGSA was operating under the lower Sigla VAD while controlled by the DECA II Consortium.[700] As he conceded, however, even if this were the case, EPM would

[695] Kaczmarek Direct Presentation, Slide 31.

[696] Abdala I ¶ 95 **(RER-1)**.

[697] Tr. (5 Mar. 2013) 1513:20-22 (Kaczmarek Direct).

[698] Tr. (5 Mar. 2013) 1561:12-1563:4 (Abdala Cross).

[699] Abdala II Table I **(RER-4)**; Tr. (5 Mar. 2013) 1495:15-1496:3 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slide 12; Kaczmarek II Table 2 (showing that Dr. Abdala calculated in his first report that Claimant either realized a *gain* of US$ 10.2 million or suffered a loss of US$ 5.2 million) **(CER-5)**.

[700] Tr. (5 Mar. 2013) 1562:6-1563:4 (Abdala Cross) (arguing that the conclusion that TECO benefitted financially from the Sigla tariffs is "not a surprising result," because EEGSA "significantly decreased the amount of CAPEX" and maybe "they were already thinking that they were exiting the business and, therefore, trying to eventually be able to distribute more dividends or maybe for other reasons").

have paid less for DECA II as a result;[701] thus, even under Respondent's theory, EEGSA only would have increased cash flow for the two-year period, but that would have been offset by the increased lost value attributable to EEGSA's sale.

186. There can be no doubt that EEGSA and its shareholders suffered severe financial damage as a result of the imposition of the Sigla VAD, which was approximately 45 percent lower than EEGSA's previous VAD.[702] Indeed, EEGSA's revenue declined by approximately 40 percent as a result of the CNEE's 2008 VAD decision.[703] Consequently, and as noted by Claimant and its witnesses, the two major rating agencies downgraded EEGSA.[704] Ms. Callahan exposed the fallacy in Respondent's failed attempt to cast the blame for this downgrade on EEGSA itself, and particularly on the alleged litigious attitude of its shareholders.[705] As Ms. Callahan affirmed, after the lower Sigla VAD was imposed, "both Standard & Poor's and Moody's [downgraded EEGSA and] attributed their ratings downgrades to the significant deterioration in financial condition of EEGSA that they expected to occur as a result of the VAD imposition. . . . [T]hose were the only causes identified by the agencies in 2008 when they downgraded."[706] Contrary to Respondent's assertions,[707] moreover, Moody's did not upgrade EEGSA's rating in December 2010. Rather, it affirmed its rating and changed the ratings

[701] Tr. (5 Mar. 2013) 1563:5-17 (Abdala Cross).

[702] *See* TECO Energy's Form 10-K dated 26 Feb. 2009, at 49 **(C-324)**; Moody's Investors Service, "Moody's Downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (explaining the downgrade in "the wake of the August 2008 tariff decision by the [ ] ('CNEE') regarding the reduction of the Value Added of Distribution-charge ('VAD-charge') by 45%") **(C-305)**.

[703] Gillette I ¶ 24 **(CWS-5)**; TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, at 2 **(C-326)**; TECO Guatemala, Inc., Operations Summary for Periods Ended Sept. 30, Board Book Write-up dated Oct. 2008, at 2 **(C-303)**.

[704] Gillette I ¶¶ 24-25 **(CWS-5)**; Callahan II ¶ 3 **(CWS-8)**; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' from 'BB/on CreditWatch Neg'" dated 26 Aug. 2008 **(C-297)**; Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 **(C-305)**.

[705] Rejoinder ¶ 477 ("The *rating upgrade* caused by the departure of Iberdrola and TGH only confirms the veracity of Guatemala's assertions regarding the litigious and abusive attitude adopted by EEGSA under the control of its shareholders during the tariff review process.") (emphasis added).

[706] Tr. (22 Jan. 2013) 573:13-21 (Callahan Direct).

[707] Rejoinder ¶ 477 ("The rating upgrade caused by the departure of Iberdrola and TGH").

outlook from negative to stable,[708] which signified that "their opinion of the creditworthiness of EEGSA had not changed. . . . [but] that they no longer expected that it was likely that ratings would go down further in the future."[709]

187. Further evidencing the severe financial damage caused by the imposition of the Sigla VAD and the reasonableness of Claimant's damages calculation—and the unreasonableness of Respondent's conclusion that Claimant suffered little, if any, damage[710]—is the fact that, without an award of damages, Claimant's internal rate of return (IRR) from its investment in EEGSA is a mere 0.6 percent in real terms.[711] As Mr. Kaczmarek explained, absent mismanagement or gross inefficiencies, of which there is no evidence, there is no reason why TECO should not have obtained a rate of return equal to its cost of capital within the 7 to 13 percent range specified in the LGE.[712] Respondent's expert, Dr. Abdala, agrees that a shareholder should be able to recover its cost of capital absent mismanagement,[713] and indeed, the evidence shows that EEGSA was managed well and performed efficiently.[714] With an award of damages in the amount sought by Claimant, Claimant's IRR would increase to 7.81 percent in real terms,[715] which is still below its cost of equity calculated by the CNEE during the third tariff

[708] Tr. (22 Jan. 2013) 572:3-5 (Callahan Direct); Moody's Investors Service, "Moody's affirms ratings of EPM and EEGSA following acquisition announcement of DECA II" dated 22 Oct. 2010 **(C-608)**; Business News Americas, "Moody's notices better relationship between EEGSA and the regulator" dated 14 Dec. 2010 **(R-208)**.

[709] Tr. (22 Jan. 2013) 572:16-573:2 (Callahan Direct).

[710] Counter-Memorial ¶ 591 ("TGH has not suffered any damage").

