

INTERNATIONAL CENTRE FOR THE SETTLEMENT  
OF INVESTMENT DISPUTES

**ICSID CASE No. ARB/10/23 - Annulment Proceedings**

**TECO GUATEMALA HOLDINGS LLC**

**v.**

**REPUBLIC OF GUATEMALA**

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**REPUBLIC OF GUATEMALA's**

**MEMORIAL ON ANNULMENT**

**17 OCTOBER 2014**

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## CONTENTS

I.	INTRODUCTION AND SUMMARY .....	1
A.	The three manifest deficiencies in the Award that require its total or partial annulment .....	1
B.	The Tribunal’s manifest excess of powers and failure to state reasons in equating a Treaty and a domestic law breach, and reversing the decisions of the Constitutional Court .....	2
1.	The flawed decision on jurisdiction .....	2
2.	The reversal of the Constitutional Court decisions .....	3
3.	The failure to apply international law and instead equating a breach of domestic law to a breach of the Treaty .....	4
C.	The Tribunal’s failure to state reasons and its serious departure from a fundamental rule of procedure in determining compensation .....	6
D.	The Tribunal’s failure to state reasons in relation to its decision on costs .....	8
E.	Request for stay of enforcement of the Award .....	8
F.	Structure of the Memorial .....	9
II.	THE ORIGINAL ARBITRATION AND THE AWARD .....	9
A.	The Dispute .....	9
B.	The Arbitration .....	15
C.	The Award .....	19
III.	THE ICSID ANNULMENT MECHANISM .....	21
IV.	FOUNDATIONS FOR THE ANNULMENT OF THE AWARD .....	24
A.	The Tribunal Manifestly Exceeded Its Powers .....	24
1.	The Tribunal exceeded its powers in asserting jurisdiction over a merely regulatory dispute under local law .....	28
2.	Manifest excess of powers of the Tribunal for reviewing and <i>de facto</i> revoking the Constitutional Court decisions .....	37
3.	The Tribunal manifestly exceeded its powers in failing to apply international law, which was the applicable law, and equating a breach of domestic law with a breach of the CAFTA-DR .....	49
4.	Conclusion on the Tribunal’s manifest excess of powers .....	65
B.	The Award Fails to State the Reasons on Which it is Based .....	66
1.	Failure to State Reasons for the Decision on Jurisdiction .....	68
2.	Failure to state reasons regarding the test of applicable international law .....	72

- 3. The manifest contradiction regarding the possibility of reviewing the decisions of the Constitutional Court ..... 74
- 4. The lack of reasoning and manifest contradiction regarding the decision on damages for historical losses..... 77
- 5. Failure to state reasons for the decision on costs ..... 80
- 6. Conclusion on the failure to state reasons ..... 82
- C. The Tribunal Seriously Departed from a Fundamental Rule of Procedure..... 83
- V. REQUEST FOR RELIEF..... 85

## **I. INTRODUCTION AND SUMMARY**

1. Pursuant to Procedural Order No. 1 dated 1 August 2014, the Republic of Guatemala (*Guatemala*) submits this memorial in support of its Application for Annulment dated 18 April 2014 (the *Application* or *Application for Annulment*) to challenge the award issued on 19 December 2013 (the *Award*) in the arbitration brought by TECO Guatemala Holdings LLC (*TGH*) against Guatemala (the *Arbitration* or *original Arbitration*).

### **A. THE THREE MANIFEST DEFICIENCIES IN THE AWARD THAT REQUIRE ITS TOTAL OR PARTIAL ANNULMENT**

2. Guatemala's request for annulment is based, essentially, on the following three manifest deficiencies of the Award:

- (a) Guatemala was found to be in breach of the Treaty for what was, as evidenced in the Tribunal's own reasoning, a mere infringement of domestic law. In its decision, the Tribunal effectively reversed the prior findings of the Guatemalan Constitutional Court confirming compliance with domestic law and based its decision on the assumption that there had been a domestic law breach. Yet it is well established that international law, including investment protection treaties, does not punish pure domestic law breaches, and that investment treaty tribunals are not appeal courts on local law matters;
- (b) The compensation granted to the Claimant in the Award was not calculated with respect to the consequences of the government act found to be in breach of the Treaty. Rather, it was calculated based on regulatory conduct which the Tribunal did not conclude was unlawful and without considering expert evidence presented by Guatemala. Thus Guatemala was unfairly, inexplicably and contradictorily condemned to pay for an act for which it was not held liable; and
- (c) The Tribunal agreed that costs should be apportioned between the Parties "based on the principle that the costs follow the event".<sup>1</sup> Yet the Tribunal awarded to

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<sup>1</sup> Award, para. 777.

TGH 75 per cent of its costs, in spite of the fact that TGH failed in all its substantive claims but one, and in 90 per cent of its damages claim. The result is an unreasoned and disproportionate costs award, which represents more than 35 per cent of the total compensation granted to TGH.

3. Due to these deficiencies the Award is subject to annulment, as summarised below.

**B. THE TRIBUNAL’S MANIFEST EXCESS OF POWERS AND FAILURE TO STATE REASONS IN EQUATING A TREATY AND A DOMESTIC LAW BREACH, AND REVERSING THE DECISIONS OF THE CONSTITUTIONAL COURT**

4. It is well established that a breach of international law is different from a breach of domestic law. In particular, an infringement of local law cannot be automatically equated with a breach of an investment protection treaty; “something more” is required.<sup>2</sup> The Tribunal did not respect this basic and fundamental principle of international law. This serious shortcoming permeates the entire Award.

**1. The flawed decision on jurisdiction**

5. First, by ignoring the principle outlined above, the Tribunal manifestly erred in affirming jurisdiction. In reality it failed to address in any substantive way Guatemala’s objection to jurisdiction *ratione materiae*. Guatemala argued that TGH’s claim was essentially based on a local law disagreement with the Guatemalan electricity regulator—already decided by local courts— without more. Investment treaty tribunals, when faced with this type of objection, examine what is the fundamental basis of the claim<sup>3</sup> and whether the alleged facts may *prima facie* constitute breaches of the Treaty.<sup>4</sup>

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<sup>2</sup> *ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190.

<sup>3</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 90; *Pantehniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21) Award, 30 July 2009, **Exhibit RL-12**, para. 61; *United Parcel Service of America, Inc. v. Canada* (UNCITRAL case) Decision on Jurisdiction, 22 November 2002, **Exhibit RL-4**, paras. 34, 35, 37; *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 351.

<sup>4</sup> *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190; *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 368. See also A. Sheppard, “*The Jurisdictional Threshold*

6. Here the Tribunal simply did nothing of the sort and relied merely on TGH's own characterisation of its claim. This is an approach to jurisdictional objections *ratione materiae* that is universally rejected,<sup>5</sup> because it equates to no analysis of the objection.
7. Thus, the Tribunal manifestly exceeded its powers in wrongly affirming its jurisdiction, and failed to state reasons for rejecting Guatemala's objection, both of which are grounds for the total annulment of the Award.

## 2. The reversal of the Constitutional Court decisions

8. There is consistent case law affirming that investment treaty tribunals "cannot substitute their own application and interpretation of national law to the application by national courts",<sup>6</sup> and the Tribunal itself recognised that "this Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law".<sup>7</sup>
9. In this case, the Constitutional Court, in two carefully reasoned judgments dated 18 November 2009 and 24 February 2010, had upheld the legality of the very same regulator conduct of the Guatemalan electricity regulator, that formed the entire basis of TGH's claim in the Arbitration.<sup>8</sup>
10. Indeed, the Tribunal based its merits decision on the same conduct, holding as the cornerstone of its reasoning that the regulator's insufficient motivation for its acts was a

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*of a Prima-Facie Case*" in P. Muchlinski, F. Ortino, and C. Schreuer, *The Oxford Handbook of International Investment Law* (2008) 932, **Exhibit RL-23**, pgs. 941-942.

<sup>5</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/83/3) Decision on Jurisdiction, 14 April 1988, **Exhibit RL-44**, para. 63; *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26) Award, 2 August 2006, **Exhibit RL-45** para. 176; *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 303; *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 90.

<sup>6</sup> *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441. *See also Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Decision, 10 November 2010, **Exhibit RL-15**, para. 70.

<sup>7</sup> Award, para. 477.

<sup>8</sup> Judgment of the Constitutional Court of 18 November 2009, **Exhibit R-105**, pgs. 23-25, 29-33; Judgment of the Constitutional Court of 24 February 2010, **Exhibit R-110**, pgs. 31-34.

“wilful disregard of the fundamental principles upon which the Regulatory Framework is based”.<sup>9</sup>

11. The Tribunal’s conclusion of “a wilful disregard of the fundamental principles upon which the Regulatory Framework is based” is simply an indirect way of concluding that the regulator did not comply with the Regulatory Framework. In this way, the Tribunal reversed the Constitutional Court’s decisions that the regulator’s decisions were indeed consistent with the Regulatory Framework. It also directly contradicted its earlier finding that it could and would not review the local court decisions that had upheld the conduct of the regulator. In so doing: (a) it manifestly exceeded its powers because the Tribunal had no jurisdiction over the domestic law claim and its role was not that of a further court of appeal on Guatemalan law, as it itself recognised in the Award; and (b) failed to state reasons.<sup>10</sup> Both grounds require annulment of the totality of the Award.

### **3. The failure to apply international law and instead equating a breach of domestic law to a breach of the Treaty**

12. The Tribunal based its merits decision on the supposed “wilful disregard of the Regulatory Framework” by the electricity regulator which it characterized as arbitrary and lacking due process.<sup>11</sup>
13. However, there is no international law analysis of the concepts of arbitrary conduct or due process, or of how a State measure can constitute either of them, in light of the facts of this case. Instead, the Award focused almost entirely on Guatemalan law. Having found that the

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<sup>9</sup> Award, para. 458. *See also Ibid*, paras. 465, 481, 497, 621.

<sup>10</sup> *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 6.107. *See also Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18) Decision on Annulment, 3 July 2013, **Exhibit RL-48**, paras. 41-46; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2) Decision on Annulment, 3 May 1985, **Exhibit RL-49**, para. 116; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, para. 65; *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13) Decision on Annulment, 10 July 2014, **Exhibit RL-51**, para. 200; *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102; *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) Decision on Annulment, 29 June 2012, **Exhibit RL-53**, para. 53.

<sup>11</sup> Award, paras. 489, 492-493, 587, 619, 621, 664, 681, 688, 691, 711.

regulator acted contrary to the Regulatory Framework, the Tribunal makes an unsubstantiated jump that Guatemala breached the Treaty.<sup>12</sup> The international law analysis is missing.

