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INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**TECO GUATEMALA HOLDINGS, LLC**

*Claimant*

v.

**THE REPUBLIC OF GUATEMALA**

*Respondent*

ICSID CASE NO. ARB/10/23

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**CLAIMANT'S REJOINDER ON JURISDICTION AND ADMISSIBILITY**

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9 November 2012

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## CLAIMANT'S REJOINDER ON JURISDICTION AND ADMISSIBILITY

### I. INTRODUCTION

1. Claimant TECO Guatemala Holdings, LLC ("TECO" or "Claimant") hereby submits its Rejoinder on Jurisdiction and Admissibility ("Rejoinder on Jurisdiction"),<sup>1</sup> in accordance with the Tribunal's direction of 1 October 2012.<sup>2</sup> This Rejoinder on Jurisdiction addresses the unauthorized jurisdictional and admissibility arguments proffered by Respondent in its Rejoinder on the Merits dated 24 September 2012 ("Rejoinder").<sup>3</sup> Claimant continues to rely upon all of its previous submissions.

2. Claimant's claim that Respondent breached Article 10.5 of the DR-CAFTA is grounded on the CNEE's unjust and arbitrary 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, as well as the CNEE's decision to impose, in the face of the Expert Commission's adverse rulings, its own unjustifiably low VAD on EEGSA, in violation of Claimant's legitimate expectations and the legal and regulatory framework established by Guatemala to encourage foreign investment in its electricity sector. Claimant's claim also is grounded on the unjustified and arbitrary actions taken by Guatemala in an effort to manipulate and to control the outcome of EEGSA's 2008-2013 tariff review, including, among other things, the enactment of amendments to RLGE Article 98 that fundamentally changed the regulatory framework in place at the time of TECO's investment, which the CNEE eventually used to justify its actions before the Guatemalan courts.

3. Contrary to Respondent's continued assertions, Claimant thus has not presented to arbitration a so-called mere regulatory dispute over the proper interpretation of Guatemalan law.

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<sup>1</sup> Abbreviations and terms used in Claimant's Rejoinder on Jurisdiction have the same meaning as in Claimant's Memorial and Reply.

<sup>2</sup> Letter from the Tribunal to the Parties dated 1 Oct. 2012.

<sup>3</sup> Respondent's Rejoinder on the Merits dated 24 Sept. 2012 ("Rejoinder") ¶¶ 31-95.

Nor has Claimant asked this Tribunal to sit as an extraordinary court of appeals on the Guatemalan legal issues presented by EEGSA to the Guatemalan courts. Instead, Claimant seeks review of Guatemala's actions during EEGSA's 2008-2013 tariff review in light of Respondent's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment, and to hold Guatemala accountable for its breaches of that obligation. The Tribunal has jurisdiction to do so.

4. Respondent's reliance on the recent decision in *Iberdrola v. Guatemala* does not detract from this conclusion in any way. While Respondent argues that the *Iberdrola* decision is of "enormous significance" for this Tribunal, as the facts in both cases allegedly "are not just similar but are identical," the way in which these two cases proceeded is not at all identical. As discussed below, the tribunal's jurisdictional decision in *Iberdrola* was premised on the manner in which that particular case was pled; based upon its review of the submissions in that case, the *Iberdrola* tribunal found that, while the claimant had argued that the respondent's actions violated Guatemalan law, it had failed to explain how those violations amounted to breaches of the applicable treaty. The same cannot be said here, and, thus, the decision is of no assistance.

5. Moreover, in reaching its conclusion, the *Iberdrola* tribunal manifestly erred to the extent that it concluded that it did not have jurisdiction to consider issues of domestic law in a regulatory context. As discussed below, investment treaty tribunals frequently rule on issues of domestic law in determining whether there has been a treaty breach, including where, as here, the claim asserted is based upon a fundamental change of the legal regime, an abuse of power, or conduct that otherwise is arbitrary by the host State. While the treaty claims in such cases arise under international law, the tribunal necessarily must make certain findings as to domestic law in order to determine whether the host State violated international law in the circumstances. Like those tribunals, this Tribunal has jurisdiction to consider issues of Guatemalan law in determining whether Guatemala's actions during EEGSA's 2008-2013 tariff review breached the fair and equitable treatment obligation contained in Article 10.5 of the DR-CAFTA.

6. In addition, in dismissing *Iberdrola*'s fair and equitable treatment claim for lack of jurisdiction, the *Iberdrola* tribunal asserted that it had no competence to decide issues of Guatemalan law, yet failed to analyze or even consider the content of *Iberdrola*'s legitimate

expectations and whether a violation of those expectations could constitute a breach of the applicable treaty, which would not have required the tribunal to decide the correct interpretation of Guatemalan law. Because TECO raises a claim for breach of Article 10.5 on the basis of Guatemala's frustration of its legitimate expectations, which also does not require this Tribunal to decide the correct interpretation of Guatemalan law, the *Iberdrola* decision is not relevant to this claim.

7. Finally, the Guatemalan Constitutional Court's decisions on EEGSA's *amparo* petitions under Guatemalan law do not divest this Tribunal of jurisdiction over Claimant's fair and equitable treatment claim, nor do they limit Claimant's claim in this arbitration to a claim for denial of justice. 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 these decisions with respect to Claimant. Moreover, that the Guatemalan Constitutional Court ultimately found the CNEE's actions to be lawful based upon RLGE Article 98, as amended by the MEM in 2007, does not preclude international liability, as Respondent would have this Tribunal find; it is well established that a State may not rely upon the provisions of its own internal law to avoid international obligations.

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## **II. THE TRIBUNAL HAS JURISDICTION TO DECIDE CLAIMANT'S CLAIM FOR RESPONDENT'S VIOLATION OF ARTICLE 10.5 OF THE DR-CAFTA**

### **A. Respondent Misconstrues The Applicable Legal Standard**

8. Respondent continues to misconstrue the nature of the Tribunal's inquiry at the jurisdictional level.<sup>4</sup> Relying on the tribunal's decision in *Iberdrola*, Respondent argues that the Tribunal must analyze the substance of Claimant's claims in order to determine whether it has jurisdiction *ratione materiae* over this dispute.<sup>5</sup> According to Respondent, because "the parties

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<sup>4</sup> *Id.* ¶¶ 35-37.

<sup>5</sup> *Id.* ¶ 37 (citing *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award of 17 Aug. 2012 ("*Iberdrola v. Guatemala*") ¶ 351 (RL-32)).

have already presented all of their arguments and evidence, the Tribunal has before it all the elements necessary to decide on the nature of the claim.”<sup>6</sup> As Claimant demonstrated in its Reply, Respondent’s transparent attempt to insert an inquiry of international claim validity into the *prima facie* standard for jurisdictional objections fails.<sup>7</sup>

9. In assessing its jurisdiction *ratione materiae*, the Tribunal must determine whether the facts, as alleged by Claimant, “fall within [the treaty] provisions or are capable, if proved, of constituting breaches of the obligations they refer to.”<sup>8</sup> As the tribunal in *Bayindir v. Pakistan* explained, “[i]n performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment of whether the facts alleged may constitute breaches.”<sup>9</sup> The tribunal in *Telefónica v. Argentina* articulated the standard as follows:

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

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<sup>6</sup> *Id.* ¶ 36.

<sup>7</sup> Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility (“Reply”) ¶¶ 283-287.

<sup>8</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 Nov. 2005 (“*Bayindir v. Pakistan*”) ¶ 197 (CL-84); see also *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 Apr. 2005 (“*Impregilo v. Pakistan*”) ¶ 254 (“[T]he Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.”) (emphasis in original) (CL-63).

<sup>9</sup> *Bayindir v. Pakistan* ¶ 197 (CL-84).

to whether the alleged facts do constitute breaches of the BIT for which the Respondent must be held liable.<sup>10</sup>

10. Numerous other tribunals have adopted this approach to assessing jurisdiction, citing to Judge Higgins’s opinion in the *Oil Platforms* case:

The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes—that is to say, to see if on the basis of Iran’s claims of fact there could occur a violation of one or more of them.<sup>11</sup>

11. Moreover, in applying the *prima facie* standard, the Tribunal “must not address the merits of the claims, but it must satisfy itself that it has jurisdiction over the dispute, as

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<sup>10</sup> *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006 (“*Telefónica v. Argentina*”) ¶ 56 (internal citations omitted) (emphasis in original) (CL-96).

<sup>11</sup> *Impregilo v. Pakistan* ¶ 239 n.103 (quoting *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 856 (para. 32) (Judgment on Preliminary Objection of Dec. 12) (concurring opinion of Judge Higgins)) (CL-63); see also *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 Mar. 2007 ¶¶ 85-86 (stating that the standard articulated by Judge Higgins in the *Oil Platforms* case “strikes a fair balance between a more demanding standard which would imply examining the merits at the jurisdictional stage, and a lighter standard which would rest entirely on the Claimant’s characterization of its claims . . . In other words, the Tribunal should be satisfied that, if the facts alleged by Saipem ultimately prove true, they would be capable of constituting a violation of [the BIT]”) (CL-93); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 Feb. 2005 ¶ 119 (“This Tribunal does not understand that Judge Higgins’ approach [in the *Oil Platforms* Case] is in any sense controversial, either at large or as between the parties to these proceedings. Accordingly, the Tribunal applies this approach to the jurisdictional issues considered below.”) (CL-66); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 Jan. 2004 ¶ 157 (relying on the *Oil Platforms* case and stating that “[t]he test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on”) (CL-69); *United Parcel Service of America, Inc. v. Canada*, UNCITRAL, Decision on Jurisdiction of 22 Nov. 2002 ¶¶ 35, 37 (agreeing with the jurisdictional standard set forth in the *Oil Platforms* case and noting that “the Tribunal’s task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state?”) (RL-4).

presented.”<sup>12</sup> As the tribunal in *Siemens v. Argentina* observed, “the Tribunal is not required to consider whether the claims under the Treaty . . . are correct,” but rather “simply has to be satisfied that, if the Claimant’s allegations would be proven correct, then the Tribunal has jurisdiction to consider them.”<sup>13</sup>

12. Respondent thus is wrong to suggest that, because “the parties have already presented all of their arguments and evidence,” the *substance* of Claimant’s claims should be analyzed by the Tribunal in order to determine whether it has jurisdiction *ratione materiae*.<sup>14</sup> Indeed, Respondent cites no authority for the proposition that the standard for deciding jurisdictional objections changes depending upon whether the objection is heard before, or together with, the merits. Applying the *prima facie* standard, the Tribunal must evaluate whether the facts, as alleged by Claimant, namely Guatemala’s fundamental changes of the regulatory regime, and the CNEE’s unjust and arbitrary decision to disregard the Expert Commission’s rulings and to impose its own artificially reduced VAD on EEGSA in violation of Claimant’s legitimate expectations, as well as the legal and regulatory framework established by Guatemala to induce foreign investment in its electricity sector, could possibly give rise to a breach of Article 10.5 of the DR-CAFTA, over which this Tribunal has jurisdiction.