[711] Tr. (5 Mar. 2013) 1501:9-12 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slide 20; Kaczmarek II Table 15 **(CER-5)**.

[712] Kaczmarek II ¶ 153 **(CER-5)**.

[713] Abdala II ¶¶ 61-62 **(RER-4)**.

[714] Inter-American Development Bank, *Keeping the Lights On: Power Sector Reform in Latin America*, at 25 (noting that during the first five years after EEGSA's privatization, EEGSA dramatically reduced the average waiting time for new service, increased the number of bill payment locations, reduced the number of unread meters, reduced billing errors, increased customer calls, reduced complaint response time, and decreased average time and frequency of disrupted service) (**C-61**); DECA II Management Presentation dated Sept. 2010, at 2 (showing that EEGSA substantially reduced energy losses from 10 percent to 7 percent between 2004 to 2010) **(C-350)**; Kaczmarek I ¶¶ 174-175 (noting that "[s]ince privatization, [ ] EEGSA has been able to substantially reduce its energy losses" and that "in 2008 EEGSA had one of the lowest energy loss percentages in Latin America") **(CER-2)**.

[715] Tr. (5 Mar. 2013) 1501:12-15 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slide 20; Kaczmarek II Table 15 **(CER-5)**.

period of 11.06 percent in real terms,[716] supporting Claimant's assertion that its damages calculation is conservative.

188. In light of the fact that 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,[717] Respondent at the Hearing put forth several meritless arguments in an attempt to undermine Claimant's IRR calculation. First, Respondent argued that Claimant and its partners overpaid for EEGSA and, therefore, Claimant's low IRR was the result of its overbidding and was not the result of any damage inflicted on EEGSA by the low Sigla VAD. Even Respondent's own expert, however, failed to endorse Respondent's assertion. Thus, while Respondent in its Opening Statement[718] argued and Mr. Damonte in his second expert report[719] asserted that DECA had overpaid for EEGSA because its bid was approximately 34 percent higher than the lowest bid, Mr. Kaczmarek explained that this is wrong,[720] and Respondent's expert, Dr. Abdala, agreed; regarding the amount of DECA's bid, Dr. Abdala thus testified that he "wouldn't characterize it as unfair."[721] He further confirmed what Mr. Kaczmarek had said, which is that "in auctions we would normally take the winning bid as the fair market price of that asset,"[722] and that "in some occasions you could use the second bidder as the proxy for Fair Market Value."[723] As Claimant

[716] Tr. (5 Mar. 2013) 1501:16-1502:5 (Kaczmarek Direct); Kaczmarek Direct Presentation, Slide 20; Kaczmarek II Table 15 **(CER-5)**; Resolution No. CNEE-04-2008 dated 17 Jan. 2008, at 2 **(C-152)**.

[717] Manuel Abdala and Pablo Spiller, Damage Valuation of Indirect Expropriation in Public Services dated 9 Sept. 2003, at 4 ("This method [calculating the IRR] is based on historic documented figures related to direct investments (either in the form of equity or debt) carried out by shareholders of the concession, net of historic distributions (dividends or interest paid out). The underlying concept is that investors have the right to recover their capital contributions to the firm, making a return equal to the opportunity cost of capital. . . . To estimate compensation values, it is assumed that investments by shareholders will provide profitability equal to its expected return, adjusted by business risk and net of dividends payments, interests and/or other compensations to equity and debt contributions that shareholders might have done before expropriation.") **(C-555)**.

[718] Tr. (21 Jan. 2013) 296:16-20 (Respondent's Opening) (arguing that DECA "paid more than double of the lowest bid during the auction" and "34 percent higher than the average").

[719] Damonte II ¶¶ 68-71 **(RER-5)**.

[720] Tr. (5 Mar. 2013) 1491:18-1492:5 (Kaczmarek Direct).

[721] Tr. (5 Mar. 2013) 1575:15-16 (Abdala Cross).

[722] *Id*. at 1577:3-5; *see also* Tr. (5 Mar. 2013) 1491:17-1492:5 (Kaczmarek Direct).

[723] Tr. (5 Mar. 2013) 1577:10-12 (Abdala Cross); *see also id.* at 1577:14-17 (Abdala Cross) ("[N]ormally you would eventually look at either the winning bid or the second bid as a reference for what a Fair Market Value

has shown, DECA's bid was within 9 percent of the second-highest bid,[724] an "acceptable range . . . of reasonable tolerance for equity values,"[725] as further demonstrated by the fact that Dr. Abdala only was able to calculate EEGSA's actual value within a range of 12.6 percent.[726] Respondent's attempts to undermine Claimant's IRR analysis on the ground that Claimant overbid for EEGSA thus fails.

189. Because DECA's bid for EEGSA was fair, as Claimant has shown, it logically follows that Claimant's share of that bid also was fair. Respondent's repeated protests that TECO overbid for EEGSA because of so-called synergies is thus of no avail.[727] Moreover, as confirmed at the Hearing, Respondent's speculation is unsupported by the evidence and defies economic sense. As both Mr. Gillette[728] and Respondent's expert, Dr. Abdala,[729] testified, the Dresdner model, which was used by the TECO group of companies to prepare its bid, contains no valuation of any synergies. That model simply predicts future cash flows from EEGSA's tariffs, which confirms Claimant's testimonial and documentary evidence that the bid amount was based upon a targeted IRR.[730] Nor would it have made any economic sense for the DECA Consortium to bid more than fair market value for EEGSA on account of so-called synergies that a minority investor might realize, when the majority of the Consortium would receive no such benefit.[731]

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of that asset was as it relates to the outcome of an auction."); *id.* at 1578:10-12 (Abdala Cross) ("[Y]ou would use either the winning price or the second best price.").

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

[725] Tr. (5 Mar. 2013) 1492:4-5 (Kaczmarek Direct).