14. International law was the primary applicable law in the case since TGH brought the claim under an international treaty seeking to hold Guatemala responsible internationally for the acts of its electricity regulator. Yet the Tribunal did not explain how it applied such international law.
15. Failure to apply the applicable law is a classic instance of manifest excess of powers.<sup>13</sup> It is also a serious failure to state reasons, because there is an obvious lack of motivation for the finding of a breach of the Treaty (as opposed to a breach of domestic law).<sup>14</sup> The Tribunal failed to provide any reasoning as to why a purely domestic law finding could equate to a Treaty breach—it simply made a leap in logic by equating a breach of the Regulatory Framework (characterized as a “wilful disregard”) with a breach of the Treaty— without more.<sup>15</sup> The Award should thus be totally annulled also for these reasons.

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<sup>12</sup> Award, paras. 681-682, 690, 711.

<sup>13</sup> *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.03; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Decision on Annulment, 25 September 2007, **Exhibit RL-54**, para. 49; *MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, para. 44; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 45; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para. 96; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment 29 June 2005, **Exhibit RL-58**, para. 40; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Decision on Annulment, 1 September 2009, **Exhibit RL-59**, paras. 46, 136.

<sup>14</sup> *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, paras. 122-123, 126, 133; *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment 29 June 2005, **Exhibit RL-58**, para. 70; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, **Exhibit RL-60**, para. 98.

<sup>15</sup> A similar leap of logic was carefully reviewed and rejected by the Tribunal in *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, paras. 356, 359, which confirmed that it had no jurisdiction over a domestic law claim “disguised” as a Treaty claim.



**C. THE TRIBUNAL’S FAILURE TO STATE REASONS AND ITS SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE IN DETERMINING COMPENSATION**

16. The dispute before the Tribunal as framed by TGH concerned essentially whether the Guatemalan electricity regulator had acted properly under Guatemalan law in deciding how to establish the electricity tariffs for a Guatemalan electricity distribution company for the next five year period. In particular, the question was whether the regulator was bound by the conclusions of an expert commission report and a technical study presented by the company to calculate the tariffs.
17. The Tribunal found that Guatemala acted arbitrarily and with lack of due process, and thus in breach of the Treaty, in not following the Expert Commission’s report and the company’s study. However, the breach occurred because the electricity regulator did not provide sufficient motivation for its decision, not for the decision itself.<sup>16</sup> In other words, the Tribunal did not find Guatemala liable because the Expert Commission report and the study were binding. Rather, the Tribunal was clear throughout the liability section of the Award that the breach related to the regulator’s failure to provide reasons for not implementing them.<sup>17</sup>
18. However, when computing the damages caused by Guatemala’s Treaty breach, the Tribunal ignored its own conclusion that the Expert Commission report and company study were not binding and calculated damages on the basis of the difference between the tariff approved by the regulator and that which would have applied on the assumption that the Commission’s report and company study were indeed binding. This is wholly inconsistent with the Tribunal’s own decision on liability which recognised that the regulator had a discretion as to whether or not to incorporate each conclusion from the Expert Commission report and company study.<sup>18</sup> The only logical damages conclusion from its own merits findings would be a review of each of the Expert Commission’s findings and whether a regulator could reasonably have rejected such conclusion in exercise of its discretion. Yet, in breach of its conclusion that the Expert

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<sup>16</sup> Award, paras. 583, 683.

<sup>17</sup> Award, paras. 565, 582-583, 588, 664, 681.

<sup>18</sup> Award, para. 531.

Commission report was not binding, the Tribunal adopted 100 per cent of its findings in its damage analysis.

19. In other words, Guatemala is being condemned to pay for damages that are not caused by the supposedly unlawful act. Damages are calculated on the basis of a different act whose unlawful nature the Tribunal nowhere examines or establishes.
20. This is a major contradiction and an unexplained leap in logic in the Award which amounts to another failure by the Tribunal to state reasons, and thus requires the annulment of the section of the Award on the historical damages granted to TGH as compensation.
21. There is another deficiency in the manner in which the Tribunal calculated the historical damages. As explained above, the Tribunal decided to base its damage calculation on the tariff that would have applied had the regulator fully accepted the distributor's tariff study. This is contradictory and incorrect as stated in the preceding paragraphs. In addition, however, it also ignores crucial evidence presented by Guatemala in the Arbitration.
22. The Tribunal relies entirely on TGH's evidence and calculations, holding that Guatemala never provided appropriate alternative calculations in the Arbitration. This is incorrect. Guatemala did provide detailed expert testimony on those calculations,<sup>19</sup> but the Tribunal apparently failed to review the file properly and take them into consideration.<sup>20</sup> In other words, it made its calculations based on Claimant's evidence alone. This is a breach of fundamental tenets of due process.
23. This failure to take into account relevant evidence and submissions constitutes a serious departure from a fundamental rule of procedure and also requires partial annulment of the Award.

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<sup>19</sup> Damonte, **Apendix RER-2**, para. 188 and Table 5; Direct examination of Mario Damonte, slide 16, Tr. (English), Day Six, 1414:7-1415:15, Damonte; Respondent's Post-Hearing Brief, para. 194.

<sup>20</sup> Memorial on Objections to Jurisdiction and Counter-Memorial, para. 618. *See also*, Respondent's Post-Hearing Brief, paras. 334-335.

**D. THE TRIBUNAL’S FAILURE TO STATE REASONS IN RELATION TO ITS DECISION ON COSTS**

24. The Tribunal condemned Guatemala to pay 75 per cent of TGH’s costs amounting to US\$ 7,520,695.39 million,<sup>21</sup> one of the highest costs awards ever made against a respondent state in ICSID history.
25. It did so after affirming, without any analysis or demonstration, that TGH’s declared costs of a massive US\$ 10 million in a straightforward arbitration with no jurisdictional bifurcation were “reasonable” notwithstanding that the entirety of Guatemala’s defence costs were approximately half those of TECO.
26. Further, although the Tribunal claimed (without more) that its cost decision was based on the principle that costs follow the event, the “event” was that Guatemala prevailed in most of the merits issues as well as in 90 per cent of the damages claim (since the compensation awarded was only 10 per cent of what TGH claimed). Thus, Guatemala was largely successful in the Arbitration. Indeed, TGH clearly believed it had “lost” the arbitration as it is seeking annulment of the damages award.
27. It follows that there is no reasoning, logic or consistency in the Tribunal’s decision on costs, which amounts to a failure to state reasons. This is a ground for the annulment of the costs decision of the Award.

**E. REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD**

28. In its Application for Annulment, Guatemala requested the stay of enforcement of the Award, until the Committee renders its final decision on annulment.<sup>22</sup> TGH has not raised any objection in this regard, and has thus acquiesced to Guatemala’s request. This is also consistent with the fact that it itself has applied for the annulment, albeit partial, of the Award.
29. For the avoidance of doubt Guatemala reiterates its stay request here.

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21 Award, para. 780.

22 Award, para. 86.

## F. STRUCTURE OF THE MEMORIAL

30. This memorial has the following structure:

- (a) Section II below summarises the dispute submitted to the original Arbitration, the main arguments raised by the parties in the proceedings and the Award;
- (b) Section III then outlines the place of the annulment mechanism within the ICSID Convention and provides a general description of such mechanism;
- (c) Section IV elaborates on the grounds of annulment that apply to the present case and the reasons why the Award should be totally or partially annulled;
- (d) Finally, Section V contains Guatemala's request for relief.

## II. THE ORIGINAL ARBITRATION AND THE AWARD

### A. THE DISPUTE

31. The dispute that gave rise to the Arbitration originated in the process for the review of electricity tariffs in Guatemala in 2008. During the process, some divergences arose between the regulator of the electricity sector in Guatemala, the *Comisión Nacional de Energía Eléctrica* (National Commission of Electric Energy, the **CNEE**) and one of the electricity distributors in the country, the *Empresa Eléctrica de Guatemala S.A.* (**EEGSA**), in which TGH was a shareholder. Essentially, EEGSA disagreed with the manner in which the CNEE interpreted certain aspects of the procedure for the tariff review.
32. The procedure for electricity tariff reviews in Guatemala is established in the General Electricity Law (the **LGE**) and its Regulations (the **Regulations**) (together the **Regulatory Framework**).<sup>23</sup> Specifically, the tariff review procedure is governed by three articles of the LGE (articles 74, 75 and 77) and two articles of the Regulations (articles 97 and 98). The CNEE, as the regulator, is responsible for conducting the

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<sup>23</sup> LGE, **Exhibit R-8**; RLGE, **Exhibit R-36**.

process and approving the tariffs.<sup>24</sup> The CNEE functions independently from the Government and has its own budget.<sup>25</sup> Before examining the tariff review process in more detail, we provide brief remarks on how electricity tariffs are designed.

33. Electricity tariffs are composed essentially of two elements: (a) the cost of purchasing the electricity by the distributor; and (b) the cost incurred by the distributor in order to provide its service.<sup>26</sup> The first tariff component does not represent an income for the distributor; the same amount paid by the distributor to buy electric energy is transferred to the consumer through the mechanism called “*pass-through*”. The second element, called Value-Added for Distribution (**VAD**, in Spanish *Valor Agregado de Distribución*) represents the real income of the distributor. It is the compensation for its operating and investment costs, the so-called cost of capital, which includes a return for the capital employed. The VAD, therefore, corresponds to an amount of money to be credited to the distributor, through tariffs, to cover its costs in providing the distribution service, allowing the distributor to recoup its investment and obtain a profit.
34. The VAD is calculated on the basis of the model company method. This means that the references for calculating the VAD are not the real costs of the distribution company, but those of an efficient fictional company that could provide the same distribution service, considering the size of the network, distribution area, etc. The real company must then seek to become as efficient as possible, and adapt its costs to the model company in order to be profitable.
35. Electricity tariffs in Guatemala are subject to ordinary five-year reviews. The main exercise, at each five-year review, is to redefine the VAD for each distribution company. The tariff review process starts with the adoption by the CNEE of the “methodology for

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<sup>24</sup> LGE, **Exhibit R-8**, arts. 4(c), 61, 71, 77; RLGE, **Exhibit R-36**, art. 29.

<sup>25</sup> LGE, **Exhibit R-8**, art. 4; Diary of the Congress of the Republic, October 16, 1996, **Exhibit R-9**, p. 112; RLGE, **Exhibit R-36**, art. 29. *See also* Memorial on Objections and Counter-Memorial, paras. 151-159.