13. As demonstrated in Claimant’s Reply and below, the facts as alleged by Claimant are capable of constituting a breach of the fair and equitable treatment obligation contained in Article 10.5 of the DR-CAFTA. Indeed, as shown in Claimant’s submissions, the facts not only

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<sup>12</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 Nov. 2004 ¶ 137 (observing that this principle “has been recognized both by the International Court of Justice and by Arbitral Tribunals in many cases”) (CL-67).

<sup>13</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 Aug. 2004 ¶ 180 (CL-94); see also *Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. Republic of Ecuador* [II], PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility of 27 Feb. 2012 ¶ 4.8 (rejecting Ecuador’s submission that the claimants “must already have established their case with a 51% chance of success, i.e. on a balance of probabilities,” preferring instead the claimants’ submission that “their case should be ‘decently arguable’ or that it has ‘a reasonable possibility as pleaded’”) (CL-85).

<sup>14</sup> Rejoinder ¶¶ 36, 37.



are capable of constituting a breach of the Treaty, but have been proven and do constitute such a breach.

**B. Claimant Alleges (And Has Demonstrated) A Breach Of Article 10.5 Of The DR-CAFTA**

14. As Claimant demonstrated in its Reply,<sup>15</sup> in an effort to avoid scrutiny of its actions under international law, Respondent has attempted to recast this case as a so-called mere regulatory dispute over the proper interpretation of the LGE and RLGE, in which Claimant allegedly asks this Tribunal to act as a regulatory agency in repeating EEGSA's 2008-2013 tariff review, and as an exceptional court of appeals in reviewing the Guatemalan legal decisions.<sup>16</sup> Nothing could be further from the truth. Indeed, Claimant repeatedly has asserted that it is not the role of this Tribunal to determine whether the Expert Commission was correct in its rulings on the discrepancies.<sup>17</sup> Rather, Claimant consistently has maintained that Guatemala was under an international legal obligation to comply with the Expert Commission's decisions regardless of whether or not they were correct as a technical matter under Guatemalan law.<sup>18</sup> It thus is beyond peradventure that Claimant does not seek to have this Tribunal repeat EEGSA's 2008-2013 tariff review and determine the "correct" tariffs under Guatemalan law. Nor has Claimant asked this Tribunal to review the Guatemalan courts' decisions under Guatemalan law. Those decisions are irrelevant to the issues here in dispute, as they do not address whether Respondent acted contrary to its prior representations and, thus, in violation of Claimant's legitimate expectations; whether Guatemala acted arbitrarily or in bad faith in manipulating the recalculation of EEGSA's VAD during the tariff review process; or whether the amendment to RLGE Article 98, upon which the

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<sup>15</sup> Reply ¶¶ 228-230, 283-287.

<sup>16</sup> Rejoinder ¶ 38 (arguing that Claimant "continues to put forward nothing but an issue of Guatemalan domestic law—whether or not the CNEE correctly interpreted and applied the regulatory framework, and whether the VAD ultimately approved was correct according to that framework"); *see also id.* ¶¶ 53-54 (arguing that what Claimant "seeks is nothing more than a third opinion, now under the guise of a Treaty claim, but its claim continues to be what it has always been: a regulatory dispute with the CNEE that was adjudicated by the Guatemalan courts, which decisions have not been the subject of a claim by [Claimant]").

<sup>17</sup> Reply ¶¶ 4, 229.

<sup>18</sup> *Id.* ¶¶ 35, 43-51, 184.

Guatemalan Constitutional Court relied in rejecting EEGSA's *amparo* petitions, constituted a fundamental change to the regulatory framework and, thus, breached Respondent's obligations under the DR-CAFTA. As set forth below, these issues form the basis of Claimant's claim in this dispute and do not reflect a so-called "simple regulatory dispute that has been heard and resolved by domestic tribunals" regarding the proper interpretation of Guatemalan law.<sup>19</sup>

15. As Claimant's written pleadings reflect, Claimant's claim is based upon Guatemala's specific representations regarding the process by which EEGSA's VAD would be recalculated every five years, and the manner in which disputes that arose between the CNEE and EEGSA during that process would be resolved.<sup>20</sup> As the documentary record shows, Respondent specifically represented in a Memorandum of Sale prepared for and circulated to potential foreign investors in EEGSA, including the TECO group of companies, that "VADs must be calculated by distributors by means of a study commissioned [by] an engineering firm," and that the CNEE "will review those studies and can make observations, *but* in the event of discrepancy, a Commission of three experts will be convened *to resolve the differences*."<sup>21</sup> The CNEE subsequently confirmed these representations, stating in its own court pleadings 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* in a term of 60 days" the dispute.<sup>22</sup>

16. As Claimant has explained, Guatemala's representations regarding the VAD-setting process were particularly important for potential foreign investors in EEGSA, including the TECO group of companies, in view of the long history of political intervention in the

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<sup>19</sup> Rejoinder ¶ 29.

<sup>20</sup> Reply ¶¶ 48-49; Memorial ¶ 278.

<sup>21</sup> Sales Memorandum dated May 1998, at 49 (emphasis added) (C-29); *see also id.* (Spanish original) at 63.

<sup>22</sup> CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 5-6 (C-81); *see also id.* (Spanish original) at 7. Guatemala's representations also are fully consistent with the terms of reference prepared by the CNEE for EEGSA's 2003-2008 tariff review, as well as with statements made by the CNEE and several of the CNEE's own consultants during EEGSA's 2008-2013 tariff review. *See* Reply ¶¶ 49-51.

Guatemalan electricity sector, as detailed in Professor Alegría's expert legal opinions.<sup>23</sup> The actions that Guatemala took during EEGSA's 2008-2013 tariff review in order to prevent an increase in EEGSA's VAD, including, among other things, the CNEE's refusal to accept the Expert Commission's resolution of the discrepancies between the CNEE and EEGSA, and the CNEE's imposition of its own artificially reduced VAD on EEGSA, which had been calculated by the CNEE's own consultant without any input from EEGSA or its independent consultant, violated Claimant's legitimate expectations arising from Guatemala's representations. As Claimant also has explained, the representations in these materials demonstrate that this dispute does not concern the proper interpretation of the LGE and RLGE, but rather Respondent's obligation under Article 10.5 of the DR-CAFTA to act in a manner consistent with prior representations aimed specifically at inducing foreign investment in its electricity sector.<sup>24</sup>

17. Claimant's claim also is based upon the unjustified and arbitrary actions taken by Guatemala in an effort to manipulate and to control the outcome of EEGSA's 2008-2013 tariff review.<sup>25</sup> As Claimant demonstrated in its Reply, the emails produced by Respondent during the document discovery phase of this arbitration (none of which was analyzed in the *Iberdrola* Award), show that the CNEE devised an unlawful FRC calculation with its consultant, Mr. Riubrugent, specifically to obtain a significant decrease in EEGSA's VAD, and that the CNEE subsequently interfered in the Expert Commission process, providing its own appointee, Mr. Riubrugent, with materials to support the CNEE's position, and engaging in *ex parte* discussions regarding the outcome of the Expert Commission's deliberations, before the Expert Commission

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<sup>23</sup> See Alegría II ¶¶ 5-6 (CER-3); Alegría I ¶¶ 20-33 (CER-1); see also Gillette I ¶¶ 9-14 (CWS-5). While Respondent criticizes Claimant for relying upon Professor Alegría's expert legal opinions in its Reply, Professor Alegría's opinions not only explain the political, economic, and social context in which Guatemala reformed its electricity sector and sought to induce foreign investment in EEGSA in the late 1990s, but also opine on issues of central importance to this case, including, among other things, the CNEE's authority under the LGE and RLGE; the role of the Expert Commission under the LGE and RLGE; and the content and scope of Guatemala's amendments to the RLGE in 2007 and 2008. Contrary to Respondent's suggestion, Claimant's reliance upon Professor Alegría's opinions regarding these critical issues is not unusual; investment treaty tribunals frequently refer to and rely upon expert domestic law opinions in assessing liability under the relevant treaty.

<sup>24</sup> Reply ¶¶ 264-266.

<sup>25</sup> Rejoinder ¶¶ 43-44.

had issued its rulings.<sup>26</sup> As Claimant has explained, this evidence is entirely inconsistent with the notions—adopted by Respondent in this arbitration and by the CNEE before the Guatemalan courts—that the Expert Commission’s decisions are advisory opinions that do not bind the CNEE or limit its discretion in any way, and that the role of the Expert Commission merely is to ascertain whether the consultant incorporated all of the CNEE’s comments into its study.<sup>27</sup> This evidence also constitutes further proof of the CNEE’s failure to act consistently, transparently, and in good faith during EEGSA’s tariff review.<sup>28</sup> While Respondent disputes the arbitrary character of this evidence in its jurisdictional arguments, whether the emails exchanged between the CNEE and Mr. Riubrugent reflect arbitrary action by the CNEE in violation of international standards is a question to be resolved by the Tribunal on the merits, not on jurisdiction.<sup>29</sup> In any event, Respondent’s assertion that the fact that Claimant “has no complaint against the opinion of the Expert Commission constitutes conclusive evidence that there was no arbitrariness in connection with Mr. Riubrugent’s participation in the Expert Commission”<sup>30</sup> deliberately misconstrues Claimant’s arguments.

18. As Claimant explained in its Reply, despite the CNEE’s attempts to manipulate and to control the outcome of the Expert Commission process, the Expert Commission, by majority vote, ultimately rejected the CNEE’s unlawful FRC calculation and ruled in favor of EEGSA on several key discrepancies.<sup>31</sup> As the evidence reflects, after the CNEE had learned of

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<sup>26</sup> Reply ¶¶ 51 n.239, 116, 138-140. Claimant notes in this regard that the emails exchanged between the CNEE and Mr. Riubrugent during EEGSA’s 2008-2013 tariff review were not presented to the Guatemalan courts, as EEGSA did not have access to document discovery in those proceedings. Contrary to Respondent’s contentions, Claimant’s allegations regarding these emails thus have not been litigated in the Guatemalan courts. *See* Rejoinder ¶¶ 48-50.