[726] As noted, Dr. Abdala estimated EEGSA's actual value to be between US$ 518 million and US$ 582 million, a difference of 12.4 percent.

[727] Tr. (21 Jan. 2013) 298:5-18 (Respondent's Opening); Counter-Memorial ¶¶ 230, 238.

[728] Tr. (22 Jan. 2013) 543:22-544:3 (Gillette Redirect).

[729] When asked if there was any evidence that any so-called synergies affected the bid price, Dr. Abdala answered "I don't know that." Tr. (5 Mar. 2013) 1579:16 (Abdala Cross). When confronted with the Dresdner model and asked whether it assigned a value to any synergies, Dr. Abdala testified "No, on that, on the Dresdner valuation model, you cannot see that, no." *Id*. at 1580:5-17.

[730] Empresa Eléctrica de Guatemala S.A., Privatization Management Presentation dated 9 July 1998, at 21, 35 (**C-33**); Tr. (22 Jan. 2013) 501:8-13 (Gillette Cross).

[731] Tr. (22 Jan. 2013) 484:12-17 (Gillette Cross) ("[W]hen the consortium was valuing the assets, we had two other partners who were not similarly situated, Iberdrola and EDP, who had no assets in Guatemala. So in determining our bid price, as a minority partner we couldn't really factor those synergies in."); *see also* Gillette

190. Second, Respondent insinuated at the Hearing that Claimant's investment in EEGSA was less than claimed and that this accounted for Claimant's IRR calculation being understated. In cross-examination, Respondent thus highlighted a financial statement of TECO Energy, Inc. showing that it had contributed US$ 100 million to TPS de Ultramar Ltd. ("TPS") for it to bid with the consortium for EEGSA.[732] What Respondent understands perfectly well, however, is that Claimant's indirect investment in EEGSA amounted to US$ 135 million, and not US$ 100 million, as Respondent sought to incorrectly portray at the Hearing. The Notarized Minutes of the Bid Award expressly state that the DECA Consortium placed the winning bid for US$ 520 million,[733] and the Stock Purchase Agreement indicates that DECA paid this same amount.[734] As Mr. Kaczmarek explained in his expert reports, because EEGSA at the time of privatization contained some unregulated businesses that later were spun off into separate entities, he allocated 15 percent of the purchase price to those entities.[735] Respondent never has contested that allocation, nor could it, given that it was derived from Respondent's own Memorandum of Sale.[736] Thus, the DECA Consortium paid approximately US$ 449 million for EEGSA's regulated distribution business, of which TECO contributed 30 percent, or US$ 135 million.[737] Respondent never has alleged that the TECO group of companies obtained a 30

II ¶ 9 (explaining that "[t]he two other members of the bidding consortium, together holding a 70% ownership interest in DECA, had no synergies with TECO Energy's other investments and, thus, no incentive to submit a higher bid price accounting for those 'synergies'") **(CWS-11)**.

[732] Tr. (5 Mar. 2013) 1523:18-1524:8 (Kaczmarek Cross) ("Q. Would you agree with me that if this, assuming that this hundred million that are in the Financial Statements are correct, if you applied a 15 percent adjustment, as you did with your initial price, it would be around 85 million initial investment, roughly? . . . Q. And changing this number would also affect the calculation that you did in your reasonability test? A. It would, but I think the number I used is the correct number for the IRR analysis, the way I put it together.").

[733] EEGSA Notarized Minutes of the Award dated 30 July 1998, at 2 **(C-36)**; *see also* Guatemalan Bid Results Summary dated 31 July 1998 **(C-37)**.

[734] Stock Purchase Agreement between Distribucion Eléctrica Centroamericano, S.A. and the Government of Guatemala dated 11 Sept. 1998, at 7-8, 10 (**C-38**). The DECA financials show that the total investment in EEGSA was US$ 528.80 million. DECA Consolidated Financial Statements from 14 Aug. 1998 to 31 Dec. 1998, at 8 **(C-40)**.

[735] Kaczmarek I, Appendix 6, Note 10 **(CER-2)**; Kaczmarek II ¶ 159 & Appendix 5, Note 10 **(CER-5)**.

[736] Sales Memorandum, at 10, 15 (showing 85 percent of EEGSA's revenues derived from non-regulated electricity distribution and other services) **(C-29)**; *see also* Tr. (5 Mar. 2013) 1522:15-1523:5 (Kaczmarek Cross) (accepting Mr. Kaczmarek's allocation).

[737] Gillette I ¶ 15 **(CWS-5)**; Kaczmarek I, Appendix 6 (calculation of 10 September 1998 "Claimant Share of EEGSA Equity") **(CER-2)**; TECO Energy, Inc. Action Regarding the Privatization of an Electric Utility in Guatemala, Board Book Write-up dated July 1998, at 1 **(C-32)**.

percent shareholding in DECA, but paid less than 30 percent of the sales price for that shareholding, as it tried to do indirectly at the Hearing. TPS financed its investment in EEGSA through both equity (the US$ 100 million referenced above)[738] and debt (in the form of a loan to DECA from Nationsbank for US$ 195 million, of which TECO owed 30 percent or US$ 35 million).[739] That it did so is unremarkable. It likewise is irrelevant for an IRR analysis: as Respondent's expert, Dr. Abdala, has written, "[t]o estimate compensation values, it is assumed that investments by shareholders will provide profitability equal to its expected return, adjusted by business risk and net of dividend payments, interests and/or other compensations to equity *and debt contributions* that shareholders might have done before expropriation."[740] Thus, debt plays a part in the analysis when the shareholders hold the debt that is used to finance the investment. The origin of the funds used by TECO to make its equity investment in EEGSA is immaterial; there is no dispute that it paid US$ 135 million for its investment in EEGSA and, therefore, Claimant's IRR analysis is correct.