<sup>26</sup> A third element in the tariff is the cost of the electricity lost by the network. The electricity lost is a cost for the distributor because it is electricity bought from the generator but which cannot be sold because it is lost before reaching the customer. Each distributor is allowed to recoup part of this cost because some losses are considered physiological and not imputable to inefficiencies. Thus, the tariff charged by the distributor incorporates a surcharge to account for this cost.

determination of the tariffs”.<sup>27</sup> This methodology constitutes the terms of reference for the distribution companies to prepare, using certain consultant firms previously pre-qualified by the CNEE, the so-called VAD studies, also known as tariff studies.<sup>28</sup> Those studies provide a proposal by the distribution company to the regulator as to the VAD that should be incorporated in the tariff to be charged to customers. The VAD studies are, initially, prepared by distribution companies because they have first-hand knowledge of the nature of their concessions, types of customers, area, etc., which are important factors to calculate the costs of the service.

36. The VAD studies must however follow the terms of reference set out by the regulator that define certain parameters decided by the regulator, such as quality of the service, organisation of the grid and the materials and equipment to be used. The terms of reference also provide for how the information is to be presented. In particular, since a VAD study is a long and complicated document containing a multitude of excel spreadsheets with numerical data on prices and quantities of various materials, goods and services used in the model company, it is crucial that such data be cross-referenced and linked up in order for the regulator to be able to reconstruct and analyse calculations and results.<sup>29</sup> This is the so-called “traceability” of the study, which is essential in order for it to be “auditable” by the regulator.
37. Importantly, the distributors can challenge (as EEGSA did in this case) the terms of reference before the domestic courts. Once confirmed, however, those terms of reference become binding for the distributors.
38. Once the VAD study is presented by the distribution company, the CNEE reviews it and may request, as the case may be, any necessary corrections for them to conform to the terms of reference.<sup>30</sup> The company must incorporate the corrections<sup>31</sup> and, if there are

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<sup>27</sup> LGE, **Exhibit R-8**, art. 77. See also *Ibid.*, art. 4(c).

<sup>28</sup> *Ibid.*, art. 74; RLGE, **Exhibit R-36**, art. 97.

<sup>29</sup> For example, the cells showing the result of multiplying prices by quantities, by grid size, by user etc., should be hyperlinked to the cells containing the underlying data being multiplied, thus allowing to trace back and review the correctness of the information used.

<sup>30</sup> *Ibid.*, art. 98.

discrepancies between the CNEE and the distributor, article 75 of the LGE provides that an expert commission may be established to issue a pronouncement.<sup>32</sup> Then the Regulatory Framework requires the CNEE to establish the VAD and the tariffs.<sup>33</sup>

39. In the 2008 tariff review EEGSA commissioned its VAD study from the consulting firm Bates White, LLC (*Bates White*). Bates White presented its VAD study for EEGSA on 31 March 2008 (the *Bates White March 2008 Study*). The CNEE is empowered to commission a study in parallel, from another of the pre-qualified consultants and in accordance with the same terms of reference, in order to establish a bench mark to enable it to review carefully the studies prepared by the distribution companies. In this case, it commissioned a parallel study from another independent and pre-qualified consultant, the firm Sigla S.A./Electrotek (*Sigla*).
40. The CNEE discovered numerous irregularities in the Bates White study including a departure from the terms of reference on numerous occasions (423 occasions to be precise).<sup>34</sup> Further, in violation of the terms of reference, Bates White did not provide the required database of prices to support its study and did not link the data in the cells on the Excel spreadsheet so that they could be traced and audited by the CNEE.<sup>35</sup> The study resulted also in a vastly over-valued VAD.<sup>36</sup> For example, in the first version of

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31 RLGE, **Exhibit R-36**, art. 98.

32 LGE, **Exhibit R-8**, art. 75.

33 *Ibid.*, arts. 4(c), 60, 61, 71, 73, 76; RLGE, **Exhibit R-36**, arts. 82, 83, 92, 98, 99.

34 Memorial on Jurisdiction and Counter-Memorial, para. 347.

35 A VAD study is a long and complicated document. It contains a multitude of numerical data on prices and quantities of various materials, goods and services used in the model company for electricity distribution. These data, contained in Excel cells and spreadsheets, then have to be cross-referenced (for example, by multiplying prices by quantities, by grid size, by user etc.). These calculations are contained in other Excel cells and spreadsheets. In order to be able to reconstruct and analyze calculations and results on the relevant spreadsheets, it is therefore crucial to know which other cells and spreadsheets contained the data or factors used. Naturally this can be done efficiently only if the spreadsheets and cells are hyperlinked, so that clicking on one cell automatically reveals the cell containing the underlying datum. This is what is meant by “trackability” of the study, which is essential in order for it to be “auditable” by the regulator.

36 The second version (May 2008) recommended double the previous VAD. In other words, far from reducing costs through efficiencies (the goal of the Regulatory Framework) Bates White increased them by 100 or 200 percent. Another irregularity was the fact that, while Bates White was presenting these increases, Mr. Gonzalo Pérez, the Chairman of the Board of EEGSA and a Director of Iberdrola, the majority shareholder and operator of EEGSA for Latin America, who lived in Mexico, came to the CNEE in April 2008 “offering” a 10 percent increase “*outside the study*” – in other words, ignoring the

the study presented in March 2008, the proposed VAD tripled the amount of the VAD of the previous tariff review.

41. In view of the reluctance of Bates White and EEGSA to incorporate the corrections indicated by the CNEE as required by the Regulation, the parties agreed to establish an expert commission to issue a pronouncement on the disagreements (the *Expert Commission*). This was the first time that an expert commission was constituted in Guatemala since the privatisation of the electricity service in 1998. Further, EEGSA was the only distributor participating in the 2008 review, which refused to incorporate the corrections of the CNEE and requested the establishment of an expert commission.
42. The report of the Expert Commission decided in favour of the CNEE with regard to most of the disagreements (more than 50%),<sup>37</sup> including the question of the study's lack of linkage, traceability and auditability. Thus, after receiving the report of the Expert Commission and in the absence of any regulatory provision for further studies, the CNEE considered that: (a) in accordance with the Regulatory Framework, it could not use the Bates White study to establish the new tariffs;; and (b) it would set EEGSA's VAD on the basis of the tariff study established by the independent and pre-qualified consultant Sigla, as permitted by the Regulatory Framework .<sup>38</sup> These decisions were contained in the CNEE Resolution 144-2008 of 29 July 2008.
43. EEGSA disagreed with this interpretation of the Regulatory Framework by the CNEE. In EEGSA's view, the CNEE could not reject the Bates White VAD study and approve tariffs calculated on the basis of another independent study. According to EEGSA, the Expert Commission's report was binding. Thus, Bates White should be allowed to unilaterally prepare a revised version of its study, incorporating such corrections, and submit it to the Expert Commission for approval. The CNEE would then use that study to calculate the new tariff.

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supposedly technical VAD calculation made by Bates White. The CNEE rejected this "negotiation" but, most importantly, this confirmed the unreliability of the Bates White study.

<sup>37</sup> Memorial on Objections and Counter-Memorial, para. 390; Rejoinder, para. 440; Respondent's Post-Hearing Brief, para. 176.

<sup>38</sup> CNEE Resolution 144-2008 of July 29, 2008, **Exhibit R-95**.



44. However, as noted previously,<sup>39</sup> none of these steps is provided for in the Regulatory Framework: the Expert Commission's report is not defined as binding; it is not contemplated that the distributor may submit an amended version of its VAD study after the Expert Commission's report; and the Expert Commission has no other function than to issue a report on disagreements, not to approve the VAD study (which is a matter for the CNEE).<sup>40</sup> Further, the Regulations expressly allow the CNEE to calculate the new tariffs on the basis of an independent expert report commissioned by it in the event that the distributor fails to incorporate its corrections to the study.<sup>41</sup>
45. Bates White and EEGSA nevertheless submitted a new unilateral VAD study on 28 July 2008 not contemplated by the Regulatory Framework arguing that it incorporated all the corrections indicated by the Expert Commission's report (the *Bates White July 2008 Study*). In the Arbitration, Guatemala demonstrated that this report did not in fact incorporate many of the corrections.
46. EEGSA requested the local courts to endorse its interpretation of the Regulatory Framework, mainly through two separate proceedings. In the first one it challenged Resolution 144-2008 of 29 July 2008, in which the CNEE considered the Expert Commission's report as advisory but non-binding, rejected the Bates White March 2008 Study for not complying with the Regulatory Framework, and used the Sigla study to establish the new tariff.<sup>42</sup> In the second one, EEGSA challenged CNEE Resolution 3121 which dissolved the Expert Commission,<sup>43</sup> arguing that the Expert Commission should have remained in place to approve the Bates White July 2008 Study and that the CNEE should have used that study and not the Sigla VAD study to set the tariff.

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39 See paras. 41, 43.

40 RLGE, **Exhibit R-36**, arts. 3, 82, 99.

41 RLGE, **Exhibit R-36**, art. 98.

42 CNEE Resolution 144-2008 of 29 July 2008, **Exhibit R-95**.

43 CNEE Resolution GJ-Providencia 3121 (Expediente No. GTTE-28-2008), 25 July 2008, **Exhibit R-86**.

47. The two proceedings went as far as the highest Guatemalan jurisdiction, the Constitutional Court. The Court issued two decisions rejecting EEGSA’s position and upholding the legality of the conduct of the CNEE during the tariff-review process.<sup>44</sup>
48. In its decision of 18 November 2009,<sup>45</sup> which dealt with Resolution 144-2008,<sup>46</sup> the Constitutional Court concluded that the Expert Commission’s report was non-binding. It also found that the CNEE had acted within the scope of its jurisdiction and that it “*followed the process regulated by law*” during the tariff review, including in deciding which of the VAD studies, that of Bates White or that of Sigla, it should use to set the tariff.<sup>47</sup>
49. In its decision of 24 February 2010, the Constitutional Court also concluded that the procedure followed by the CNEE during the tariff review was correct according to the Regulatory Framework, including with regard to the decision of the CNEE to approve the Sigla VAD study.<sup>48</sup> The Constitutional Court observed that the Expert Commission issued a non-binding report and that once it had done so, it was for the CNEE to proceed to use the VAD study that it considered appropriate to set the tariff.<sup>49</sup>

**B. THE ARBITRATION**

50. TGH initiated the Arbitration Proceedings on 20 October 2010. In its Notice of Arbitration of that date, it stated that the “*long-term sustainability*” of EEGSA was endangered and that its “*operational viability*” was “*severely undermined.*”<sup>50</sup> On the

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44 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**; Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**.

45 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**.

46 CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

47 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, pgs. 23-25 and 29-33 (emphasis added).

48 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 28-30.

49 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 31-36.