<sup>27</sup> Reply ¶¶ 138-140. Notably, none of the authors of these documents has presented any testimony in this arbitration to defend their nature or content, including Mr. Riubrugent, Mr. Quijivix, or Ms. Peláez.

<sup>28</sup> *Id.* ¶¶ 138-140, 252.

<sup>29</sup> Rejoinder ¶¶ 43-44. Similarly, whether, to the contrary, “the CNEE acted to the best of its knowledge and understanding in the exercise of its duties as an independent regulatory authority in the tariff review process,” as Respondent contends, also is a disputed factual issue to be resolved by the Tribunal on the merits, not on jurisdiction. *Id.* ¶ 52.

<sup>30</sup> *Id.* ¶ 44.

<sup>31</sup> Reply ¶¶ 161-164.

the Expert Commission's adverse rulings, the CNEE disregarded the Expert Commission's Report and proceeded to impose its own reduced VAD on EEGSA, as the VAD that resulted from the Expert Commission's decisions was deemed by the CNEE to be too high.<sup>32</sup> In such circumstances, Claimant has no reason to raise any complaints against the Expert Commission's Report itself, and its failure to do so in no way constitutes "conclusive evidence that there was no arbitrariness in connection with" the CNEE's unsuccessful attempts to influence the Expert Commission through Mr. Riubrugent,<sup>33</sup> who, notably, is not a witness in this proceeding.

19. Claimant's claim also is based upon the fundamental legal changes introduced by Guatemala to RLGE Article 98 shortly before and during EEGSA's 2008-2013 tariff review, which likewise does not require this Tribunal to repeat EEGSA's tariff review process or to sit in review of Guatemala's court decisions.<sup>34</sup> As Claimant explained in its Reply, Government Accord No. 68-2007 dated 2 March 2007 amended RLGE Article 98 to grant the CNEE the right to rely upon its own VAD study to calculate the distributor's VAD in certain circumstances.<sup>35</sup> This amendment constituted a fundamental change to the regulatory framework established by the LGE and RLGE, as it subverted the requirement in LGE Article 74 that the distributor calculate the VAD through its own independent consultant prequalified by the CNEE, and introduced the possibility, *for the very first time*, that the CNEE could calculate the distributor's VAD on the basis of its own VAD study.<sup>36</sup> The 2007 amendment thus not only fundamentally altered the balance struck in the LGE and RLGE between the CNEE and the distributor with

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<sup>32</sup> *Id.* ¶¶ 158-164; *see also* Analysis of the Expert Commission Opinion (undated) (C-547).

<sup>33</sup> Rejoinder ¶ 44.

<sup>34</sup> Contrary to Respondent's argument, (*see* Rejoinder ¶¶ 21, 41), there is no contradiction between Claimant's position that the 2007 amendment to RLGE Article 98 constituted a fundamental change to the regulatory framework and its position that the CNEE deliberately misconstrued that amendment by applying it to EEGSA during its 2008-2013 tariff review. As Claimant has explained, the 2007 amendment, for the very first time, gave the CNEE authority to rely upon its own VAD study to calculate the VAD in certain circumstances, which was a fundamental change. That amendment, by its terms, however, should have not have applied in situations like EEGSA's, where the distributor had submitted a VAD study and had made changes to the same in response to the CNEE's observations. *See* Reply ¶¶ 89-100, 238-253; Alegría II ¶¶ 45-66 (CER-3).

<sup>35</sup> Reply ¶ 250; Government Accord No. 68-2007 dated 2 Mar. 2007 (C-104).

<sup>36</sup> Reply ¶¶ 91-100; Memorial ¶¶ 84-93.

respect to the calculation of the distributor's VAD, but also violated Guatemala's express representation during EEGSA's privatization process that "VADs *must be calculated by distributors* by means of a study commissioned [by] an engineering firm."<sup>37</sup>

20. As Claimant observed in its Reply, while the CNEE did not invoke amended RLGE Article 98 as the alleged legal basis for its actions at the time it imposed its artificially low VAD on EEGSA,<sup>38</sup> the CNEE subsequently invoked this amendment in defending its actions before the Guatemalan courts, and the Guatemalan Constitutional Court expressly relied upon the amendment in ruling that the CNEE's actions were lawful under Guatemalan law.<sup>39</sup> Indeed, without the 2007 amendment to RLGE Article 98, there would have been no basis in the LGE or the RLGE for the CNEE to rely upon its own VAD study to calculate EEGSA's VAD for the 2008-2013 tariff period.<sup>40</sup> The 2007 amendment thus was a fundamental change to the regulatory framework upon which Claimant legitimately relied in making its investment in EEGSA. As Claimant noted in its Reply, Respondent itself has admitted that the fair and equitable treatment obligation contained in Article 10.5 of the DR-CAFTA "prohibits changes to the regulatory framework that are fundamental and that affect the legitimate expectations of an

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<sup>37</sup> Sales Memorandum dated May 1998, at 49 (emphasis added) (C-29). While Respondent notes that EEGSA never challenged the constitutionality of the 2007 amendment to RLGE Article 98, as Claimant has explained, unlike the other proposed amendments, Guatemala deliberately failed to disclose this particular amendment to the electricity industry before the MEM issued Government Accord No. 68-2007, and EEGSA thus had no opportunity to object to the amendment before it was issued. *See* Reply ¶ 99. Moreover, while EEGSA seriously considered challenging the amendment's constitutionality after it was issued, EEGSA ultimately decided not to do so, because it feared retaliation from the CNEE during its forthcoming tariff review, and because a final decision would not have been reached in any judicial challenge before the completion of EEGSA's tariff review. *See id.* ¶ 100. EEGSA also justifiably believed that, by its own terms, this amendment would not apply to its tariff review, as EEGSA intended to prepare and to submit a VAD study in accordance with LGE Article 74. *See id.*; Calleja II ¶ 10 (CWS-9); Maté II ¶ 7 (CWS-12).

<sup>38</sup> Reply ¶¶ 188, 214. As Claimant explained in its Reply, the CNEE initially relied upon RLGE Article 99 to justify the unilateral imposition of its own VAD on EEGSA, but abandoned this position before the Guatemalan courts, arguing instead that RLGE Article 98 granted it authority to calculate EEGSA's VAD on the basis of its own consultant's VAD study, and that it was not bound by the Expert Commission's decisions. *See id.* ¶ 214.

<sup>39</sup> Reply ¶¶ 214-215; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009, at 15-20 (C-331).

<sup>40</sup> *See* Alegría II ¶ 78 (CER-3); Alegría I ¶ 67 (CER-1).

investor,”<sup>41</sup> which should be viewed as a concession that this Tribunal has jurisdiction over any dispute alleging such prohibited changes to the regulatory framework.<sup>42</sup>

21. Similarly, although the CNEE agreed not to apply RLGE Article 98 *bis* to EEGSA’s 2008-2013 tariff review after EEGSA threatened to challenge its application in the Guatemalan courts, RLGE Article 98 *bis* also constituted a fundamental change to the regulatory framework established by the LGE and RLGE.<sup>43</sup> That amendment 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.<sup>44</sup> Respondent’s argument that RLGE Article 98 *bis* is irrelevant, because it was not applied to EEGSA, is erroneous.<sup>45</sup> As Claimant has explained, the enactment of RLGE Article 98 *bis* a mere four days after the CNEE had called for the establishment of an Expert Commission, as well as the CNEE’s attempt to apply RLGE Article 98 *bis* retroactively to EEGSA’s tariff review, violated Claimant’s legitimate expectation that EEGSA’s 2008-2013 tariff review would be conducted in a fair and depoliticized manner, and further reflects the pattern of arbitrary and bad faith conduct undertaken by Guatemala in an effort to manipulate and to control the outcome of EEGSA’s tariff review.<sup>46</sup>

22. Moreover, as Claimant also has explained, Respondent’s argument that RLGE Article 98 *bis* filled a “lacuna” in the RLGE is inconsistent with the notion that the Expert Commission’s decisions are advisory opinions that do not bind the CNEE or limit its discretion in any way, and thus further undermines Respondent’s assertion that the CNEE’s actions were

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<sup>41</sup> Counter-Memorial ¶ 567 (subheading b).

<sup>42</sup> Reply ¶ 287.

<sup>43</sup> *Id.* ¶¶ 142-144; Memorial ¶¶ 133-135.

<sup>44</sup> Reply ¶¶ 142-144, 249; 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).

<sup>45</sup> Rejoinder ¶ 41.

<sup>46</sup> Reply ¶ 249.

based upon a good faith interpretation of the law. Instead, what RLGE Article 98 *bis* shows is that—contrary to Respondent’s position in this arbitration and contrary to the CNEE’s position before the Guatemalan courts—Guatemala understood that the Expert Commission’s decisions on the discrepancies were binding. Furthermore, Guatemala’s argument that Article 98 *bis* was necessary in order to prevent the indefinite delay of the calculation of the distributor’s VAD in the event of discrepancies, contradicts its position before this Tribunal that the CNEE always had discretion to unilaterally calculate the distributor’s VAD irrespective of any ruling by an Expert Commission.<sup>47</sup>

23. Respondent now argues for the first time in its Rejoinder that Claimant’s allegations regarding the 2007 amendment cannot be considered by this Tribunal, because Claimant failed to mention this amendment in its “notice of intent to submit the dispute to arbitration,” and its claim thus is “time-barred” under Article 10.18.1 of the DR-CAFTA.<sup>48</sup> Respondent’s arguments are erroneous and unavailing. The 2007 amendment to RLGE Article 98, which was discussed in Claimant’s Notice of Arbitration and Memorial,<sup>49</sup> constitutes one of the several measures that Guatemala adopted in dismantling the regulatory framework on which Claimant relied in making its investment in EEGSA. As the DR-CAFTA reflects, the investor, in its notice of intent, is not required to identify every measure about which it complains, but rather is required to identify only the articles of the DR-CAFTA which it alleges have been breached, and the legal and factual basis for the dispute.<sup>50</sup> In the notice of intent, the investor’s

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<sup>47</sup> Rejoinder ¶¶ 212, 213.