191. Third, Respondent's continued criticism that Claimant should have calculated an IRR for EEGSA, and not for Claimant,[741] is misplaced. It was appropriate for Mr. Kaczmarek to conduct the IRR analysis for Claimant, as he was using the IRR to show that, if damages were awarded *to Claimant* in the amount sought, Claimant still would not be fully compensated, confirming that his valuations were conservative.[742] Furthermore, it is appropriate to calculate the cash flows to an equity holder, like Claimant, and then to compare that to that equity holder's cost of equity, as Mr. Kaczmarek did. By contrast, calculating an IRR for EEGSA is imprecise,

[738] TECO Energy Form 10-K dated 26 Feb. 2009 at 19 **(C-324)**; *see also* Minutes of Recessed Special Directors' Meeting of TECO Energy, Inc. dated 15 July 1998, at 4 (authorizing TECO Energy "to make advances or equity contributions from time to time to TPS of up to US$ 100 million, and to take any and all other actions that they deem necessary or desirable, for the purposes of carrying out TPS's participation in the Consortium, including the furnishing of bid bonds, guaranties, or indemnities in connection with the Consortium and its activities.") **(C-34)**.

[739] Notes to the DECA Consolidated Financial Statements from 14 Aug. 1998 to 31 Dec. 1998, at 14 **(C-40)**.

[740] Manuel Abdala and Pablo Spiller, Damage Valuation of Indirect Expropriation in Public Services dated 9 Sept. 2003, at 4 (2003) (emphasis added) **(C-555)**.

[741] Abdala II ¶¶ 51, 60 **(RER-4)**; Rejoinder ¶ 518(a).

[742] Tr. (5 Mar. 2013) 1501:21-1502:5 (Kaczmarek Direct) ("So, as a regulated utility, from my perspective, you award that amount of damages, they're not even recovering the cost of capital, which they should if they operate and perform well, and there is no indication that they didn't. They're still coming out far short of earning their cost of capital with the damages."); Kaczmarek II ¶ 146 **(CER-5)**.

because comparing cash flows to the enterprise with the enterprise's WACC ignores the fact that EEGSA's debt holders have been paid, but its shareholders have not recovered their cost of equity. In any event, it is telling that, despite its criticism, Respondent itself never conducted an IRR analysis for EEGSA.[743] The reasons for this are apparent, as that exercise only further validates Claimant's conclusions. As a valuation expert, Dr. Abdala undoubtedly would have recognized as much, making his criticisms all the more disingenuous.

192. EEGSA's IRR is 3.08 percent in real terms, that is, below the minimum of the 7 to 13 percent real rate of return set forth in the LGE.[744] With an award of damages to all shareholders in proportion with the amount of damages sought by Claimant, EEGSA's IRR would fall within the lower part of that range, at 8.46 percent in real terms,[745] which is below EEGSA's average WACC over the three tariff periods of 9.5 percent in real terms.[746] As Claimant has explained, moreover, this comparison of EEGSA's IRR to the WACC underestimates the financial impact of the Sigla VAD on Claimant, because it ignores the fact that EEGSA's debt-holders have been paid in full.

193. Fourth, Dr. Abdala tried to deflect attention from Claimant's IRR analysis by presenting a completely different type of analysis, which he labeled a "prospective IRR." As Mr. Kaczmarek explained at the Hearing, Dr. Abdala's "prospective IRR" analysis is meaningless.[747]

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[743] Dr. Abdala's attempt to show that EEGSA's profitability if the Bates White VAD had been applied would have significantly exceeded its historic profitability is not an IRR analysis and is severely flawed. Dr. Abdala has measured EEGSA's EBITDA under the Bates White and Sigla tariffs. *See* Abdala Direct Presentation, Slide 8. EBITDA, however, does not take into account capital expenditures and, thus, does not include the impact of Dr. Abdala's assumed increase in capital expenditures on the returns available to shareholders. Including assumed capital expenditures in the analysis would demonstrate that Dr. Abdala's projected returns are significantly below historical averages.

[744] *See* Appendix 1. Submitting new evidence on this point is warranted, as the Tribunal asked the parties to calculate the IRR for EEGSA under both the Sigla VAD (*i.e.*, an actual IRR without damages) and the Bates White July 28 VAD (*i.e.*, with an award of damages). *See* Tr. (22 Jan. 2013) 404:5-9, 404:14-18 (Tribunal Question).

[745] *See id.*

[746] EEGSA's WACC in real terms for the third tariff period, as calculated by the CNEE, was 7 percent. Resolution No. CNEE-04-2008 dated 17 Jan. 2008, at 2 **(C-152)**. EEGSA's WACC in real terms for the first tariff period, as calculated by the CNEE, was 10 percent. *See* Colom Bickford, Carlos E., Presidente CNEE, *Evolution of the Tariff Calculation Method in Guatemala* dated Apr. 2010, at 19 **(C-348)**.

[747] *See* Tr. (5 Mar. 2013) 1503:3-9 (Kaczmarek Direct) (explaining that Dr. Abdala's "prospective IRR" analysis simply uses Mr. Damonte's VNR and calculates whether someone could make a return off of it if they purchased EEGSA at Mr. Damonte's price); *id.* 1503:14-17 (Kaczmarek Direct) (explaining that Dr. Abdala's

It does not respond to Claimant's IRR analysis in any way, as it fails to measure the investments made by TECO or EEGSA against the returns received by either entity.