50 Notice of Arbitration, para. 69 (emphasis added).

very next day, 21 October 2010, it sold its interest in EEGSA for a sum of approximately US\$181.5 million.<sup>51</sup>

51. In the Arbitration proceedings, TGH argued that the conduct of the CNEE during the 2008 tariff review constituted a violation of the international minimum standard of fair and equitable treatment under article 10.5 of CAFTA-DR.<sup>52</sup> According to TGH, the violation resulted from the manner in which the CNEE interpreted and applied the Regulatory Framework, having considered the opinion of the Expert Commission to be advisory and non-binding, as well as having rejected the Bates White July 2008 Study and used that of Sigla instead to set the tariffs in 2008.
52. TGH considered all this to constitute arbitrariness, a fundamental modification of the Regulatory Framework and a frustration of its legitimate expectations.<sup>53</sup> TGH did not claim any Treaty violation arising out of the decisions of the Constitutional Court; in other words, it did not allege denial of justice.
53. Guatemala raised an objection of jurisdiction *ratione materiae*, arguing that the claim submitted was, in reality, the same pure domestic law claim that had already been settled by the Constitutional Court of Guatemala.<sup>54</sup> According to article 10.16 of CAFTA-DR,<sup>55</sup> the Tribunal would have had jurisdiction only over claims that genuinely concerned a breach by the Guatemalan State of one of the investment protections established by the Treaty. However, the dispute submitted by TGH related merely to the correct interpretation and application of the Regulatory Framework, equating a possible error by

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51 Press release of Teco Guatemala Holdings, LLC, “Teco Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company,” October 21, 2010, **Exhibit R-162**.

52 Claimant’s Memorial, section III, paras. 228-280.

53 *Ibid.*, para. 259. *See also* paras. 228, 268, 270-273, 280.

54 Memorial on Objections and Counter-Memorial, paras. 47-131; Rejoinder, paras. 31-78.

55 Specifically, art. 10.16, paragraph 1(a)(i)(A) states:

“In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under section A [...]

the regulator in such interpretation and application of the regulation, already examined and ruled upon by the local courts, with a breach of the Treaty. Yet, international law is clear that a mere allegation of a breach of domestic law cannot give rise to a breach of a treaty, less so when, as here, domestic courts have already ruled on the matter and there is no claim of denial of justice.

54. Guatemala argued these points extensively in its submissions.<sup>56</sup> The Tribunal decided to join the objection to jurisdiction to the merits and resolved it in the final Award together with the merits of the case.<sup>57</sup>
55. On the merits, Guatemala objected to the interpretation of the Regulatory Framework by TGH.<sup>58</sup> Guatemala also contested the substantive arguments raised by TGH that a domestic law disagreement, or even a breach of domestic law by the regulator, could be considered arbitrariness or breach of legitimate expectations under international law.<sup>59</sup>
56. With regard to damages, TGH requested a compensation of US\$243.6 million plus interest.<sup>60</sup> This amount was calculated by TGH by comparing the tariff set by the CNEE based on the Sigla study and the higher tariff claimed by TGH on the basis of the Bates White July 2008 Study.<sup>61</sup> In other words, TGH was requesting its part of the net income that EEGSA would have earned if the CNEE had accepted and approved the Bates White July 2008 Study instead of the Sigla study in setting the tariffs. The amounts claimed were: US\$21.1 million as “*historical losses*”, i.e. for the period between August 2008, when the new tariff was approved, and October 2010, when TGH sold its investment;<sup>62</sup> and US\$222.5 million for the period from that date until the expiration of the concession. THG assumed in this future loss calculation that the 2008 tariffs would

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56 Memorial on Objections and Counter-Memorial, paras. 47-131; Rejoinder, paras. 31-78.

57 Award, para. 27.

58 Memorial on Objections and Counter-Memorial, paras. 495-540; Rejoinder, paras. 214-251.

59 Memorial on Objections and Counter-Memorial, paras. 525-534, 541-585; Rejoinder, paras. 165-215.

60 Reply, para. 321; Claimant’s Post-Hearing Brief, para. 203.

61 See paras. 34, 35.

62 Award, paras. 335-336.

remain in place unaltered until the expiration of the concession which wholly ignores the Regulatory Framework and is irrelevant in light of its disposal of its interest to a buyer who knew that the tariffs would only apply until 2013.<sup>63</sup>

57. Guatemala objected to this calculation. Through its independent expert Mario Damonte, Guatemala stated that the basis used for the calculation was incorrect.<sup>64</sup> Even if one were to accept TGH's position that the CNEE should not have set the tariffs on the basis of the Sigla study, but instead on a new version of the Bates White study that reflected the Expert Commission's report, Guatemala explained that the unilateral Bates White July 2008 Study could not be used. The Bates White July 2008 Study did not correctly incorporate the Expert Commission's report.<sup>65</sup>
58. Thus, to provide a full response to TGH's case, Mr. Damonte repeated the exercise of correcting the Bates White May 2008 Study on the basis of the report of the Expert Commission. In so doing, it reached the conclusion that correctly adopting TGH's method for calculating the alleged damages resulted in a substantial reduction of such damages.<sup>66</sup> Guatemala also argued that the future damage alleged by TGH was wholly speculative in view of TGH's sale of its investment and the impossibility of determining the future tariff because of the periodicity of the five-year tariff reviews and the prior sale of the interest.<sup>67</sup>

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<sup>63</sup> *Ibid.*, para. 340.

<sup>64</sup> Memorial on Objections and Counter-Memorial, paras. 592-615; Rejoinder, paras. 494-519.

<sup>65</sup> Memorial on Objections and Counter-Memorial, paras. 428-434; Rejoinder, paras. 282-487; Respondent's Post-Hearing Brief, paras. 334-335.

<sup>66</sup> Damonte, **Appendix RER-2**, para. 188 and Table 5; Direct examination of Mario Damonte, slide 16, Tr. (English), Day Six, 1414:7-1415:15, Damonte; Respondent's Post-Hearing Brief, para. 194.

<sup>67</sup> Memorial on Objections and Counter-Memorial, paras. 592-615; Rejoinder, paras. 494-519; Respondent's Post-Hearing Brief, para. 354-363.

### C. THE AWARD

59. In a short passage of barely four pages in the Award,<sup>68</sup> the Tribunal affirmed its jurisdiction *ratione materiae* over TGH's claim, concluding:

The Arbitral Tribunal considers that the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard [...].<sup>69</sup>

60. Regarding the merits, the Tribunal rejected the allegation of changes in the Regulatory Framework, and instead described the dispute as one relating to a claim for breach of the Regulatory Framework by the regulator:

The present dispute essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process."<sup>70</sup>

The basis for the State's responsibility is rather its repudiation of such fundamental principles [of the regulatory process] and its breach of due process in administrative matters.<sup>71</sup>

61. For the same reason, the Tribunal rejected the allegation of violation of legitimate expectations. The expectations invoked by TGH concerned mere compliance by the CNEE with the Regulatory Framework. The Tribunal noted that these sort of expectations are not the type of expectations protected by international law: "[...] the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner [...] is irrelevant to the assessment of whether a State should be held liable."<sup>72</sup>

62. The Tribunal rejected all TGH's allegations, except for one. It rejected the argument that the CNEE manipulated the Terms of Reference, did not cooperate in the tariff review

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<sup>68</sup> Award, pgs. 97-101, sections 2, 3 and 4 of the part entitled "*Jurisdiction*," addressing the objections raised by Guatemala, as stated by the Tribunal itself at para. 442 of the Award.

<sup>69</sup> *Ibid.*, para. 464.

<sup>70</sup> *Ibid.*, para. 489.

<sup>71</sup> *Ibid.*, para. 619. *See also Ibid.*, paras. 624-638.

<sup>72</sup> *Ibid.*, para. 621.

process or had breached an agreement with EEGSA by which it had accepted to delegate power to the Expert Commission.<sup>73</sup> It also found that the CNEE did not try to unduly influence the Expert Commission and had not engaged in any kind of reprisals against EEGSA.<sup>74</sup> Further, the Tribunal affirmed that the CNEE had the right to dissolve the Expert Commission once it had issued its report,<sup>75</sup> and also accepted Guatemala's argument that the report of the Expert Commission was not binding but advisory.<sup>76</sup>

63. The Tribunal's decision that Guatemala breached the international minimum standard of fair and equitable treatment under the Treaty was based exclusively on CNEE Resolution 144-2008. As stated above,<sup>77</sup> that Resolution was based on the premise that the Expert Commission's report was advisory, and that the report had confirmed that the Bates White study had deviated from the terms of reference. Against that background, the Resolution considered that the CNEE was not bound to give any further consideration to the Bates White study and could use the Sigla study instead to set the tariffs.
64. Specifically, for the Tribunal the breach was not that decision *per se* but the fact that it was not sufficiently reasoned. The Tribunal found that the CNEE had failed to provide sufficient motivation for what the Tribunal considered was a "disregard" of the report of the Expert Commission. In other words, the breach lied on the fact that the CNEE had not explained properly why the Expert Commission's report could not be given more relevance, and specifically be used as a guide to correct the Bates White study rather than the CNEE endorsing directly the Sigla study. In the Tribunal's words:

In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the

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<sup>73</sup> *Ibid.*, paras. 639-650.

<sup>74</sup> *Ibid.*, paras. 651-652, 712-714.

<sup>75</sup> *Ibid.*, paras. 653-657.

<sup>76</sup> *Ibid.*, paras. 565, 670.

<sup>77</sup> *See* para. 42.

CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.

In so doing, the CNEE in fact repudiated the two fundamental principles upon which the tariff review process Regulatory Framework is premised [...].

[...]

The CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reason to consider that such conclusions were inconsistent with the Regulatory Framework, in which case it had the obligation to provide valid reasons to that effect. However, no such reasons were provided.<sup>78</sup> (Emphasis added.)

65. Regarding damages, the Arbitral Tribunal accepted TGH's claim regarding the historical losses of US\$21.1 million, but rejected the future losses of US\$222.5 million.<sup>79</sup>
66. On costs, the Tribunal ordered Guatemala to pay 75 per cent of TGH's costs,<sup>80</sup> i.e. US\$7.5 million out of a total of US\$10 million.

### **III. THE ICSID ANNULMENT MECHANISM**

67. One of the objectives of the ICSID Convention is to ensure the finality of its awards. This is reflected in its article 53 which provides that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."<sup>81</sup>
68. However, as this provision illustrates, this is not an absolute principle. The ICSID Convention is not totally indifferent to awards that show serious deficiencies. This is why the Convention provides, at article 52, for an annulment recourse and certain grounds of annulment that operate as fundamental guarantees of the integrity of the

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78 Award, paras. 664, 665, 683.

79 *Ibid.*, paras. 716-761.

80 *Ibid.*, paras. 769-779.