<sup>48</sup> *Id.* ¶ 41.

<sup>49</sup> Notice of Arbitration ¶¶ 44-45; Memorial ¶¶ 84-93. Claimant notes that, at the time it filed its Notice of Intent, the Guatemalan Constitutional Court had not yet rendered its decisions, ruling that the CNEE’s actions were lawful on the basis of RLGE Article 98, as amended by the MEM in 2007.

<sup>50</sup> DR-CAFTA, Art. 10.16(2)(b-c) (CL-1). Some tribunals have even accepted jurisdiction over claims for breach of a provision of the treaty where the article allegedly violated was not identified in the Notice of Intent. See *ADF Group Inc. v. United States of America*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1, Award of 9 Jan. 2003 (“*ADF v. United States*”) ¶¶ 127, 134-139 (accepting jurisdiction over claimant’s claim for breach of NAFTA Article 1103 where that claim was not identified in either the Claimant’s Notice of Intent or Notice of Arbitration, but was raised for the first time in Claimant’s Reply, and noting that “[t]he generality and flexibility of this requirement [concerning the information to be included in a



allegations thus may be in summary form,<sup>51</sup> while the claim itself is first made in the notice of arbitration.<sup>52</sup> Contrary to Respondent's contentions, Claimant's allegations regarding the 2007 amendment thus are not "time-barred" under Article 10.18.1 of the DR-CAFTA, as those allegations were included in Claimant's Notice of Arbitration, which was submitted less than three years from the date on which TECO learned of Respondent's breach and that it had suffered loss or damage on account of that breach.

24. In any event, Respondent's objection regarding the 2007 amendment is untimely and must be rejected on that ground alone. As noted above, Claimant addressed the 2007 amendment both in its Notice of Arbitration and in its Memorial.<sup>53</sup> Respondent, however, failed to raise any objections to Claimant's allegations in its Memorial on Jurisdiction and Admissibility, which the parties had agreed and the Tribunal had ordered would be Respondent's only submission on jurisdiction and admissibility in this case.<sup>54</sup> Having unilaterally granted itself a Reply on Jurisdiction and Admissibility, Respondent now cannot be permitted to raise additional jurisdictional objections that it could have raised in its Memorial. As ICSID Arbitration Rule 41(1), which applies under Article 10.16(3) of the DR-CAFTA, provides, "[a]ny objection that the dispute or any ancillary claim 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,*" and "[a] party shall file the objection with the Secretary-General *no later than the*

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Notice of Intent] do not suggest that failure to be absolutely precise and complete in setting out that 'information' must necessarily result in diminution of jurisdiction on the part of the Tribunal") (CL-4).

<sup>51</sup> DR-CAFTA, Art. 10.16(2) ("At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of *its intention to submit the claim to arbitration* ('notice of intent'.") (emphasis added) (CL-1).

<sup>52</sup> *Id.*, Art. 10.16(3) ("Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a *claim . . .*") (emphasis added); *see also id.*, Art. 10.16(4) ("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 ISCID Secretary-General or the respondent as the applicable rules require) (emphasis added).

<sup>53</sup> Notice of Arbitration ¶¶ 44-45; Memorial ¶¶ 84-93.

<sup>54</sup> *See* Email from Claimant to the Tribunal dated 25 Oct. 2011; Email from Respondent to the Tribunal dated 27 Oct. 2011.

*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.*<sup>55</sup> As the facts on which Respondent’s objection is based were known to Respondent at the time for filing its Memorial on Jurisdiction and Admissibility, Respondent has waived that objection under ICSID Arbitration Rule 41(1).

**C. The *Iberdrola* Award Is Inapposite And Should Not Be Followed By This Tribunal**

**1. The *Iberdrola* Tribunal Dismissed *Iberdrola*’s Claim On The Basis Of “Defective Pleading,” A Circumstance Absent Here**

25. In its Rejoinder, Respondent argues that Claimant’s claim should be dismissed for lack of jurisdiction,<sup>56</sup> because its claim allegedly is “the same as *Iberdrola*’s” and “refer[s] to the same facts, the same arguments regarding Guatemalan law, and identical financial-technical issues.”<sup>57</sup> Respondent thus urges this Tribunal to adopt the *Iberdrola* tribunal’s conclusion that, “[i]n the assertions of the Claimant, the Tribunal finds no more than a discussion of local law, which it does not have the jurisdiction to consider and adjudicate as it if were a court of appeals” or “as regulatory authority, as administrative entity.”<sup>58</sup> In so doing, Respondent quotes selectively from the *Iberdrola* Award, without providing the context in which the tribunal’s jurisdictional decision was rendered, which makes clear that the tribunal’s decision was limited to the particular circumstances of that case and has no application here. Indeed, as the tribunal in *Iberdrola* itself emphasized, “jurisdictional analysis must be done carefully, *in each individual case*, taking into account the respective treaty or instrument of expression of consent without presumptions in favor of or against ICSID jurisdiction or tribunal competence.”<sup>59</sup>

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<sup>55</sup> ICSID Arbitration Rule 41(1) (emphasis added).

<sup>56</sup> Rejoinder ¶ 37.

<sup>57</sup> *Id.* ¶ 39.

<sup>58</sup> *Id.* ¶ 38 (quoting *Iberdrola v. Guatemala* ¶¶ 349, 354 (emphasis added) (RL-32)).

<sup>59</sup> *Iberdrola v. Guatemala* ¶ 303 (emphasis added) (RL-32).

26. In its Award, the *Iberdrola* tribunal observed that Iberdrola initially had raised an indirect expropriation claim as its main claim, and had raised claims for violation of the standards of fair and equitable treatment, full protection and security, and the umbrella clause only as subsidiary claims, but then shifted its emphasis in its post-hearing submission to focus on the fair and equitable treatment standard.<sup>60</sup> The tribunal criticized Iberdrola’s “new strategy” of focusing its claims “on alleged violations of other standards other than expropriation, particularly the standard of fair and equitable treatment,”<sup>61</sup> and noted that it would proceed to analyze Iberdrola’s claims as presented before its post-hearing submission.<sup>62</sup> In so doing, the tribunal asserted that the parties cannot be allowed to reformulate their claims or arguments in their post-hearing submissions: “[T]he written post-hearing briefs memorialize conclusions, that is, they are intended to recap what has been alleged and proven during the course of arbitration. But they are not, nor may the Tribunal allow them to be, a new opportunity for parties to reformulate their claims or arguments.”<sup>63</sup>

27. With respect to Iberdrola’s arguments, the *Iberdrola* tribunal found that, “beyond labeling [the] CNEE’s behaviors as violating the Treaty, the Claimant did not raise a dispute under the Treaty and international law, but a technical discussion on financial and legal provisions of the law of the Respondent State,” and that Iberdrola had asked the tribunal to review “the regulatory decisions of the CNEE, MEM, and the Guatemalan judicial courts, not in the light of international law, but the law of Guatemala.”<sup>64</sup> As the tribunal noted, “*according to the claim filed by the Claimant*, [the tribunal] would have to act as regulatory authority, as administrative entity and as trial court, to decide” various issues of Guatemalan law.<sup>65</sup> The tribunal further observed that there was only marginally a “debate about violations of the Treaty,

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<sup>60</sup> See *Iberdrola v. Guatemala* ¶¶ 320, 324, 347-348 (RL-32).

<sup>61</sup> *Id.* ¶ 320.

<sup>62</sup> *Id.* ¶ 347.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* ¶¶ 353, 354.

<sup>65</sup> *Id.* ¶ 354 (emphasis added).

or international law, or which actions of the Republic of Guatemala, in exercise of State power, had violated certain standards contained in the Treaty.”<sup>66</sup> In fact, the tribunal noted that, “[b]y the way the debate, the hearing, and the issues raised had developed, this process was more like an international commercial arbitration than an investment one.”<sup>67</sup> According to the tribunal, “[t]he discussion of international law that occurred during this process was simply theoretical,” and “there was no connection in the Claimant’s pleadings between the facts alleged and the standards invoked, nor did an act or acts of State materialize that, in the light of international law, could have been considered violations of rights under the Treaty.”<sup>68</sup> The tribunal further found that Iberdrola had failed to explain how, if its “position regarding the differences in local law that initiated this dispute were correct, it would follow that the Respondent violated the treaty or international law” and that “[s]uch proof is necessary for ICSID to have jurisdiction and the Tribunal competence” over the dispute.<sup>69</sup> The tribunal thus ruled that it had no jurisdiction over the claimant’s expropriation, fair and equitable treatment, full protection and security, and umbrella clause claims.<sup>70</sup> There are no comparable circumstances here.

28. Unlike in *Iberdrola*, Claimant has not raised an expropriation claim in this arbitration, but has raised only a fair and equitable treatment claim under Article 10.5 of the DR-

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<sup>66</sup> *Id.* ¶ 352.

<sup>67</sup> *Id.* ¶ 353.

<sup>68</sup> *Id.* ¶ 358.

<sup>69</sup> *Id.* ¶ 357.

<sup>70</sup> *Id.* ¶ 373. In so ruling, the tribunal noted that, due to “the manner in which the Claimant has presented its case, the Tribunal does not even have competence to consider the Parties’ allegations regarding the regulatory or contractual nature of the controversy given that this would be, before anything else, an issue regarding the merits of the controversy.” *Id.* ¶ 356 n.347. The tribunal’s reasoning, however, is circular. In assessing whether it has jurisdiction *ratione materiae*, a tribunal must evaluate whether the facts, as alleged by the claimant, are capable of constituting a breach of the relevant treaty; the tribunal thus has competence to consider all of the allegations made by the claimant and to determine whether it has jurisdiction over any of them. The tribunal may not ignore certain allegations, which it concludes are relevant to merits issues, while determining that the other allegations made by the claimant are insufficient to constitute a breach of the treaty, which the *Iberdrola* tribunal appears to have done. The *Iberdrola* tribunal’s reasoning on this point is particularly perplexing, as the tribunal dismissed the claim after finding that it was “regulatory” in nature and merely raised issues of interpretation of Guatemalan law, yet at the same time deemed itself incompetent to consider the alleged regulatory nature of the controversy.

CAFTA.<sup>71</sup> While the *Iberdrola* tribunal criticized Iberdrola for shifting its emphasis from its main expropriation claim to the fair and equitable treatment standard, Claimant has not shifted its emphasis or restructured its claims or arguments in any way. To the contrary, Claimant has consistently maintained its fair and equitable treatment claim—the only claim ever raised in this arbitration—as well as the factual allegations underlying its claim, throughout its written pleadings in this case.