194. The unreasonableness of Respondent's conclusions on damages is further evidenced by the fact that its own experts could not offer an economic justification for Sigla's low VNR that was used to calculate EEGSA's VAD. Claimant has outlined the multiple factors that should have led to an increase in EEGSA's VNR in 2008 and which justified using Bates White's 28 July VNR from an economic point of view.[748] As Mr. Kaczmarek testified, "that reconciliation [explaining the increase in the VNR between 2003 and 2008] has not been seriously contested. And it seems quite logical to me as well, from an economic point of view."[749] It was these factors that led Mr. Gillette to reasonably expect that "the rate would likely go up because we had added more assets to the system over time, and the new replacement value of the system as a result had increased."[750]

195. Although Dr. Abdala acknowledged that the price of relevant materials used in electricity distribution may not fluctuate at the same rate as inflation,[751] he did not consider this

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"prospective IRR" test "doesn't disprove what we have done and doesn't actually prove anything with regard to whether or not the damages we calculated are reasonable."); Kaczmarek Direct Presentation, Slide 22 (stating that Dr. Abdala's "'prospective' analysis attempts to show that EEGSA could earn an IRR of 7 percent [real] on the **Damonte** VNR of US$ 661 million from 2008 to 2013" and that [t]his analysis does not prove zero damages are reasonable. The law provides for the opportunity to earn a 7 percent [real] return on regulatory asset base, regardless of what the actual value of it is.") (emphasis in original).

[748] Tr. (4 Mar. 2013) 909:2-910:1 (Giacchino Cross); Tr. (21 Jan. 2013) 79:4-83:12 (Claimant's Opening);; Giacchino I ¶¶ 75, 77, 80 **(CWS-4)**; Kaczmarek II ¶¶ 195-197 **(CER-5)**; Kaczmarek I ¶¶ 14, 104-112 **(CER-2)**; Barrera ¶¶ 54-56, 263, 265 **(CER-4)**; Reply ¶¶ 66, 200, 313.

[749] Tr. (5 Mar. 2013) 1511:8-1512:9 (Kaczmarek Direct).

[750] Tr. (22 Jan. 2013) 524:5-9 (Gillette Tribunal Question). Growth of the network as a result of new customers or increased customer demand increases the VNR, because a model efficient company would need more resources to service that increased demand. This is why expansion capital expenditures are part of the VNR. By contrast, maintenance capital expenditures, which is used to maintain or replace the network, are not part of the VNR, because the assets of a model efficient company are always deemed to be new under the VNR method adopted by Guatemala in the LGE and RLGE. *See* Tr. (22 Jan. 2013) 525:17-22 (Tribunal Question); Tr. (22 Jan. 2013) 526:5-10 (Gillette Tribunal Question) (explaining that "actual capital expenditures don't matter," but "[w]hat matters is the miles that you have and the density that you have"); Tr. (5 Mar. 2013) 1293:16-20, 1295:8-14, 1302:20-22 (Barrera Direct); Tr. (5 Mar. 2013) 1336:19-1337:20 (Barrera Cross); Tr. (5 Mar. 2013) 1508:9-1509:6 (Kaczmarek Direct); RLGE, Art. 83 **(C-21)**; Kaczmarek I ¶ 163 n.144 (explaining that "VNR capital expenditures included are only for expansion of the distribution network and not replacement of capital") **(CER-2)**; Resolution No. CNEE-05-2008 dated 17 Jan. 2008, 2008 Terms of Reference, Art. 8.2.2 **(C-153)**.

[751] Tr. (5 Mar. 2013) 1566:20-21 (Abdala Cross).

when determining that TECO suffered little, if any, damage. Similarly, Mr. Damonte insisted that the VNR under the model company regulation always should be lower than the company's actual assets,[752] and only reluctantly conceded that the VNR would increase if the price of relevant materials outpaced inflation.[753] Dr. Abdala sought to deflect questions regarding the economic factors that would have resulted in an increased VNR for EEGSA in 2008, had the tariff review process been guided by technical and economic considerations, testifying that consideration of the amount by which prices for materials used in distribution networks increased during the 2003-2008 period was "not part of my scope of my opinion;"[754] that he didn't "recall that" EEGSA's network had expanded by 9 percent between the two tariff periods;[755] and that he had "heard" about the different treatment of working capital in the two tariff periods,[756] but apparently did not consider this when accepting Mr. Damonte's VNR. The CNEE's failure to use Bates White's VNR, and its decision to impose an artificially low VNR on EEGSA undoubtedly caused TECO damages.

196. Unable to credibly rebut the evidence showing that EEGSA's VNR and VAD should have increased in 2008, Respondent attempted to justify its conclusion that TECO suffered no damages when the CNEE *decreased* EEGSA's VAD in 2008 by asserting that the problem was not that the Sigla VAD was too low, but rather that EEGSA's VAD approved by the CNEE in 2003 was too high.[757] This argument was debunked in Claimant's written submissions,[758] and further exposed as erroneous at the Hearing.

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[752] Tr. (5 Mar. 2013) 1394:18-1395:2 (Damonte Tribunal Question) ("[Q.] The problem is when the value of the model company is higher than the actual assets, correct? [A.] Well, in general, that cannot be the case. I am going to look for the lowest value, and therefore the model company is always going to be lower than the Actual Company.").

[753] *Id*. at 1396:16-1397:3 ("It is very unusual, but here, if the cost of rebuilding the company with copper wire is higher and . . . the only option is copper, well, then, the VNR value of that company is going to be based on what we have in the market at that point in time and also the cheapest or the lowest price we have to carry out that function. And it could, yes, it could be feasible to have an increase.").

[754] Tr. (5 Mar. 2013) 1569:2-3 (Abdala Cross).

[755] *Id*. at 1569:9.

[756] *Id*. at 1569:14.

[757] Rejoinder ¶ 278; Counter-Memorial ¶ 259 (arguing that "this tariff review resulted in very disproportionate values for EEGSA as compared to the average throughout Latin America").