81 ICSID Convention, art. 53(1).



arbitration proceedings governed by the Convention.<sup>82</sup> In the words of an annulment committee:

Integrity of the dispute settlement mechanism, integrity of the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism.<sup>83</sup>

69. The annulment recourse is not an appeal mechanism and the role of annulment committees is not to review the merits of an award, in order to correct its findings of fact or law. Annulment is a control mechanism to ensure the “legitimacy” of ICSID awards.<sup>84</sup> Thus, despite its limited scope, the annulment mechanism has a fundamental role in the Convention.

70. In particular, the control function of annulment is particularly important in cases of deficient decisions of jurisdiction. One highly distinguished commentator, Professor Pierre Lalive, writing on the annulment decision in *Industria Nacional de Alimentos v Peru*<sup>85</sup> (in which the committee examined the tribunal’s arguably insufficiently reasoned decision denying jurisdiction), noted that:

[W]hatever the doctrinal or philosophical preferences of commentators regarding the finality (absolute or relative?) of international arbitral awards, one thing should remain largely beyond dispute: the decision to assume jurisdiction when the latter is denied by the State is of such capital importance that it must be fully reasoned and justified [...]. And in the absence of existing and proven consent, the arbitrators could hardly be said to have ‘assumed’ jurisdiction but, more correctly, would appear to have created or usurped it. [...]

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82 ICSID, “Background Paper on Annulment for the Administrative Council of ICSID”, 10 August 2012, **Exhibit RL-61**, para. 73.

83 *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No ARB/02/7) Decision of the *Ad Hoc* Committee on the Application for Annulment, 5 June 2007, **Exhibit RL-56**, para 23. *See also CDC Group plc v. Seychelles* (ICSID Case No ARB/02/14) Decision on Annulment, 29 June 2005, **Exhibit RL-58**, para 34.

84 *M.C.I. Power Group, L.C. and New Turbine, Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6) Decision on Annulment, 19 October 2009, **Exhibit RL-62**, para. 24.

85 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, **Exhibit RL-60**.

When explaining the reasons for their decision to assume jurisdiction, [...] [arbitrators] should be particularly aware of the exceptional caution required when verifying State's consent to ICSID jurisdiction—a consent that implies a significant surrender of (judicial) sovereignty in favour of foreign persons, more precisely in favour of investors who are 'nationals of another Contracting State' (Article 25 of the Convention).<sup>86</sup> (Emphasis added.)

71. It follows that the control function of annulment is also especially relevant in case an award presents more than one cause of annulment, especially if one such cause of annulment is based on failure to state reasons for the decision on jurisdiction. The same commentator, based on his analysis of the *Industria Nacional de Alimentos v Peru* annulment decision, advocated for “a special duty of the Arbitrators to justify their [jurisdictional] decision ‘adequately’ and ‘with the very particular care. [...]’”<sup>87</sup>
72. In the following sections we will examine the grounds for annulment that affect, very seriously, the Award. In particular, among the grounds for annulment of article 52, three of them can and must be invoked against the Award: that the Tribunal manifestly exceeded its powers, that the Award fails to state the reasons on which it is based, and that it seriously departs from a fundamental rule of procedure.
73. It is not uncommon that the same flaws in an Award may give rise to different grounds of annulment simultaneously. As stated in Schreuer's commentary to the ICSID Convention:

Practice has demonstrated not only that a wide array of perceived flaws are subsumed under the three frequently used grounds in Art. 52(1) but also that the same sets of facts is often seen to amount to different grounds for annulment simultaneously.<sup>88</sup>

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<sup>86</sup> P Lalive, “On the Reasoning of International Awards” (2010) 1(1) Journal of International Dispute Settlement 55, **Exhibit RL-63**, p. 61.

<sup>87</sup> P Lalive, “On the Reasoning of International Awards” (2010) 1(1) Journal of International Dispute Settlement 55, **Exhibit RL-63**, p. 61, referring with approval to the position taken by Arbitrator Berman in his dissenting opinion in *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, **Exhibit RL-60**, Dissenting opinion, para. 17.

<sup>88</sup> C Schreuer *et al.*, *The ICSID Convention, A Commentary*, 2 ed, (2009), art. 52, **Exhibit RL-40** pgs. 933-934, para. 114.

74. In the same sense, the *Duke v Peru* annulment committee held as follows:

This practice is entirely permissible within the framework of Article 52(1), which permits a party to request annulment ‘*on one or more of the following grounds.*’ It has been a frequent feature of ICSID annulment applications to submit that one and the same aspect of an award constitutes a manifest excess of powers, a serious departure from a fundamental rule of procedure and a failure to state reasons.<sup>89</sup>

#### IV. GROUNDS FOR THE ANNULMENT OF THE AWARD

##### A. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS

75. In accordance with article 52(1)(b) of the ICSID Convention, an award must be annulled if “the Tribunal has manifestly exceeded its powers.”

76. As explained by the annulment committee in the *Vivendi I* case, the excess of powers by a tribunal is never, “by definition” a trivial matter.<sup>90</sup> It is very serious because it implies that the tribunal deviates from the parties’ arbitration agreement, breaching the mandate that derives from such agreement.

77. A manifest excess of powers exists when an arbitral tribunal exceeds the limits of the jurisdiction it has been granted,<sup>91</sup> or when it fails to apply the law applicable to the dispute.<sup>92</sup> As explained in Schreuer’s commentary:

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<sup>89</sup> *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para. 91. *See also MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007 **Exhibit RL-55**, para. 57.

<sup>90</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, para. 63.

<sup>91</sup> E.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, para. 86; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, paras. 41-44; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), 1 September 2009, **Exhibit RL-59**, para. 45.

<sup>92</sup> *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para 5.03; *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on Annulment, 5 February 2002, **Exhibit RL-64**, para. 22; *MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, para. 44.

The most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction [...]. In the case of ICSID arbitration, jurisdiction is determined by Art. 25 of the Convention and the Parties' agreement on consent. A tribunal may also exceed its power by failing to exercise a jurisdiction it does have. Another instance of excess of powers would be a violation of Art. 42 on applicable law. Non-application of the law agreed by the parties or of the law determined by the residual rule in Art. 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of power.<sup>93</sup>

78. In the words of an annulment committee:

The concept of the 'powers' of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed. That is why, for example, a failure to apply the law chosen by the parties (but not a misapplication of it) was accepted by the Contracting States of the ICSID Convention to be an excess of powers, a point also accepted by annulment committees.<sup>94</sup>

79. Thus, firstly, there is an excess of powers if a tribunal goes beyond its jurisdiction, including *ratione materiae*:

Firstly, it can be said that there is an excess of power if a tribunal acts "too much." There is, in principle, an excess of power if a tribunal goes beyond its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis*. There is an excess of power if the tribunal:

- asserts its jurisdiction over a person or a State in regard to whom it does not have jurisdiction;
- asserts its jurisdiction over a subject-matter which does not fall within the ambit of the jurisdiction of the tribunal;

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<sup>93</sup> C Schreuer *et al.*, *The ICSID Convention, A Commentary*, 2 ed, (2009), art. 52, p. 938, **Exhibit RL-40**, para. 133.

<sup>94</sup> *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Decision on Annulment, 14 June 2010, **Exhibit RL-65**, para. 46.

- asserts its jurisdiction over an issue that is not encompassed in the consent of the Parties.<sup>95</sup>

80. Annulment committees have underlined the importance of annulment for excess of powers in relation to jurisdictional decisions:

[A] Tribunal's legitimate exercise of power is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, i.e., absent jurisdiction).<sup>96</sup> (Emphasis added.)

81. Thus, in case of allegations of excess of powers in relation to jurisdictional decisions, the annulment committee can and shall conduct a thorough review of jurisdictional issues:

The question is therefore to what extent is the review of jurisdictional issues warranted by the ground of manifest excess of powers. The answer to this question is that this ground allows the ad hoc committee full control over the findings of the arbitral tribunal.<sup>97</sup>

82. As another very distinguished commentator, Professor Kaufmann-Kohler has noted:

Whatever the basis for jurisdiction, treaty or contract, the requirement of manifestness appears inappropriate in the context of jurisdiction. A tribunal either has jurisdiction or it does not; there is nothing in between. In other words, any exercise of jurisdictional power without proper jurisdiction is a manifest excess of power.<sup>98</sup> (Emphasis added.)

83. In the words of Sir Franklin Berman:

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<sup>95</sup> *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 42.

<sup>96</sup> *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment 29 June 2005, **Exhibit RL-58**, para. 40.

<sup>97</sup> P Pinsolle, "Jurisdictional Review of ICSID Awards", presentation, British Institute of International and Comparative Law (BIICL), 7 May 2004, **Exhibit RL-66** p. 7.

<sup>98</sup> G Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?" in: (E Gaillard and Y Banitafermi (eds), *Annulment of ICSID Awards* (2004) 189, **Exhibit RL-67**, pgs. 198-199. See also P Pinsolle, "Jurisdictional review of ICSID Awards" (2004) 5(4) *Journal of World Investment and Trade* 613, **Exhibit RL-68**, p. 616 ("One cannot be half-right or half-wrong when it comes to jurisdictional issues."); F Berman, "Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration" in: E Gaillard (ed), *The Review of International Arbitral Awards* (2010) 253, **Exhibit RL-69**, p. 260.

Jurisdiction is obviously something pretty fundamental and, if so, I am not sure that that leads to the answer that one would treat it, could treat it, or legitimately should treat it as if it were exactly the same as the other possible grounds for annulment.<sup>99</sup> [...]

84. Secondly, there is excess of powers if the Tribunal does not pay due regard to the applicable law:

The concept of the ‘powers’ of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed. That is why, for example, a failure to apply the law chosen by the parties to the determination of the dispute (but not a misapplication of it) was accepted by the Contracting States of the ICSID Convention to be an excess of powers, a point also accepted by other annulment committees.<sup>100</sup>

85. In the words of the annulment committee in *MINE v Guinea*:

The Committee is of the view that the provision is significant in two ways. It grants the parties to the dispute unlimited freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy and to apply those rules. From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.<sup>101</sup> (Emphasis added.)

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99 F Berman, “Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration” in: E Gaillard (ed), *The Review of International Arbitral Awards* (2010) 253, **Exhibit RL-69**, p. 259.

100 *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para. 96. *See also Ibid*, paras. 95, 99, 183-192.

101 *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.03.