29. In addition, unlike what was found to be the case in the *Iberdrola* arbitration, Claimant has 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. As set forth above, Claimant’s fair and equitable treatment claim does not depend upon a mere disagreement over the proper interpretation of Guatemalan law, or from mere regulatory irregularities in EEGSA’s ordinary dealings with the CNEE. Rather, Claimant’s 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 bad faith conduct taken in connection with EEGSA’s 2008-2013 tariff review. As Claimant has demonstrated, numerous tribunals have found a violation of the fair and equitable treatment standard where, as here, the State violates an

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<sup>71</sup> Respondent erroneously asserts in its Rejoinder that Claimant “withdrew its expropriation claim,” to which it had made reference in its Notice of Intent. A claim under the DR-CAFTA, however, is not submitted to arbitration until a notice of arbitration is filed; because a claim is not made with the filing of a notice of intent, the filing of a notice of arbitration cannot be deemed to have withdrawn any such potential claim to which reference was made at any earlier time. *See* DR-CAFTA, Art. 10.16(2) (“[B]efore submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration”) (CL-1); *id.*, Art. 10.14(4) (“A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of request for arbitration (‘notice of arbitration’): (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General”); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)99/1, Interim Decision on Preliminary Jurisdictional Issues of 6 Dec. 2000 ¶ 44 (“[T]he time at which the notice of arbitration has been received by the Secretary-General rather than the time of delivery of the notice of intent to submit a claim to arbitration is apt to interrupt the running of the limitation period under NAFTA Article 1117(2).”) (CL-90); *accord Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)99/1, Submission of the United States of America on Preliminary Issues of 6 Oct. 2000 ¶ 14 (“It is the United States’ position that only the submission of a claim to arbitration, and not the delivery of the notice of the intent to submit a claim to arbitration, effectuates the ‘making of a claim’ for purposes of [NAFTA] Article 1117(2).”) (CL-91).

investor's legitimate expectations arising from specific representations that the State made to induce the investor's investment.<sup>72</sup> Numerous tribunals also have found a violation of the fair and equitable treatment standard where, as here, the State undermined or fundamentally altered critical aspects of its own legal regime upon which the investor relied in making its investment, whether by legislative, regulatory, administrative, or other measures.<sup>73</sup> And numerous tribunals likewise have found a violation of the fair and equitable treatment standard where, as here, the State acted arbitrarily or took actions in bad faith to achieve a result favorable to it and harmful to the investor.<sup>74</sup>

30. Claimant's discussion of international law in this case thus has not been purely theoretical, as was found to be the case in the *Iberdrola* arbitration. To the contrary, Claimant has shown by reference to investment treaty jurisprudence and other sources of international law that, if its allegations are proven correct, "it would follow that the Respondent violated the treaty or international law."<sup>75</sup> Because the tribunal's jurisdictional decision in *Iberdrola* was based upon that tribunal's finding that the claimant in that case had changed the nature and emphasis of its claims and that the claimant's pleadings had focused on proving violations of domestic law

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<sup>72</sup> See Reply ¶¶ 254-260 (citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability of 27 Dec. 2010 ("*Total v. Argentina*") (CL-70); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 Aug. 2008 (CL-19); *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 (CL-39); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008 ("*Biwater Gauff v. Tanzania*") (CL-10); *BG Group Plc. v. Argentine Republic*, UNCITRAL, Award of 24 Dec. 2007 ("*BG Group v. Argentina*") (CL-9)); see also Memorial ¶¶ 245-258.

<sup>73</sup> See Reply ¶¶ 238-246 (citing *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award of 18 May 2010 ("*ATA Construction v. Jordan*") (CL-58); *Biwater Gauff v. Tanzania* (CL-10); *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 (CL-27); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005 (CL-17)); see also Memorial ¶¶ 228-258.

<sup>74</sup> See Reply ¶¶ 231-253 (citing *Cargill, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/05/2, Award of 18 Sept. 2009 (CL-12); *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ("*PSEG v. Turkey*") (CL-37); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 Sept. 2001 ("*CME v. Czech Republic*") (CL-16)); see also Memorial ¶¶ 229-244.

<sup>75</sup> *Iberdrola v. Guatemala* ¶ 357 (RL-32).

and other technical issues and had failed to explain how such violations, if proven, would amount to a treaty breach, the tribunal's conclusions are of no assistance to this Tribunal, which must consider Claimant's claims as pled. On the basis of the submissions filed in this arbitration, there is no way to find that Claimant has not asserted a claim, which if proven, could amount to a violation of the DR-CAFTA. The *Iberdrola* Award thus is inapposite.

**2. The *Iberdrola* Tribunal's Conclusion That It Did Not Have Jurisdiction To Consider Issues of Domestic Law In A Regulatory Context Is Manifestly Incorrect**

31. In its Rejoinder, relying on the *Iberdrola* Award, Respondent argues that “a dispute to determine whether a regulator correctly interpreted and applied a regulatory framework in the exercise of its functions . . . cannot give rise to a claim for violation of international investment protection standards,” as that “dispute is merely about local law (whether or not the legal framework has been violated).”<sup>76</sup> As demonstrated in Claimant's prior submissions and above, unlike what was found to be the case in the *Iberdrola* arbitration, Claimant does not submit to this Tribunal a so-called mere regulatory dispute to determine whether the CNEE properly interpreted Guatemalan law.

32. In any event, to the extent that the *Iberdrola* tribunal ruled that it did not have jurisdiction to consider issues of domestic law in assessing the conduct of regulatory or administrative authorities under international law, as Respondent suggests, that position is manifestly incorrect. In dismissing *Iberdrola*'s claims for lack of jurisdiction, the *Iberdrola* tribunal observed that, “if the State has acted by invoking the exercise of its constitutional, legal and regulatory functions, by which it interpreted its internal law in a particular manner, an ICSID tribunal, constituted pursuant to the protections of the Treaty, cannot determine that it has competence to judge, according to international law, the interpretation that the State has made regarding its internal law simply because the investor does not share it or considers it arbitrary or in violation of the Treaty.”<sup>77</sup> The tribunal thus concluded that it lacked jurisdiction to determine,

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<sup>76</sup> Rejoinder ¶¶ 51, 61.

<sup>77</sup> *Iberdrola v. Guatemala* ¶ 367 (RL-32).

among other things, “the powers of the CNEE” under Guatemalan law, and the nature of the distributor’s participation in the calculation of the VAD under LGE Articles 74 and 75.<sup>78</sup> The tribunal’s conclusion that it lacked jurisdiction to consider such issues of domestic law, however, is inconsistent with numerous authorities, which confirm that investment treaty tribunals are permitted to determine issues of domestic law in assessing whether there has been a violation of an international law obligation.

33. As the commentary to Article 3 of the ILC Articles reflects, the international law rules regarding the treatment of foreign investment set forth in bilateral investment treaties often are defined with reference to the internal law of a State:

Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.<sup>79</sup>

34. This principle has been confirmed by several tribunals, including in *Kardossopoulos v. Georgia*, where the tribunal observed that “it is well established that there are provisions of international agreements that can only be given meaning by reference to municipal law.”<sup>80</sup> The tribunal in *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* similarly noted that “the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability,” but that it must “be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporations methods, or by direct reference to certain supplementary rules, whether of

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<sup>78</sup> *Id.* ¶ 354(g).

<sup>79</sup> JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 89 (2005) (“*Crawford, ILC Articles*”), Art. 3, cmt. (7) (CL-97).

<sup>80</sup> *Ioannis Kardossopoulos v. Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction of 6 July 2007 (“*Kardossopoulos v. Georgia*”) ¶ 145 (internal citations omitted) (CL-88).



international law character or of domestic law nature.”<sup>81</sup> In *Total v. Argentina*, the tribunal likewise observed that the law of the host State “has a broader role than that of just determining factual matters” and, that “[t]he content and the scope of [the claimant’s] economic rights . . . must be determined by the Tribunal in light of Argentina’s legal principles and provisions.”<sup>82</sup> There thus is no prohibition on an investment treaty tribunal determining issues of domestic law in order to inform its decision as to whether there has been a violation of an international law obligation.<sup>83</sup>

35. Accordingly, numerous investment treaty tribunals have ruled on issues of domestic law, including where, as here, the investor’s claim was based upon a unilateral change of the legal regime, an abuse of power, or conduct that otherwise is arbitrary by the host State.<sup>84</sup> In *EDF v. Argentina*, for example, the tribunal held that Argentina violated the fair and equitable treatment standard when it modified the tariff regime that it had implemented to solicit foreign investment in its electricity sector.<sup>85</sup> In that case, the claimants argued that Argentina had violated the fair and equitable treatment standard by, among other things, enacting the Emergency Laws, which had “destroyed the legal regime created to attract Claimants’

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<sup>81</sup> *Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990 ¶ 21 (CL-82).

<sup>82</sup> *Total v. Argentina* ¶ 39 (CL-70).

<sup>83</sup> See, e.g., *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 Dec. 2003 ¶ 95 (rejecting Argentina’s objection that the tribunal should decline jurisdiction over the claim because it allegedly would be impossible for the tribunal “to resolve the dispute without deciding the scope of ABA’s and the Province’s rights under the Concession Agreement or performing regulatory functions by undertaking the task of judicial review of the decisions of the regulatory agencies of the Province and Argentina,” and holding that “its role is limited to deciding whether Argentina has breached its obligations to Azurix under the BIT,” and that “[t]he extent to which this requires an analysis of facts which may have been put before an Argentine court or administrative tribunal . . . are not relevant considerations for the Tribunal to take into account in determining [its] jurisdiction . . .”) (CL-83).

<sup>84</sup> See, e.g., *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006 ¶ 87 (finding that it had jurisdiction *ratione materiae* over the claimant’s claims of “alleged breach by Argentina, through its legislative and other measures of 2001 and 2002, of the legal regime applicable to Telefónica’s investment in the telecommunication sector in Argentina in violation of various terms of the BIT”) (CL-96).