[758] Reply ¶¶ 84, 200; *see also* Memorial ¶ 186.

197. Notably, Respondent did not proffer a *single* witness or expert at the Hearing who was involved in EEGSA's 2003-2008 tariff review. Respondent thus did not present *any* of the CNEE's Directors at that time—Messrs. Luis García, Elmer Ruiz, or Edgar Navarro—nor did Respondent present the then Manager of the CNEE's Tariff Division, Mr. Roberto Urdiales, or anyone from PA Consulting, the CNEE's outside consultant during EEGSA's 2003-2008 tariff review, to testify at the Hearing.[759] Rather than support its unfounded assertions with testimony from anyone with first-hand knowledge, Respondent's witnesses offered only uncorroborated hearsay testimony, claiming that the CNEE was understaffed and overwhelmed during EEGSA's 2003-2008 tariff review, seeking to leave the impression that EEGSA essentially hoodwinked the CNEE into approving a VAD that was too high. The evidence, however, clearly shows otherwise.

198. First, Mr. Colom sought to portray NERA, which served as EEGSA's consultant for the 2003-2008 tariff review, as unqualified. But, the CNEE pre-qualified NERA in 2003, although it has refused to prequalify other firms,[760] showing that it takes its pre-qualification authority seriously. Moreover, Mr. Giacchino was the lead consultant for NERA's 2003 VAD study, and, in 2008, the CNEE pre-qualified Bates White, whose application showed that Mr. Giacchino would lead the team performing any tariff study.[761] Clearly, if the CNEE had been displeased with Mr. Giacchino's work in 2003, it would not have pre-qualified Bates White in 2008. Mr. Colom's testimony that "further on we understood that we had to perhaps be more rigorous with the pre-qualification process to ensure that those firms that were qualified were firms that would actually be able to do an adequate job,"[762] is yet another of Respondent's *post-hoc* arguments.

199. Second, all three of Claimant's witnesses who were intensively involved in EEGSA's 2003-2008 tariff review confirmed that the CNEE was advised by competent and

[759] Tr. (4 Mar. 2013) 971:5-973:13 (Moller Cross); Tr. (4 Mar. 2013) 1072:1-1074:7 (Colom Cross).

[760] *See* Tr. (4 Mar. 2013) 1091:16-1092:20 (Colom Cross) (testifying that the CNEE does not prequalify those firms that do not meet the terms of reference and that, in 2007, the CNEE prequalified only six of the nine firms that applied).

[761] Proposal of Bates White, LLC in response to the Contracting Basis for the Distribution Added Value Study dated 11 July 2007 **(C-121)**.

[762] Tr. (4 Mar. 2013) 1093:3-10 (Colom Cross).

experienced professionals during EEGSA's 2003 tariff review. Mr. Calleja, an EEGSA manager at the time, testified that the CNEE's tariff manager during the 2003 review was Roberto Urdiales, who had spent his entire career at INDE as well as EEGSA and was very knowledgeable.[763] Mr. Giacchino, the lead consultant at NERA who authored EEGSA's 2003 tariff study, similarly recalled that "[t]he 2003 team that CNEE assembled, it was highly qualified on the technical side" and, in particular, he noted that Messrs. Urdiales and Orozco were highly qualified and that the CNEE had assistance from PA Consulting (Claudio Guidi and others)."[764] Even Mr. Colom acknowledged that PA Consulting, which advised the CNEE during EEGSA's 2003 tariff review was not understaffed.[765] And the documentary evidence shows that the CNEE was very engaged with EEGSA's consultant during the tariff review, posing technical questions and never appearing to be overwhelmed or unable to understand the study.[766]

200. By contrast, the CNEE's team in place during the 2008-2013 tariff review was filled with political appointees who did not have the same level of expertise. Mr. Calleja thus testified that he was asked to give Mr. Quijivix, the CNEE's tariff manager in 2008, an elementary presentation of electricity regulation.[767] Mr. Colom, who admitted to consulting with Mr. Quijivix when preparing his own witness statements and preparing for the Hearing, did not dispute this.[768] And Mr. Colom himself was appointed President of the CNEE merely six years after he graduated from University, without any prior experience in electricity distribution, and held office while his uncle served as President of Guatemala.[769] The documentary evidence, moreover, confirms that the CNEE directors did not have an understanding of the basic regulatory framework and relied on outside consultants to devise formulas that they themselves

[763] Tr. (22 Jan. 2013) 610:11-14 (Calleja Direct).

[764] Tr. (4 Mar. 2013) 827:15-828:12 (Giacchino Direct).

[765] Tr. (4 Mar. 2013) 1075:15-19 (Colom Cross).

[766] *See, e.g.,* Emails between Mr. Orozco and Mr. Giacchino dated 28 Jan. 2003 **(C-599)**; Email from Mr. Orozco to Mr. Giacchino dated 3 Feb. 2003 **(C-600)**.

[767] Calleja II ¶ 18 **(CWS-9)**; Calleja I ¶ 20 **(CWS-3)**.

[768] Tr. (4 Mar. 2013) 1088:5-12 (Colom Cross) (testifying that he did not know whether Mr. Calleja was asked to give such a presentation).

[769] *Id*. at 1064:3-7, 1089:17-22.

did not understand with the objective of obtaining the lowest VAD rates possible.[770] Thus, regarding the exchanges that the CNEE had with Mr. Riubrugent of Mercados Energéticos who devised the CNEE's contested FRC formula with the "2" in the denominator, Mr. Moller testified that "[i]t's a very complex issue in terms of specialty, economics, what have you, on this part. And I wasn't familiar with this. I understood that Mr. Colom was not familiar with this . . . . "[771] When asked why it would be proper for the CNEE to adjust the "2" in the formula to reflect the distribution company's actual depreciation of its assets, Mr. Moller responded, "[t]hat's what the experts explained to me in due course."[772] This demonstrates a lack of understanding of the most basic concepts underlying the model efficient company regulation that had been adopted by Guatemala, and further undermines Respondent's argument that the CNEE was better equipped in 2008 than it was in 2003 to handle EEGSA's tariff review.