86. The failure to apply the proper law is obviously applicable to instances in which a tribunal fails to apply international law. In *Amco v. Indonesia* the annulment committee held that annulment would not be warranted “under the supposition that the award involved is not violative of applicable principles and rules of international law.”<sup>102</sup>
87. All this is also confirmed in Schreuer’s commentary: “A general failure to apply international law, if it is part of the applicable law, would amount to an excess of powers exposing the award to annulment.”<sup>103</sup>
88. An example of annulment for failure to apply the correct international law provision is the *Sempra v Argentina* case. In this case, the annulment committee held that in these circumstances the tribunal “made a fundamental error in identifying and applying the applicable law,” and thus the Tribunal “has failed to conduct its review on the basis that the applicable legal norm [...] and that this failure constitutes an excess of powers within the meaning of the ICSID Convention.”<sup>104</sup>

**1. The Tribunal exceeded its powers in asserting jurisdiction over a merely regulatory dispute under local law**

89. In the Arbitration, Guatemala argued that the Tribunal did not have jurisdiction *ratione materiae* because TGH only submitted a regulatory dispute under Guatemalan law before the ICSID Tribunal. This type of dispute could not automatically constitute an international law dispute under an investment treaty.<sup>105</sup>
90. There is a difference between a regulatory dispute, which may not be decided by an international tribunal, and a dispute for breach of an international treaty which may be so decided and which necessarily involves “something more” than the domestic law

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102 *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) Decision on Annulment, 16 May 1986, **Exhibit RL-70**, para. 21 (emphasis added).

103 C Schreuer *et al.*, *The ICSID Convention, A Commentary*, 2 ed, (2009), art. 52, p. 975, para. 263, **Exhibit RL-40**.

104 *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) Decision on Annulment, 29 June 2010, **Exhibit RL-71**, paras. 208-209 (emphasis added).

105 *See* Rejoinder, Section IV.B.

disagreement.<sup>106</sup> Here however, TGH was submitting the same issues already litigated before all court levels in Guatemala, including the Constitutional Court, which is the highest court of the State. Further, TGH failed to explain how there could be a breach of the Treaty where the underlying conduct of the regulator complained of had been upheld by the Constitutional Court and there was no complaint against the Court's decisions, i.e. there was no allegation of denial of justice.

91. Guatemala based its objection to jurisdiction *ratione materiae* on the scope of the written agreement to arbitrate applicable to the instant case. Such agreement is to be found in article 10.16.1(a)(i)(A) of the CAFTA-DR, which was the provision invoked by TGH in submitting the original dispute to the original tribunal.<sup>107</sup> In accordance with this article, Guatemala consented to submit to arbitration disputes brought by U.S. investors involving “a claim [...] that the respondent has breached [...] an obligation under Section A” of the Treaty<sup>108</sup>. Thus, Guatemala's consent did not refer to just any type of claim, but only to those claims concerning a violation by the Guatemalan State of investment protections established by the Treaty. Therefore, Guatemala's consent did not cover, for example, claims merely based on local law.
92. It is well established under both the case law and scholarly writings that consent to arbitration is the key element for an international tribunal to be able to exercise jurisdiction over a dispute. Therefore, observance of the agreement to arbitrate is essential.<sup>109</sup> As held by the tribunal in the *Iberdrola* case, brought on identical facts by the controlling shareholder of EEGSA, and in which the tribunal accepted Guatemala's same jurisdictional objection:

It is clear then that consent is the fundamental requirement for disputes between a Contracting State and an investor of

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<sup>106</sup> *ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190.

<sup>107</sup> Notice of Arbitration, para. 27.

<sup>108</sup> CAFTA-DR, art. 10.16.1(a)(i)(A).

<sup>109</sup> See ICSID, Background Papers on Annulment for the Administration Council, 10 August 2012, p. 53 *et seq.*; F Berman, “Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration” in: E Gaillard (ed), *The Review of International Arbitral Awards* (2010) 253, **Exhibit RL-69**, p. 260; J Lew, L Mistelis and S Kroll, *Comparative International Commercial Arbitration* (2003) **Exhibit RL-72**, p. 795.



another Contracting State to be submitted to arbitration under the ICSID Convention.

However, the Tribunal cannot limit itself to affirm that the State concerned, in this case the Republic of Guatemala, has consented to ICSID jurisdiction. Instead, it must verify the scope of such consent, that is, if it is a broad consent, including any dispute that may be included within the scope of application of Article 25 of the ICSID Convention, or if such consent is in any way restricted or limited.

The consent of the Republic of Guatemala to the arbitration with Spanish investors is contained in the Treaty and, therefore, the matters in respect of which such consent was given are those that determine the competence of the Tribunal. It is then up to the latter, considering the matter of the dispute raised by the claimant investor, to establish whether or not this is covered in the consent to arbitration and, therefore, if it is a matter about which the Tribunal can decide. For this purpose, the instrument by which the Republic of Guatemala consented to arbitration, i.e. the Treaty, must be analyzed.<sup>110</sup> (Emphasis added.)

93. The examination of the instruments of consent has to be carried out with particular care, as the tribunal in *Iberdrola* indicated:

As noted in previous decisions rendered by tribunals, jurisdictional analysis must be made carefully, in each particular case, taking into account the respective treaty or instrument of expression of consent and without any presumption for or against ICSID jurisdiction or the competence of the Tribunal.<sup>111</sup>

94. Thus, here the Tribunal should have examined article 10.16.1(a)(i)(A) of the CAFTA-DR carefully to determine if it did have jurisdiction, but it did not do so. The award devotes barely eight pages to its decision on jurisdiction, and does not even refer once to article 10.16.1(a)(i)(A), which was the provision determining whether the Tribunal had jurisdiction *ratione materiae*.

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<sup>110</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, paras. 293-295.

<sup>111</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, para. 303.

95. The Tribunal effectively skipped the entire analysis on the matter of its jurisdiction. It omitted examining the Treaty and presenting an examination of the facts and circumstances specific to the case enabling the Tribunal to claim jurisdiction over TGH’s dispute as an international –as opposed to a domestic– claim.
96. The Tribunal did not discuss at all the distinction between a claim under domestic law and one under international law, despite the fact that it is well established that a breach of domestic law does not automatically become a claim under an investment protection treaty. As the tribunal in *ADF v United States* indicated, it did not have “*authority*” or “*jurisdiction*” under the NAFTA over claims under domestic law: “something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with” the substantive protections of an investment protection treaty.<sup>112</sup>
97. Support for this proposition abounds in the case-law.<sup>113</sup> In *SD Myers v Canada*, the claimant argued that Canada breached the minimum standard by imposing restrictions on the transport of environmentally harmful substances that caused damage to the claimant’s waste treatment business. The Tribunal noted:

When interpreting and applying the “minimum standard”, a Chapter 11 tribunal does not have an open-ended mandate to

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<sup>112</sup> *ADF Group Inc v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, párr. 190 (emphasis added). *See also*, *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 90; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **Exhibit RL-73**, para. 145; *SGS Société Générale de Surveillance S.A. v. Philippines* (ICSID Case No. ARB/02/6) Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, **Exhibit CL-69**, para. 157; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Paraguay* (ICSID Case No. ARB/07/9) Decision of the tribunal on Objections to Jurisdiction, 29 May 2009, **Exhibit RL-74**, paras. 127, 148-149; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision of the Tribunal on Objections to Jurisdiction, 22 April 2005, **Exhibit CL-63**, para 243.

<sup>113</sup> *SD Myers Inc v. Canada* (UNCITRAL Case) First Partial Award, 13 November 2000, **Exhibit CL-41**, paras. 261, 263; *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, 26 January 2006, **Exhibit CL-25**, paras. 195, 200; *GAMI Investments, Inc v. United Mexican States* (UNCITRAL Case) Final Award, 15 November 2004, **Exhibit RL-7**, para. 103; *ADF Group Inc v. United States of America* (ICSID Case No. ARB[AF]/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190; *Genin et al. v. Republic of Estonia* (ICSID Case No. ARB/99/2) Award, 25 June 2001, **Exhibit RL-3**, paras. 365-367; *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, paras. 762, 779; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, **Exhibit CL-12**, para. 296.

second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.

[...]

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.<sup>114</sup> (Emphasis added.)

98. In *Genin v Estonia*, the claimant argued that the allegedly illegal actions of the central bank in the context of the regulation of financial services constituted of a breach of the minimum standard. The tribunal similarly decided that:

[W]hile the Central Bank's decision to revoke the EIB's license invites criticism, it does not rise to the level of a violation of any provision of the BIT.<sup>115</sup> [...] (Emphasis added.)

99. The distinction between a domestic law claim and an investment treaty claim is relevant for the merits but also, primarily, as a matter of jurisdiction *ratione materiae* because, as explained above, investment treaties often limit the type of disputes that may be submitted to a treaty tribunal. Only those disputes that give rise to credible claims of breach of the treaty standards may be so submitted.
100. To determine if in effect the dispute submitted qualifies as an international claim, a tribunal must examine the fundamental basis of the claim, and cannot accept the formal

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114 *SD Myers Inc v. Canada* (UNCITRAL Case) First Partial Award, 13 November 2000, **Exhibit CL-41**, paras. 261, 263.

115 *Genin et al. v. Republic of Estonia* (ICSID Case No. ARB/99/2) Award, 25 June 2001, **Exhibit RL-3**, pars. 365 and 367.

legal characterization of the claim as presented by the claimant: “in the application of those presumed facts to the legal question of jurisdiction before it, the tribunal must objectively characterise those facts” and “the tribunal may not simply adopt the claimant’s characterisation without examination.”<sup>116</sup> As another tribunal has declared, “[l]abeling is [...] no substitute for analysis.”<sup>117</sup>

101. The test has often been called also the *prima facie* test. In the words of the tribunal in *Bayindir v Pakistan*:

Accordingly, the Tribunal’s first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In 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 whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.<sup>118</sup> (Emphasis added.)

102. Here, the fundamental basis of TGH’s claim was the dispute over whether the CNEE breached the Regulatory Framework in the manner in which it applied it in the context of EEGSA’s 2008 tariff review. The Tribunal described the dispute as follows:

This dispute arose from the alleged violation by the Comisión Nacional de Energía Eléctrica (National Commission of Electric Energy) (“CNEE”) of the Guatemalan Regulatory Framework for setting tariffs for distribution of energy by EEGSA, the electricity company in which the Claimant had an indirect share.<sup>119</sup>

103. A similar description is contained in other paragraphs of the Award:

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<sup>116</sup> *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para. 118 (emphasis added).

<sup>117</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 90.

<sup>118</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, **Exhibit RL-75**, para. 197.

<sup>119</sup> Award, para. 79.