<sup>85</sup> *EDF Int’l S.A., Saur Int’l S.A. & Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012 (“*EDF v. Argentina*”) ¶¶ 994-1051 (CL-86).

investment,”<sup>86</sup> while Argentina asserted in its defense that “in all circumstances the national and provincial authorities acted in a reasonable, responsible, non-discriminatory, and proportionate manner in light of their public responsibility under extraordinary conditions.”<sup>87</sup>

36. In considering the claimants’ fair and equitable treatment claim, the *EDF* tribunal examined the regulatory framework for electricity distribution and found that the regulatory agency responsible for the electricity sector had unilaterally modified the terms of the claimants’ concession agreement, as well as the tariff regime, in violation of the fair and equitable treatment standard.<sup>88</sup> In so finding, the tribunal noted that Argentina “had clearly embarked on a campaign to attract foreign investors in purchasing 51% of the company” and that Argentina’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.”<sup>89</sup> The tribunal further noted that Argentina had given “specific guarantees and commitments that created strong expectations of a long-term investment subject to only *de minimis* political or regulatory risk.”<sup>90</sup> With respect to the tariff regime, the tribunal observed that the regulatory agency, among other things, had “unilaterally modified the terms of the Concession Agreement by Resolution No. 8/98, which effectively allowed large users to only pay for the yearly minimum of their electricity use rather than the maximum as originally contemplated.”<sup>91</sup>

37. As in the present case, the claimants’ distribution company in *EDF* submitted its “administrative claim in the first instance to [the regulatory agency], which in fact was the same independent government entity that had issued the administrative resolutions detrimental to” the

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<sup>86</sup> *Id.* ¶ 364.

<sup>87</sup> *Id.* ¶ 370.

<sup>88</sup> *Id.* ¶¶ 998-1090.

<sup>89</sup> *Id.* ¶ 1008.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ¶ 1031.

claimants' distribution company.<sup>92</sup> As the tribunal observed, it was mindful of the regulatory agency's "role as both judge and party and finds that such dual responsibility is inherently suspect in providing justice before the administrative tribunal."<sup>93</sup> The tribunal noted that the "administrative appeal process failed to provide meaningful recourse as each and every claim submitted" was rejected, and that "[a]s to the final stage of appeal, the Supreme Court of Mendoza rejected all claims" made by the claimants' distribution company.<sup>94</sup> Notably, the fact that the Supreme Court of Mendoza had rejected all claims brought by the claimants' distribution company in the Argentine courts did not render the *EDF* tribunal without jurisdiction to consider the claimants' fair and equitable treatment claim, nor did it prevent the tribunal from examining the content of the regulatory framework, or the scope of the regulatory agency's powers, under Argentine law. The tribunal also did not limit the claimants' fair and equitable treatment claim to a claim for denial of justice, as discussed further below.

38. Similarly, in the only DR-CAFTA arbitration to have reached a decision on the merits to date, the tribunal in *Railroad Development Corp. v. Guatemala* found that Guatemala had violated its obligation to accord the claimant's investment fair and equitable treatment, because it had acted in a manner that was "arbitrary, grossly unfair, [and] unjust,"<sup>95</sup> when it declared one of Claimant's contracts *lesivo*, or contrary to the national interest.<sup>96</sup> In so doing, the tribunal examined the extent of the President's powers under Guatemalan law to issue such a declaration, and determined that "the *lesivo* procedure has characteristics which may be easily abused by the Government,"<sup>97</sup> and that "the *lesivo* remedy has been used under a cloak of formal

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<sup>92</sup> *Id.* ¶ 1094.

<sup>93</sup> *Id.* ¶ 1095.

<sup>94</sup> *Id.*

<sup>95</sup> *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 ("*RDC v. Guatemala*") ¶ 235 (quoting *Waste Management II*) (CL-92).

<sup>96</sup> *Id.* ¶ 235. While relying on the non-party submissions made by El Salvador and Honduras in this case, Respondent failed to acknowledge in its Rejoinder that the tribunal had issued an award finding Guatemala liable. See Rejoinder ¶ 20 & n.22.

<sup>97</sup> *RDC v. Guatemala* ¶ 233 (CL-92).

correctness allegedly in defense of the rule of law . . . .”<sup>98</sup> In holding that Guatemala had abused its authority and tried to mask its wrongdoing “under a cloak” of legality, the tribunal found, among other things, that the claimant had a legitimate expectation that the contract at issue, which had been the subject of a public bidding, was in the national interest; that the Government had breached representations made to the claimant upon which it was entitled to rely; and that the contemporaneous evidence demonstrated that the respondent was using the legal power granted to it under its laws for reasons other than their intended purpose.<sup>99</sup> Notably, the tribunal not only examined Guatemalan law to determine the extent of the respondent’s authority and, whether, for instance, the President had discretion to exercise the *lesivo* remedy, which was disputed by the parties,<sup>100</sup> but then determined that Guatemala had breached its treaty obligations irrespective of the legality of its actions under domestic law. This finding, moreover, was made despite the respondent’s insistence that “Guatemalan courts have ruled that the *Lesivo* Declaration had no effect upon Claimant’s investment or rights under [the] Contract . . . .”<sup>101</sup>

39. Likewise, in *PSEG v. Turkey*, the tribunal held that Turkey had violated the fair and equitable treatment 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.<sup>102</sup> 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

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<sup>98</sup> *Id.* ¶ 234.

<sup>99</sup> *Id.* ¶¶ 232-235; *see also id.* ¶ 222 (finding that the *lesivo* remedy could be “easily abused in its application [and] [w]hether it has been abused in the instant case and to such an extent as constituting a breach of the minimum standard of treatment, are matters addressed next by the Tribunal”).

<sup>100</sup> *See id.* ¶ 227 (“The Tribunal notes that these are Respondent’s documents drafted by Respondent, and they contradict the arguments made by Respondent and its expert that the President has no discretion in matters of *lesividad*. He has discretion and used it with the approval of his Government for a purpose different from that for which it was justified . . . .”).

<sup>101</sup> *Id.* ¶ 171.

<sup>102</sup> *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).

examine important communications, and its refusal to address the need to end fruitless negotiations.<sup>103</sup> 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."<sup>104</sup> In so finding, the tribunal examined not only the content of the claimant's concession contract, but also the scope of the Ministry's authority under Turkish law.

40. And in *Tecmed v. Mexico*, the tribunal held that Mexico had violated the fair and equitable treatment standard, when its environmental agency refused to renew the claimant's permit to operate a landfill, not on environmental and human health considerations, as was within their authority, but due to "political reasons relating to the community's opposition" to the landfill.<sup>105</sup> In so holding, the tribunal examined "the factors or parameters that [the environmental agency] should take into account under Mexican law to decide on the renewal of authorizations such as the Permit," and found that the environmental agency had "resorted to the non-renewal of the Permit to overcome obstacles not related to the preservation of health and the environment although, according to the evidence submitted, the protection of public health and the environment is where [the environmental agency's] preventive function should be focused."<sup>106</sup> Again, unlike the *Iberdrola* tribunal, the tribunal in *Tecmed* did not have any difficulty in assuming jurisdiction over this dispute or in reviewing the content of the environmental agency's actions under Mexican law.

41. Moreover, as the tribunal in *Waste Management II v. Mexico* observed, NAFTA Chapter Eleven tribunals consistently have held that the customary international law minimum standard of treatment is infringed by "a complete lack of transparency and candour in an

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<sup>103</sup> *Id.* ¶¶ 246-248.

<sup>104</sup> *Id.* ¶ 247.

<sup>105</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003 ("*Tecmed v. Mexico*") ¶¶ 164, 166 (CL-95).

<sup>106</sup> *Id.* ¶ 164.

administrative process.”<sup>107</sup> It is axiomatic that, in order to determine whether an administrative process, such as EEGSA’s 2008-2013 tariff review, was carried out by the relevant regulatory agencies in good faith, with candor, and transparently, the tribunal would be required to examine the scope of the regulator’s authority under domestic law in order to assess whether the regulator had abused its authority or had acted for an unlawful or otherwise improper purpose during the course of the administrative process. The *Iberdrola* tribunal thus was wrong to conclude that, “if the State has acted by invoking the exercise of its constitutional, legal and regulatory functions, by which it interpreted its internal law in a particular manner, an ICSID tribunal, constituted pursuant to the protections of the Treaty, cannot determine that it has competence to judge, according to international law, the interpretation that the State has made regarding its internal law simply because the investor does not share it or considers it arbitrary or in violation of the Treaty.”<sup>108</sup> The mere fact that the State invokes its own authority under domestic law to take certain actions *vis-à-vis* a protected investment does not *ipso facto* divest the tribunal of jurisdiction to determine whether, in taking the actions that it did, the State acted in violation of its international obligation to accord fair and equitable treatment to covered foreign investments. Indeed, it is well established that a State may not rely upon the provisions of its own internal law to avoid international obligations.<sup>109</sup>

42. In the present case, the Tribunal accordingly has jurisdiction to determine whether Guatemala’s actions during EEGSA’s 2008-2013 tariff review breached the fair and equitable treatment obligation contained in Article 10.5 of the DR-CAFTA. In particular, the Tribunal has jurisdiction to consider issues of Guatemalan law in determining whether Respondent made fundamental changes to its regulatory framework, upon which Claimant legitimately relied in investing in EEGSA, and whether the actions of the CNEE during EEGSA’s 2008-2013 tariff review were motivated by a good faith interpretation of Guatemalan law, as Respondent

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<sup>107</sup> *Waste Management, Inc. v. United Mexican States*, NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/3, Award of 30 Apr. 2004 (“*Waste Management IP*”) ¶ 98 (CL-46).

<sup>108</sup> *Iberdrola v. Guatemala* ¶ 367 (RL-32).

<sup>109</sup> See, e.g., Crawford, ILC Articles, Art. 3 (CL-97).

continues to assert,<sup>110</sup> or rather were inconsistent, non-transparent, and taken in bad faith to achieve the outcome that Respondent wanted—a sharp reduction in EEGSA’s electricity tariffs through the VAD.<sup>111</sup> In exercising its jurisdiction, the Tribunal does not act as a super-regulator, an Expert Commission, or a Guatemalan court of appeals, as Respondent contends; instead, it examines the evidence presented in order to determine whether Guatemala’s actions in this case breached its international legal obligation to accord TECO’s investment in EEGSA fair and equitable treatment. As the evidence shows, Guatemala’s actions in connection with EEGSA’s 2008-2013 tariff review did so.