201. That EEGSA's 2003 VAD was reasonable also was confirmed by Claimant's two experts, Dr. Barrera and Mr. Kaczmarek.[773] For example, Mr. Kaczmarek demonstrated that returns during the second tariff period fell within the band of potential returns established in the regulatory framework.[774] In his two reports and testimony, Dr. Abdala did not offer any criticism of this analysis.

C. Interest

202. At the Hearing, Dr. Abdala acknowledged that, if the Tribunal finds liability and damages, an appropriate pre-judgment interest rate for the more than two-year period between 1 August 2008 and 21 October 2010 is 8.8 percent, which was EEGSA's WACC at that time.[775] Dr. Abdala also testified that a pre-judgment rate equal to the WACC should be applied up to the

[770] *See* Email chain from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez Yat, and A. Garcia dated 17 Dec. 2007 (emphasis added) **(C-490)**; Email exchange between M. Peláez to J. Riubrugent dated 8 Jan. 2008, at 2 **(C-567)**.

[771] Tr. (4 Mar. 2013) 1021:8-11 (Moller Cross).

[772] *Id*. at 1027:14-15.

[773] Kaczmarek I Figure 10 and ¶ 96 **(CER-2)**; Tr. (5 Mar. 2013) 1484:9-11 (Barrera Direct) (testifying that "in '03 they chose a normal VNR. Then in '08 they said, okay, your assets are depreciated by half").

[774] Kaczmarek I Figure 10 and ¶ 96 **(CER-2)**.

[775] Tr. (5 Mar. 2013) 1587:7-13 (Abdala Cross); *see also* Reply ¶ 318 (noting the parties' agreement that EEGSA's WACC was 8.8 percent and agreeing that the WACC provides an appropriate interest rate).

date of the Award unless there is evidence that the investor's divestment was unrelated to the host State's actions.[776] As Dr. Abdala explained, the WACC is an appropriate pre-judgment interest rate, because "in the absence of the breach, the company would still be operating today and therefore that's the opportunity cost it would have suffered."[777] Here, Dr. Abdala conceded that "Claimant's case[] seem[s] to be one that the divestiture to EPM bears some relationship with the measures here,"[778] and the documentary and testimonial evidence indeed supports a finding that TECO sold its interest in EEGSA as a result of Respondent's actions during the 2008-2013 tariff review and the Government's refusal to revisit the VAD that it imposed on EEGSA at that time.[779] The same interest rate should be applied post-award, because, as Mr. Kaczmarek explained, there is no reason to differentiate between the applicable interest rate pre-

[776] Tr. (5 Mar. 2013) 1591:3-15 (Abdala Cross) ("In cases in which the exit is not voluntary . . . I do recommend using the WACC as the . . . pre-judgment interest rate . . . . "); *see also id.* 1598:5-17 (Abdala Tribunal Question) (explaining that, in order to incentive payment and discourage breaches, the pre-award interest rate should be "at least equal to [Respondent's] own cost of borrowing, so that the Respondent has an incentive to not to be eventually delaying the payment at a cost that may be lower than its own cost of borrowing. . . . But at the same time, that cost of borrowing by the Respondent may be insufficient and eventually to compensate . . . Claimant . . . the WACC may be a good approximation for a full compensation criteria as well.").

[777] Tr. (5 Mar. 2013) 1597:12-17 (Abdala Tribunal Question).

[778] Tr. (5 Mar. 2013) 1592: 9-21 (Abdala Cross) (further testifying that, because he is unqualified to opine on this factual question, he "cannot make an opinion as to a recommendation or what should be the appropriate pre-judgment interest rate.").

[779] Respondent has introduced no evidence to the contrary, but merely seeks to cast doubt on this assertion by noting that the sale took place two years after the Sigla VAD was imposed. *See* Tr. (21 Jan. 2013) 208:18-22 (Respondent's Opening). As Claimant has explained, during that two year period, TECO continued to seek a negotiated resolution of the dispute and EEGSA was seeking relief in domestic court. *See, e.g.*, Tr. (22 Jan. 2013) 583:9-14 (Callahan Cross) ("EEGSA had attempted through both discussions and litigation to try to get to a resolution that was appropriate in the 2008 VAD setting. And it was fairly apparent that that wasn't going to happen. And that went on for a while after August 2008."); *id.* at 581:22-582:8 (explaining that, given TECO's minority position, it was much more reasonable to wait for Iberdrola, which had indicated its interest in exiting, "and see if they were successful in doing what they had indicated they desired to do."); Tr. (22 Jan. 2013) 424:3-15 (Gillette Direct) (explaining that from April 2009 through July 2010 TECO was negotiating a resolution of the Alborada dispute with the Government and held out hope for a global resolution of both that dispute and the dispute concerning EEGSA); Gillette I ¶ 23 (outlining attempts at negotiation following the imposition of the Sigla VAD in August 2008) **(CWS-5)**; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 14, 15-20 (rejecting EEGSA's challenge to Resolution No. CNEE-144-2008, which approved Sigla's VAD study) **(C-331)**; TECO Energy, Inc. Board of Directors Meeting Oct. 14, 2010, Proposed Sale of DECA II dated 14 Oct. 2010, at 1 ("The proposed sale provides us with an opportunity to exit a minority position in a business where we perceive risk to have meaningfully increased. As discussed at previous Board meetings, the Guatemalan government regulator, acting outside the process prescribed in the Guatemalan electricity law, imposed a significant reduction of the tariff rate for distribution (VAD) on EEGSA in its rate case in August 2008 . . . . We believe there is continued risk of government interference in EEGSA's business.") **(C-353)**.

and post-award.[780] Respondent's expert did not disagree, and thus, the Tribunal should award Claimant pre- and post-award compound interest at 8.8 percent.