The present dispute essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process.<sup>120</sup>

The question here is whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and to apply its own. The Parties are in disagreement in this regard.<sup>121</sup>

104. Yet, the Tribunal did not elaborate on the fundamental basis of the claim and whether it passed the *prima facie* test. Instead, the Tribunal accepted, without further analysis, TGH's formal characterization of those facts. The Tribunal described TGH's allegations as follows:

[T]he Claimant alleges that Guatemala's actions infringed "*a sense of fairness, equity and reasonableness*", and "*constitutes an unexpected and shocking repudiation of [the LGE's] policy's very purpose and goals or otherwise subverts a domestic law or policy for an ulterior motive.*" [...] Guatemala repudiated the fundamental principles upon which the Regulatory Framework was based [...] [T]he CNEE failed to act in good faith in the process of establishing the tariff for 2008-2013, and acted in manifest breach of the law in disbanding the Expert Commission in July 2008.<sup>122</sup>

105. The Tribunal found that if TGH were right that Guatemala committed an arbitrary act and wilfully disregarded the Regulatory Framework, then there could be a breach of the Treaty and thus the Tribunal would have jurisdiction over such claim:

The Arbitral Tribunal considers that the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard, as defined in previous sections of this award.

There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and wilful disregard of the applicable Regulatory Framework, or showed a complete lack of candor

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120 *Ibid.*, para. 489.

121 Award, para. 534.

122 Award, paras. 459-461.

or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.<sup>123</sup>

106. But this is not the point. Of course if TGH's allegations were proven right in light of its characterization of the claim, then the Tribunal would have jurisdiction. But the analysis on jurisdiction is whether those allegations and characterisations have a real basis, *prima facie*, in view of the facts of the case. This is the required inquiry, which is missing here. Instead, the Tribunal was satisfied that the allegations made by TGH, i.e. its characterisation of the facts, were enough for the purpose of jurisdiction. All that the Tribunal required from TGH was that it had invoked the Treaty and that it had used words such as "arbitrariness", "bad faith", "wilful disregard", no more. This effectively eliminates any jurisdictional objection *ratione materiae*.
107. Thus, the analysis of the fundamental basis of the claim is lacking. It is as if a claim for breach of contract could qualify as a claim under an investment protection treaty simply because the claimant alleges that the breach was arbitrary or in bad faith. It is well established that this is not permitted.<sup>124</sup>
108. The reality is that, in this case, the Treaty dispute could not be distinguished from the domestic dispute. The Tribunal itself described the dispute as one that "essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process."<sup>125</sup> This is exactly what the domestic court litigation initiated by EEGSA had examined.

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123 Award, paras. 464-465.

124 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **Exhibit RL-73**, para. 145; ; *United Parcel Service of America, Inc. v. Canada* (UNCITRAL case) Decision on Jurisdiction, 22 November 2002, **Exhibit RL-4**, para. 34; *SGS Société Générale de Surveillance S.A. v. Philippines* (ICSID Case No. ARB/02/6) Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, **Exhibit CL-69**, para. 157; *Methanex Corporation v. United States* (UNCITRAL Case) Partial Award on Jurisdiction, 7 August 2002, **Exhibit RL-76**, paras. 119-121; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, **Exhibit RL-75**, paras. 197, 263; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, paras. 95-96, 98-101; *Pantehniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21) Award, 30 July 2009, **Exhibit RL-12**, para. 61.

125 *Ibid.*, para. 489.

109. In cases where, as in the present one, the dispute concerns a mere disagreement between an investor with the actions of an administrative body that has already been the subject of a final decision by the local judicial authorities, the only available claim that may be brought forward is a claim for denial of justice. In other words, where there is a disagreement between a regulatory authority and an investor, the international obligation on the State is to ensure that the courts —the competent bodies to resolve such disputes— are available, provide due process, and do not issue arbitrary decisions. As has already been explained above and will be further elaborated in the next section, the highest court of Guatemala resolved the disagreement in favour of the CNEE in two separate decisions, and TGH did not submit a claim for denial of justice challenging the highest court’s decisions. It did not do so, presumably because the decisions are carefully reasoned and do not come close to a breach of that international law standard.
110. In other words, if TGH wanted Guatemala to be found responsible as a State under international law, it had to demonstrate what the Guatemala courts —which were called upon by EEGSA to intervene in the dispute and which eventually ruled in favour of the position adopted by the CNEE— have done wrong. As held by the tribunal in *Azinian*, “[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level.*”<sup>126</sup> Otherwise, this would amount to allowing any investor to use international tribunals as a second instance, to relitigate any conduct of a domestic regulatory authority with which the investor disagreed, even if such conduct were approved by the local judicial authorities.
111. Therefore, the Tribunal exceeded its powers by exercising jurisdiction over a merely regulatory dispute under local law, ignoring the fundamental basis of the claim, applying no test *prima facie*, and merely accepting TGH’s characterization of such claim. The only claim that TGH could have brought before an international tribunal would have been a claim for denial of justice, and it did not do so.

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<sup>126</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 97 (emphasis in original).

112. As already noted, a manifest excess of jurisdiction is a serious breach because it infringes the arbitration agreement between the parties, that is, their consent to arbitration. The Committee in *Helnan v Egypt* was clear in this sense:

The question whether an ICSID arbitral tribunal has exceeded its powers is determined by reference to the agreement of the parties. It is that agreement or compromis from which the tribunal's powers flow, and which accordingly determines the extent of those powers. In the case of an investment treaty claim, this agreement is constituted by the BIT and by the ICSID Convention (which the agreement to arbitrate incorporates by reference) as well as by the filing of the investor's claim. Read together, these three elements constitute the arbitration agreement and therefore prescribe the parameters of the Tribunal's powers.<sup>127</sup> (Emphasis added.)

113. In this case the Tribunal completely ignored the arbitration agreement and wrongly affirmed jurisdiction on a mere domestic law claim, already resolved by the local courts. This amounts to a manifest excess of powers and requires annulment of the Award in its entirety.

## **2. Manifest excess of powers of the Tribunal for reviewing and *de facto* revoking the Constitutional Court decisions**

114. As discussed in the previous section, TGH intended to use its international claim to relitigate questions regarding the interpretation of the Guatemalan Regulatory Framework which had already been resolved by the Constitutional Court, the highest judicial instance of the country. International law, however, precludes *de facto* review of domestic decisions on questions of local law.<sup>128</sup> As the tribunal in *Arif v Moldova* held:

[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the

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<sup>127</sup> *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Decision on Annulment, 14 June 2010, **Exhibit RL-65**, para. 40.

<sup>128</sup> *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, **Exhibit CL-4**, para. 190. See also, *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 99; *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, **Exhibit CL-46**, para. 129; *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441.



application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if “[a] simple difference of opinion on the part of the international tribunal is enough” to allow a finding that a national court has violated international law. The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact – as Claimant formulated – arbitral tribunals cannot “put themselves in the shoes of international appellate courts”.<sup>129</sup> (Emphasis added.)

115. It is a fundamental principle of international law that an arbitral tribunal may not review decisions by national courts on local law matters. As stated by the tribunal in *ADF v United States*: “the Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures.”<sup>130</sup>
116. Nor can a public authority be in breach of international law for implementing a decision supported by its local courts unless the local courts’ decision itself is challenged under international law:

The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction.<sup>131</sup>

117. Similarly, the *Waste Management v Mexico* Tribunal declared that it could not act as an additional local court of appeal or amparo:

[T]he Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of *amparo*

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129 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441.

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

131 *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 99.

in respect of the decisions of the federal courts of NAFTA parties.<sup>132</sup>

118. In the Award, the Tribunal itself recognised this principle affirming that it could not review the decisions of the Constitutional Court:

It is indeed true that the Guatemalan courts have decided some of the questions in dispute concerning the interpretation of the Guatemalan Regulatory Framework and the regularity of some of the CNEE's decisions under such law. It is also true that this Arbitral Tribunal will have to apply Guatemalan law to some of the regulatory aspects of the dispute, and that, in so doing, it may have to defer to the decisions made by the Guatemalan courts when such aspects of the dispute are subject to Guatemalan law.<sup>133</sup> [...] (Emphasis added.)

This Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law.<sup>134</sup>

119. Yet the Tribunal did exactly the opposite in the Award.
120. As explained above, at the end of the 2008 tariff review process, EEGSA challenged the relevant acts of the CNEE before the local courts. In particular, EEGSA questioned two CNEE resolutions: Resolution 144-2008,<sup>135</sup> which considered the report by the Expert Commission as non-binding, rejected the Bates White study and approved the Sigla study to set the tariffs; and Resolution 3121,<sup>136</sup> which declared the dissolution of the Expert Commission after it had issued its report.
121. In its decision of 18 November 2009 regarding Resolution 144-2008,<sup>137</sup> the Constitutional Court concluded that the CNEE acted within the scope of its powers and

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132 *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, **Exhibit CL-46**, para. 129.

133 Award, para. 474.

134 Award, para. 477.

135 CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

136 CNEE Resolution GJ-Providencia-3121 (File GTTE-28-2008), 25 July 2008, **Exhibit R-86**.

137 CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

that it “followed the process regulated by law”.<sup>138</sup> In particular it found that the report of the Expert Commission was non-binding and that the CNEE could decide, in light of that report, whether to accept or not the Bates White study and whether to adopt the Sigla study to establish the tariffs:<sup>139</sup>

The petitioner pointed out a violation to the right of due process by the decision not to accept the existence of corrections indicated by the regulating authority (which were not included either by the Experts’ Commission in their decision), it must be noted that, in this case, it is not established that the General Electricity Law and the Regulation does not compel the National Electricity Commission to accept that decision as binding, because, given the nature of the experts’ opinion, even if it concurred, it did not oblige it to accept its terms to approve the tariffs at issue. The phrase “issuing an opinion” must be understood to the effect that it is consistent with the abovementioned Law, which is equivalent to "declare or express oneself in favor or against something", (Dictionary of the Spanish Academy) which is why the opinion issued could only have an illustrative or informative value for the National Electricity Commission to make its decision on the subject. Thus, the Experts’ Commission having issued an opinion on the items received for consideration -submitted by the regulatory authority-, the process should have been deemed concluded to avoid falling into a vicious circle. [...] <sup>140</sup> (Emphasis added.)

Expecting the Expert Commission to decide a conflict and empowering it to issue a binding decision breaches the principle of legality that is characteristic of the Rule of Law [...]. [ According to] the General Electricity Law, the power to approve tariff schemes pertains to the National Electricity Commission and in no way, either directly or indirectly, to an expert commission.<sup>141</sup> (Emphasis added.)

If the discrepancies between the electricity distribution operator and the terms of reference determined by the authority in the electricity subsector were not settled despite the report from an expert commission, it had to continue the

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138 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, p. 31.

139 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, pgs. 24-26.

140 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, pgs. 21-22.