**3. The *Iberdrola* Tribunal’s Decision Has No Bearing On Claimant’s Claim That Guatemala’s Frustration Of Its Legitimate Expectations Violated The Fair And Equitable Treatment Obligation**

43. As the *Iberdrola* Award reflects, in rejecting Iberdrola’s fair and equitable treatment claim for lack of jurisdiction, the *Iberdrola* tribunal failed to analyze or even consider the content of Iberdrola’s alleged expectations;<sup>112</sup> whether those expectations were based upon Respondent’s prior representations and were legitimate; whether Guatemala’s actions frustrated those expectations; and, if so, whether that gave rise to a violation of Respondent’s obligation to accord Iberdrola’s investment fair and equitable treatment. Iberdrola’s claim that Guatemala had breached its duty to accord its investment fair and equitable treatment by violating its legitimate expectations, like TECO’s legitimate expectations arguments, cannot be said to concern a so-called mere regulatory disagreement between the CNEE and EEGSA under Guatemalan law, and, in fact, do not depend at all upon the correct interpretation of Guatemalan law.<sup>113</sup>

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<sup>110</sup> Rejoinder ¶¶ 51-54.

<sup>111</sup> Reply ¶¶ 283-287.

<sup>112</sup> See, e.g., *Iberdrola v. Guatemala* ¶¶ 324-334, 350-373 (RL-32).

<sup>113</sup> The *Iberdrola* tribunal also did not analyze whether the amendments to RLGE Article 98 constituted a fundamental change to the regulatory framework in violation of the fair and equitable treatment obligation, as Claimant contends here. Like Claimant’s legitimate expectations arguments, its claim based upon a fundamental change to the regulatory framework does not depend upon the correct interpretation of Guatemalan law.

44. In the *Iberdrola* case, Iberdrola argued that Guatemala had made certain representations “to induce international investors to invest in Guatemala” in its promotional tours or “road shows,” as well as in its Memorandum of Sale, which informed potential foreign investors that the CNEE shall “review the studies and may make observations, but in the case of discrepancy a committee of three experts shall be appointed to resolve the differences.”<sup>114</sup> Iberdrola also argued that “Guatemala’s current interpretation was not the interpretation that was presented to investors and defended by the CNEE and all other members of the sector until the last tariff revision,” as reflected in, among other things, the Memorandum of Sale, “which unequivocally stated that the Expert Commission was a body that would resolve the discrepancies between the distributor and the CNEE,” and the terms of reference for EEGSA’s 2003-2008 tariff review, which stated that “it is on these intermediate differences, constituting discrepancies in written form, that the Expert Commission referred to in Article 75 of the Law shall issue its decision if, upon completion of the tariff review process, discrepancies still exist between the CNEE and the DISTRIBUTOR that should be reconciled by the aforementioned Expert Commission.”<sup>115</sup> While the *Iberdrola* tribunal noted that “it is not enough to label their own interpretation of the history of the LGE and RLGE as ‘legitimate expectations,’”<sup>116</sup> in determining whether it had jurisdiction over Iberdrola’s fair and equitable treatment claim, the tribunal did not analyze or even consider the relevance of Guatemala’s prior representations, or whether the alleged violation of those representations could constitute a breach of the fair and equitable treatment standard in the BIT. The *Iberdrola* tribunal’s failure to do so was manifestly incorrect.

45. Numerous tribunals, including NAFTA Chapter Eleven tribunals and a recent DR-CAFTA tribunal, have recognized that an investor’s legitimate expectations are an integral part of the fair and equitable treatment standard. Indeed, in a recent DR-CAFTA arbitration, Guatemala endorsed the fair and equitable treatment standard as described by the NAFTA

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<sup>114</sup> *Id.* ¶ 140.

<sup>115</sup> *Id.* ¶ 141.

<sup>116</sup> *Id.* ¶ 368.



Chapter Eleven tribunals in *Waste Management II* and *Thunderbird v. Mexico*.<sup>117</sup> In *Waste Management II*, the tribunal stated that “[i]n applying this standard [*i.e.*, the customary international law minimum standard of treatment] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>118</sup> And, as Claimant noted in its Reply,<sup>119</sup> the tribunal in *Thunderbird v. Mexico*, observed as follows:

Having considered recent investment case law and the good faith principle of international customary law, 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.<sup>120</sup>

46. The recent DR-CAFTA tribunal, in the *Railroad Development Corp. v. Guatemala* case, adopted the *Waste Management II* standard, finding that it “persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment.”<sup>121</sup>

47. The tribunal in *Glamis Gold v. United States* similarly agreed with this concept, noting that “a State may be tied to the objective expectations that it creates *in order to induce* investment.”<sup>122</sup> Likewise, the tribunal in *Grand River Enterprises v. United States* understood “the concept of reasonable or legitimate expectations in the NAFTA context to correspond with

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<sup>117</sup> *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).

<sup>118</sup> *Waste Management II* ¶ 98 (CL-46); see also Reply ¶ 255.

<sup>119</sup> Reply ¶ 257.

<sup>120</sup> *International Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA Chapter Eleven, UNCITRAL, Award of 26 Jan. 2006 ¶ 147 (CL-25).

<sup>121</sup> *RDC v. Guatemala* ¶ 219 (CL-92).

<sup>122</sup> *Glamis Gold, Ltd. v. United States of America*, NAFTA Chapter Eleven, UNCITRAL, Award of 8 June 2009 ¶ 621 (emphasis in original) (CL-23).

those expectations upon which an investor is entitled to rely as a result of representations or conduct by a state party.”<sup>123</sup> The *Grand River Enterprises* tribunal also observed that “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.”<sup>124</sup> 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,”<sup>125</sup> thus confirming that an analysis of legitimate expectations does not require the determination of the proper interpretation of domestic law. Indeed, as the NAFTA Chapter Eleven tribunal in *ADF v. United States* intimated, such a claim may be made on the basis of misrepresentations made by an authorized official regarding the legal framework.<sup>126</sup>

48. Consistent with these decisions, the Tribunal in the present case has jurisdiction to determine whether Guatemala’s actions during EEGSA’s 2008-2013 tariff review violated Claimant’s legitimate expectations arising from the specific representations made by Guatemala to induce foreign investment in EEGSA. In so doing, the Tribunal does not act as a regulator or as an extraordinary court of appeals, as Respondent contends, but rather examines the specific representations made by Guatemala and determines whether, in view of all of the evidence presented, Guatemala’s actions were contrary to those representations and thus in violation of its obligation to accord Claimant’s investment fair and equitable treatment. As the evidence shows, Guatemala’s actions were contrary not only to the specific representations made by Guatemala to induce foreign investment in EEGSA, but also were contrary to the legal and regulatory

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<sup>123</sup> *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, NAFTA Chapter Eleven, UNCITRAL, Award of 12 Jan. 2011 (“*Grand River Enterprises v. United States*”) ¶ 140 (CL-87).

<sup>124</sup> *Id.* ¶ 141.

<sup>125</sup> *Id.* ¶ 140.

<sup>126</sup> *ADF v. United States* ¶ 189 (denying the 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).

framework in place at the time of Claimant's investment and to the manner in which Guatemala had implemented the provisions of the LGE and RLGE from 1998 until 2005.<sup>127</sup>

#### **D. The Tribunal's Jurisdiction Is Not Limited To Claims Of Denial Of Justice**

49. In its Rejoinder, Respondent continues to argue that, because EEGSA has litigated in the Guatemalan courts, "the only possible claim for TGH is one for denial of justice, as accepted by the tribunal in *Iberdrola*."<sup>128</sup> As Claimant demonstrated in its Reply, Respondent's argument is factually incorrect, because EEGSA did not litigate the same claims that Claimant has asserted before this Tribunal.<sup>129</sup> The Guatemalan courts, for instance, did not address issues of international law; Respondent's prior representations and TECO's or EEGSA's legitimate expectations; whether the amendments to RLGE Article 98 constituted a fundamental change in the regulatory framework; or the contemporaneous evidence demonstrating Guatemala's bad faith that has been produced in this arbitration. Moreover, Respondent's argument that TECO is prohibited from asserting its claims in this arbitration, because "TGH, through EEGSA, has already litigated the same issues about which it complains in this arbitration in the courts in Guatemala,"<sup>130</sup> is wrong on multiple grounds. Not only are the causes of action before this Tribunal and those that were before the courts in Guatemala different, but the parties before the respective tribunals were different as well. The Guatemalan court decisions thus can have no *res judicata* effect *vis-à-vis* TECO.<sup>131</sup>

50. Furthermore, as previously noted in Claimant's Reply, Respondent's argument improperly conflates fair and equitable treatment and denial of justice, and is inconsistent with

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<sup>127</sup> See, e.g., Reply ¶¶ 254-271.

<sup>128</sup> Rejoinder ¶ 19.

<sup>129</sup> Reply ¶¶ 208-216, 283-287.

<sup>130</sup> Rejoinder, subheading III(C).

<sup>131</sup> See *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).

numerous investment treaty cases finding a fair and equitable treatment violation on account of a State's legislative, administrative, or regulatory actions, irrespective of whether there has been a denial of justice by the host State's courts.<sup>132</sup> Indeed, Respondent incorrectly characterizes the *Iberdrola* decision as “the last link in a long list of decisions confirming that disputes of this nature cannot give rise to breaches of investment protection treaties (*BITs*), except where denial of justice has occurred:”<sup>133</sup> the *Iberdrola* decision, however, is the *only* case where a claim was dismissed for lack of jurisdiction on these grounds, and is incorrect in this regard for the reasons stated.

51. As Claimant demonstrated in its Reply, denial of justice is but a subset of the international minimum standard and one way in which a State may violate its obligation to accord an investment fair and equitable treatment.<sup>134</sup> Even in cases where the State's domestic courts are implicated, investment treaty tribunals have recognized that a breach of the fair and equitable treatment standard can occur separate and apart from any treatment accorded by the domestic courts. In *Vivendi II*, the tribunal thus rejected the argument that Respondent advances in the present case, 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.”<sup>135</sup> As the tribunal observed, if it “were to restrict the claims of unfair and inequitable treatment to circumstances in which Claimants

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<sup>132</sup> Reply ¶¶ 272-282.

<sup>133</sup> Rejoinder ¶ 62.

<sup>134</sup> 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); *see also ATA Construction v. Jordan* ¶¶ 121-128 (CL-58).