* * *

[780] Tr. (5 Mar. 2013) 1599:17-20 (Kaczmarek Tribunal Question).

V. CONCLUSION

203. For all the reasons set forth above and in Claimant's previous submissions, Claimant respectfully requests that the Tribunal issue an Award:

1. Finding that the Tribunal has jurisdiction *ratione materiae* over Claimant's claim arising under Article 10.5 of the DR-CAFTA;

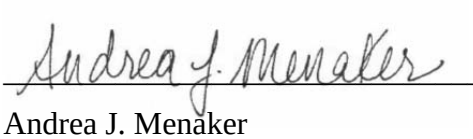
2. Finding that Respondent has breached its obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment;

3. Ordering Respondent to pay compensation to Claimant in the amount of US$ 243.6 million;

4. Ordering Respondent to pay interest on the above amount at 8.8 percent, compounded from 1 August 2008 until full payment has been made; and

5. Ordering Respondent to pay Claimant's legal fees and costs incurred in these proceedings.

Respectfully submitted,



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10 June 2013

Appendix 1

Return Measure	Nominal	Real
EEGSA's Actual IRR	5.65%	3.08%
EEGSA's But-for IRR (including damages)	11.14%	8.46%
Benchmark Returns		
Decree 93-96, The Electric Power Act, Article 67		7% - 13%
Claimant's Expected WACC 1998 (Dresdner Kleinwort)	12.28%	9.01%
Average WACC per CNEE Resolutions (1998, 2003, 2008)		9.50%

IRR for EEGSA (US$)

Date[1] [A]	Investment Amount in EEGSA[2] [B]	EEGSA Free Cash Flow to the Firm[3] [C]	Total Cash Flows [D] = [B]+[C]	Damages[4] [E]	Cash Flows and Damages Total [F] = [D]+[E]	Inflation Factor[5] [G]	Adjusted Total [H] = [F]/[G]
9/10/1998	(618,106,139)	-	(618,106,139)		(618,106,139)	1.00	(618,106,139)
12/31/1998		4,091,012	4,091,012		4,091,012	1.01	4,066,128
12/31/1999		(3,932,520)	(3,932,520)		(3,932,520)	1.03	(3,806,717)
12/31/2000		(11,561,611)	(11,561,611)		(11,561,611)	1.07	(10,819,973)
12/31/2001		72,690,133	72,690,133		72,690,133	1.09	66,953,595
12/31/2002		183,476	183,476		183,476	1.11	164,906
12/31/2003		39,166,762	39,166,762		39,166,762	1.14	34,500,533
12/31/2004		91,953,903	91,953,903		91,953,903	1.17	78,379,070
12/31/2005		26,182,088	26,182,088		26,182,088	1.21	21,595,927
12/31/2006		93,363,305	93,363,305		93,363,305	1.24	75,113,560
12/31/2007		59,720,977	59,720,977		59,720,977	1.29	46,157,375
12/31/2008		58,112,129	58,112,129		58,112,129	1.29	44,932,838
12/31/2009		4,862,281	4,862,281		4,862,281	1.33	3,658,611
10/21/2010	562,400,000	70,210,036	632,610,036		632,610,036	1.34	472,066,858
6/1/2012				1,003,900,000	1,003,900,000	1.39	722,230,216
				Nominal IRR	**5.65%**	**Real IRR**	**3.08%**
				With damages	**11.14%**	*With damages*	**8.46%**

Notes & Sources

(1) Dates of acquisition: including fees and expenses DECA paid US$ 528.8 million. Distribucion Electrica Centroamericano, S.A., Consolidated Financial Statements, 14 August 1998 through 31 December 1998, p. 7 (C-40)). Sale date: (TECO Energy Press Release. "TECO Guatemala Holdings LLC Sells Its Interest in Guatemalan Electric Distribution Company." (C-357)). Damage date: Navigant Second Report, para. 26.

(2) 1998 Investment Amount from Navigant Second Report, Appendix 5; 2010 Sale Value from Navigant Second Report, Table 13.

(3) Historical free cash flows from Navigant Second Report, Appendix 3 and Compass Lexecon's DAS-37. The free cash flow to the firm does not take into account cash flows allocated to the non-regulated EEGSA businesses. Free cash flow for 10/21/2010 calculated using actual FCF for 1/1/2010 to 7/31/2010 grossed up by 54% to account for the period August 1, 2010 to October 21, 2010.

(4) EEGSA Total Damages are US$1,003.9 million from Navigant Second Report, Table 3.

(5) CPI Index from Bloomberg Professional Services **(C-392)**. Assumes 9/10/1998, the date of the initial acquisition, as the base date.

Date	CPI Index
9/10/1998	163.4

Date	US CPI Index	Factor (EOY)
9/10/1998	163.4	1.00
12/31/1998	164.4	1.01
12/31/1999	168.8	1.03
12/31/2000	174.6	1.07
12/31/2001	177.4	1.09
12/31/2002	181.8	1.11
12/31/2003	185.5	1.14
12/31/2004	191.7	1.17
12/31/2005	198.1	1.21
12/31/2006	203.1	1.24
12/31/2007	211.4	1.29
12/31/2008	211.3	1.29
12/31/2009	217.2	1.33
10/21/2010		1.34
6/1/2012		1.39