<sup>135</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 (“*Vivendi II*”) ¶¶ 7.4.10-7.4.11 (CL-18).

have also established a denial of justice, it would eviscerate the fair and equitable treatment standard.”<sup>136</sup>

52. Similarly, in *ATA Construction v. Jordan*, the tribunal found that Jordan had violated the fair and equitable treatment standard by retroactively applying a new law that had extinguished the investor’s right to arbitrate, which the tribunal deemed to be an “integral part” of the claimant’s investment contract, even though the Jordanian Court of Cassation had rendered a decision confirming the annulment of the claimant’s arbitration award and extinguishing the arbitration agreement under Jordanian law.<sup>137</sup> As the tribunal observed, the “operation of Jordanian law opened the door to the adjudication of the parties’ dispute before the Jordanian State courts, depriving the Claimant of its legitimate reliance on the Arbitration Agreement in the Contract of 2 May 1998.”<sup>138</sup> In so ruling, the tribunal recalled “the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law,” as well as “the unanimous award rendered in the *Desert Line Co. v. Yemen* case,” which emphasized that “State authorities are estopped from undertaking any act that contradicts what they previously accepted as obligations incumbent upon them in a given context.”<sup>139</sup> As Claimant noted in its Reply,<sup>140</sup> while the tribunal found that the extinguishing of the claimant’s arbitration agreement by the Jordanian courts had violated the fair and equitable treatment standard, the tribunal rejected the claimant’s denial of justice claim, finding that the Court’s “actions could hardly be said to have constituted abusive misconduct, bad faith or a denial of justice.”<sup>141</sup>

53. Other investment treaty tribunals similarly have confirmed that they are not required to follow domestic court decisions to determine whether applicable treaty provisions

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<sup>136</sup> *Id.* ¶¶ 7.4.10-7.4.11.

<sup>137</sup> *ATA Construction v. Jordan* ¶¶ 121-128 (CL-58).

<sup>138</sup> *Id.* ¶ 124.

<sup>139</sup> *Id.* ¶ 122 (internal citations omitted).

<sup>140</sup> Reply ¶ 275.

<sup>141</sup> *Id.* ¶ 123.

have been violated in the circumstances. In *CME v. Czech Republic*, for example, the Czech Republic argued that ongoing civil litigation in the Czech courts should determine whether the host-State’s Media Council had made an appropriate decision not to allow the investor use the license to operate a television station.<sup>142</sup> The tribunal rejected the Czech Republic’s argument, finding that the claimant was not required to wait for the Czech Supreme Court’s decision before initiating arbitration proceedings, because “[t]he outcome of the civil court proceedings is irrelevant to the decision on the alleged breach of the Treaty by the Media Council acting in concert with the Respondent.”<sup>143</sup>

54. Similarly, as noted above, in *EDF v. Argentina*, the fact that the Supreme Court of Mendoza had rejected all claims brought by the claimants’ distribution company in the Argentine courts did not render the *EDF* tribunal without jurisdiction to consider the claimants’ fair and equitable treatment claim, nor did it limit the claimants’ fair and equitable treatment claim to a claim for denial of justice.<sup>144</sup> In so ruling, the tribunal observed that “the legality of Respondent’s acts under national law does not determine their lawfulness under international legal principle,” and that “[t]he fact that the Argentine Supreme Court has vested Respondent with robust authority during national economic crises does not change the Tribunal’s analysis.”<sup>145</sup> The tribunal also noted that Article 27 of the 1969 Vienna Convention precludes a host-State from “invok[ing] the provisions of its internal law as justification for its failure to perform,”<sup>146</sup> and that Article 3 of ILC Articles provides that the characterization of an act of a State as internationally wrongful “is not affected by the characterization of the same act as lawful by internal law.”<sup>147</sup>

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<sup>142</sup> *CME v. Czech Republic* ¶ 415 (CL-16).

<sup>143</sup> *Id.* ¶ 415.

<sup>144</sup> *EDF v. Argentina* ¶ 1095 (CL-86).

<sup>145</sup> *Id.* ¶ 907.

<sup>146</sup> *Id.* ¶ 905.

<sup>147</sup> *Id.* ¶ 906; see also *Kardossopoulos v. Georgia* ¶ 146 (holding that “whatever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law”) (CL-88).

55. Likewise, in the present case, EEGSA's *amparo* petitions under Guatemalan law before the Guatemalan courts do not divest this Tribunal of jurisdiction over Claimant's fair and equitable treatment claim, nor do they limit that claim to a claim for denial of justice. As Claimant observed in its Reply, none of the cases on which Respondent relied in its Counter-Memorial in support of its argument was dismissed for lack of jurisdiction on the grounds that the claim was a so-called regulatory dispute or one necessitating the determination of issues of domestic law and, thus, the only claim over which the tribunal had jurisdiction was one for denial of justice. Those cases, rather, fell into two categories: (i) claims dismissed for lack of jurisdiction, because the claimant had not alleged facts capable of constituting a breach of the treaty, but had alleged only facts capable of constituting a breach of the contract at issue;<sup>148</sup> and (ii) a small number of claims dismissed *on the merits* where the tribunal found that the claimant had not established a violation of the fair and equitable treatment obligation.<sup>149</sup> Here, Claimant has not alleged facts constituting a breach of any contract; consequently, the long list of cases in which tribunals have affirmed that a mere breach of contract does not give rise to a fair and equitable treatment violation, and that the only international claim over which the tribunal could exercise jurisdiction would be a denial of justice claim, is inapposite. Likewise, the additional few cases relied on by Respondent in which the tribunal ultimately determined that the respondent's specific actions did not violate its fair and equitable treatment obligation undermine Respondent's objection, because those claims were dismissed on the merits, highlighting the fact that the respective tribunals did have jurisdiction to consider the claims. Thus, far from being the latest in a long line of cases or "simply adher[ing] to international case law on investment protection,"<sup>150</sup> the *Iberdrola* decision is an outlier, as it is the *only* case in which a tribunal has dismissed a claim for lack of jurisdiction on the grounds advanced by Respondent and is a marked departure from established jurisprudence on the issues discussed above.

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<sup>148</sup> See Reply ¶ 277.

<sup>149</sup> See *id.* ¶¶ 278-279.

<sup>150</sup> Rejoinder ¶ 19.

56. That the Guatemalan Constitutional Court’s decisions on EEGSA’s challenges do not divest this Tribunal of jurisdiction over Claimant’s fair and equitable treatment claim or limit this claim to a claim for denial of justice also comports with the object and purpose of the DR-CAFTA, whereas the interpretation Respondent urges frustrates the same. A claim for denial of justice requires the claimant to have exhausted local remedies (or established the futility of doing so), because the claim itself may be established only by showing that the respondent State’s judicial system as a whole has failed to accord the level of justice required by international law.<sup>151</sup> By contrast, a violation of the customary international law minimum standard of treatment by executive, administrative, regulatory, or legislative action requires no such resort to local courts: the violation is complete once the objectionable measure has been adopted and maintained.<sup>152</sup> Whether a prospective claimant may seek relief in international arbitration for any such violation without first resorting to local courts depends upon the instrument granting the State’s consent to arbitration. One hallmark of modern investment treaties is the State’s granting consent to international arbitration to determine the compatibility of such measures with the State’s international obligations without requiring resort to local courts.

57. In accordance with this practice, the State Parties to the DR-CAFTA, like those of the NAFTA, do not require exhaustion of local remedies or even resort to local courts as a precondition to initiating investor-State arbitration. At the same time, the State Parties wished to encourage investors to attempt to resolve their disputes in local courts.<sup>153</sup> This is a commendable policy objective, as giving local courts the opportunity to resolve investment disputes has the potential to strengthen the rule of law and to avoid the internationalization of the dispute.<sup>154</sup> The DR-CAFTA Parties balanced these competing policy objectives—permitting resort to arbitration

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<sup>151</sup> See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003 (CL-89); J. PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 100-102, 107-119 (2005) (CL-98).

<sup>152</sup> See, e.g., *Vivendi II* ¶¶ 7.4.10-7.4.11 (CL-18); *CME v. Czech Republic* ¶¶ 416-417 (CL-16).

<sup>153</sup> See, e.g., William S. Dodge, *National Courts and International Arbitration: Exhaustion of Local Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT’L & COMP. L. REV. 357, 381-383 (2000) (CL-99).

<sup>154</sup> See, e.g., *id.*



without first requiring local court proceedings and encouraging resort to local courts—by adopting what is commonly known as a “no u-turn” provision. DR-CAFTA Article 10.18(2) thus provides that claimants must waive their rights to initiate or continue proceedings challenging the objectionable measure once they commence arbitration: thus, claimants may first resort to local courts and, then, if their dispute is not resolved to their satisfaction, they may commence international arbitration.<sup>155</sup> If, during the course of their litigation in local courts, they suffer a denial of justice, that treatment may serve as an *additional* claim in international arbitration. But regardless of whether a claimant chooses to make a denial of justice claim or succeeds on such a claim in international arbitration, the investor retains its original claim for breach of the applicable treaty. Were it otherwise, investors would be loathe to give national courts a chance, knowing that by doing so they were forfeiting their international law claims and would only be left with a potential new claim for denial of justice. Yet, this is what Respondent proposes when it argues that, because EEGSA challenged certain actions of the CNEE in Guatemalan courts, the only claim that TECO may bring in international arbitration is a denial of justice claim. Accepting Respondent’s argument not only runs counter to the international arbitral jurisprudence discussed above, but also would frustrate the DR-CAFTA’s object and purpose of encouraging investors to attempt to resolve their differences with host States in local courts before resorting to international arbitration.

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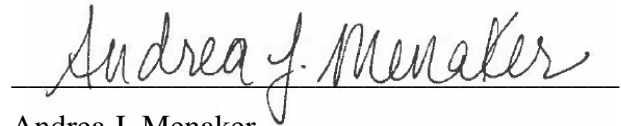
<sup>155</sup> The provision is termed a “no u-turn” provision because, once arbitration is commenced, the investor may not make a u-turn and go back to local courts. The arbitration also must be commenced within three years from the date the investor first acquired or should have acquired knowledge of the breach and that it had suffered damage on account of the breach. DR-CAFTA, Art. 10.18(1) (CL-1). By including a three-year prescription period, the State Parties ensured that they would not have open-ended potential liability for measures, yet granted their respective courts a reasonable amount of time to resolve disputes that could become the subject of an arbitration claim.

### III. CONCLUSION

58. 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 a reasonable commercial rate, 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,

A handwritten signature in cursive script that reads "Andrea J. Menaker". The signature is written in black ink and is positioned above a solid horizontal line.

Andrea J. Menaker

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9 November 2012