141 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, p. 29.

process that meets the peremptory deadlines provided for in Articles 75 of the Law and 98 paragraph three, of the Regulations to comply with its responsibility in this respect. Therefore, under Articles 4, subsection c) and 71 of said law, the tariffs must be calculated by the National Electricity Commission, that must do so after receiving the report from the Expert Commission, which, as mentioned, concluded with said opinion its advisory role in the decision of the competent authority to fix the tariff schedules.<sup>142</sup> (Emphasis added.)

122. Supreme Court Judge Gladys Chacón Corado dissented from the majority judgment of 18 November 2009, opining that, in the circumstances of the case, the Regulatory Framework did not entitle the CNEE to depart from the Expert Commission's decision, or displace the Bates White study with the Sigla study.<sup>143</sup> As we will see below, Judge Chacón's arguments in her dissenting opinion were largely those adopted by the Tribunal in the Arbitration. This shows that the Tribunal effectively reversed the Constitutional Court's majority decision.<sup>144</sup>
123. In its decision of 24 February 2010<sup>145</sup> the Constitutional Court further concluded that Resolution 144-2008 was issued in accordance with the law,<sup>146</sup> that the Expert Commission's report was not binding,<sup>147</sup> and that the Expert Commission was lawfully dissolved by the CNEE after it issued its report.<sup>148</sup> In that decision, the Constitutional Court finally determined that:

[N]either the Law on the subject nor its respective Regulations – the only body of law applicable to the case in the Guatemalan legal system – contain any rule that confers to the Expert Commission duties other than issuance of its opinion on the aforesaid discrepancies. Thus, by submitting its respective opinion, the Expert Commission fulfilled the duty

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142 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, p. 31.

143 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, Dissenting Opinion By Judge Gladys Chacón Corado, p. 001603-001604.

144 Award, paras. 524-531.

145 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**.

146 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 27-28.

147 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, p. 35.

148 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, p. 32.

assigned thereto by the Law on the subject and its respective Regulations. Therefore, having fulfilled its legal purpose, and not being a permanent Commission but rather a temporary one, the opinion of which, according to the law, was to be used by the competent authority in establishing the tariff, and not having any other role in the proceedings, in accordance with the Law, its dissolution could not have caused any injury to petitioner, given that the challenged authority's conduct adhered to the procedure established in the Law and Regulations on the subject.<sup>149</sup> (Emphasis added.)

[A]ssigning to the Expert Commission the role of settling the dispute between the petitioner and the challenged authority; conferring it jurisdiction to issue a binding decision; and moreover, empowering it to approve the tariff studies, as the Court has held, would violate the well-developed principle of legality of the Rule of Law.<sup>150</sup> (Emphasis added.)

[T]he General Electricity Law and its respective Regulations specifically establish and define the procedure that both domestic distributors of electricity and the [CNEE] must follow prior to setting the amount of the applicable tariff [...]. This Court, as it did in the [proceedings that resulted in the decision of 18 November 2009], upon reviewing, in the light of the aforementioned body of laws, the manner in which this administrative case – the cause of this amparo action – was conducted, determines that the procedure followed by the petitioner and the challenged authority was conducted in accordance with the aforesaid Law and Regulations.<sup>151</sup> [...] (Emphasis added.)

124. In other words, the Constitutional Court concluded that the CNEE had correctly followed the tariff review process, and that both Resolution 144-2008 and Resolution 3121<sup>152</sup> were issued in accordance with the LGE and the Regulations.
125. It follows that, according to the international principle outlined above, the Tribunal should not have resolved issues already settled by these two Constitutional Court decisions. However, as admitted by the Tribunal itself, the dispute submitted by TGH

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149 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 31-32.

150 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 33-34.

151 Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 27-28.

152 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, p. 20; Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 28, 31-32.

concerned “an allegation of abuse of power by the regulator and disregard of the Regulatory Framework [...],”<sup>153</sup> whether “the CNEE wilfully disregarded the fundamental principles of the Regulatory Framework,”<sup>154</sup> and “whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor’s study and to apply its own.”<sup>155</sup> These, which were the matters before the Tribunal, had been resolved by the Constitutional Court’s decisions of 18 November 2009 and 24 February 2010. On the merits, and in spite of the clear statements by both Constitutional Court decisions that the procedure through which the tariffs were established was carried out in accordance with the law, the Tribunal concluded that it was not.

126. The Award held that a violation of the Regulatory Framework had occurred. In particular Resolution 144-2008 was found to be unlawful:

The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the Regulatory Framework. By rejecting the distributor’s study because it had failed to incorporate the totality of the observations that the CNEE had made in April 2008, with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.<sup>156</sup>

127. On its decision on the merits, as already mentioned,<sup>157</sup> the Tribunal rejected the claims relating to the modification of the Regulatory Framework and of legitimate expectations, as well as other numerous allegations by TGH. The Tribunal’s decision that Guatemala breached the international minimum standard of the Treaty was based solely on Resolution 144-2008:

The Arbitral Tribunal disagrees with the Respondent for the reasons that will be explained below. In the Arbitral

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153 Award, para. 489.

154 Award, para. 481.

155 Award, para. 534.

156 Award, para. 681.

157 See paras. 60-62.

Tribunal's view, in adopting Resolution No. 144–2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.

In so doing, the CNEE in fact repudiated the two fundamental principles upon which the tariff review process Regulatory Framework is premised.<sup>158</sup> [...]

128. But Resolution 144-2008 and its compatibility with the Regulatory Framework had been precisely the object of the decision of the Constitutional Court of 18 November 2009. How could the Tribunal not review that decision in deciding exactly the opposite, i.e. that the Resolution was indeed in breach of the Regulatory Framework?
129. Of course it could not. The Tribunal did review and reverse those court decisions. Not only did the Tribunal arrive at conclusions diametrically opposite to those in the Constitutional Court decisions despite alleging that its task “is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law.”<sup>159</sup> The Tribunal also embraced the opinion of dissenting Constitutional Court Judge Chacón in the 18 November 2009 decision.<sup>160</sup>
130. Particularly, the Tribunal made several findings regarding “the interpretation of the Regulatory Framework,”<sup>161</sup> all of which conform with the reasons of Judge Chacón's dissenting opinion.
131. The first of the Tribunal's findings was that under article 98 of the Regulation, the CNEE was entitled to depart from the distributor's study only in two specific situations:

First, the Arbitral Tribunal found that, pursuant to Article 98 of the RLGE, the regulator is entitled to fix the tariff on the basis of his own VAD study only in two limited

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158 Award, paras. 664-665.

159 Award, para. 477.

160 Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, Dissenting Opinion By Judge Gladys Chacón Corado, pgs. No. 001603-001604.

161 Award, para. 666.

circumstances, i.e. when the distributor fails to submit its study and when the distributor fails to correct its study according to the observations of the regulator.<sup>162</sup> (Emphasis added.)

132. This is exactly what Judge Chacón concluded in her dissenting opinion:

[T]he attitude the challenged authority subsequently assumed, of using an independent tariff study, through the issuance of the challenged order, so that it would serve as a basis for issuing the tariff schemes, constitutes an act that the National Electric Commission could not make under protection of Article 98 of the related regulation, since it clearly states that this authority assists the Commission only in two cases: a) when the distributor does not submit the tariff studies; or b) when the distributor does not submit the corrections made to them.<sup>163</sup> (Emphasis added.)

133. The second of the Tribunal's findings was that the distributor did not have the obligation to implement all of the Expert Commission's observations into its study:

It follows that the distributor could not have the obligation to implement corrections to its VAD report upon which a disagreement had properly been submitted to the Expert Commission.<sup>164</sup> [...] (Emphasis added.)

[B]ecause the Regulatory Framework provides that a neutral Expert Commission would pronounce itself on any disagreement regarding the observations of the regulator, RLGE Article 98 only mandates the distributor to implement such observations in respect of which (i) there is no disagreement, or (ii), in case of disagreement, the Expert Commission pronounced itself in favor of the regulator [...].<sup>165</sup> (Emphasis added.)

134. Notice again the similarity between the preceding finding in the Award and the conclusion of the dissenting opinion:

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<sup>162</sup> Award, para. 667. *See also Ibid.*, para. 526.

<sup>163</sup> Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, Dissenting Opinion By Judge Gladys Chacón Corado, p. No. 001604, Section (c).

<sup>164</sup> Award, para. 577. *See also Ibid.*, para. 578.

<sup>165</sup> Award, para. 668.



[T]he National Electricity Commission issued a resolution calling for the constitution of an Expert Commission, which expressly recognized that corrections existed that were not addressed by the distributor. However, this attitude is within the framework of the rights of the distributor, as if it were obliged to carry out all the comments then it would be impossible for discrepancies to arise under the provisions of Article 75 of the general Electricity Law [...].<sup>166</sup>(Emphasis added.)

135. The Tribunal seeks to distinguish its decision from that of the Constitutional Court. It says that the Court did not examine whether the CNEE had to provide reasons for the decisions contained in Resolution 144-2008, pursuant to the Regulatory Framework:

It is indeed true that the Guatemalan courts have decided some of the questions in dispute concerning the interpretation of the Guatemalan Regulatory Framework and the regularity of some of the CNEE's decisions under such law. It is also true that this Arbitral Tribunal will have to apply Guatemalan law to some of the regulatory aspects of the dispute, and that, in so doing, it may have to defer to the decisions made by the Guatemalan courts when such aspects of the dispute are subject to Guatemalan law.<sup>167</sup> [...]

This Tribunal's task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law.<sup>168</sup> [...]

Nor did the Constitutional Court, as will be seen in further sections of this award, decide whether, despite the Expert Commission's report not being binding, the CNEE nonetheless had the duty to consider it and provide reasons for its decision to disregard it. Such question will thus have to be decided by the Arbitral Tribunal.<sup>169</sup> (Emphasis added.)

136. The Tribunal instead based its decision on the CNEE's failure to provide reasons: for departing from the opinion of the Expert Commission and approving the Sigla study:

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<sup>166</sup> Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, Dissenting Opinion By Judge Gladys Chacón Corado, p. No. 001604, Section (d).

<sup>167</sup> Award, para. 474.

<sup>168</sup> Award, para. 477

<sup>169</sup> Award, para. 545.

[I]n adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission’s report, and in unilaterally imposing a tariff based on its own consultant’s VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.<sup>170</sup>

[...] the regulator [must express] valid reasons to depart from the experts’ pronouncements.<sup>171</sup> (Emphasis added.)

The Arbitral Tribunal finally found that, although the findings of the Expert Commission are not technically binding in the sense that the Expert Commission has no adjudicatory powers, the regulator had the duty to give them serious consideration and to provide reasons in the case it decided to depart from them.<sup>172</sup> (Emphasis added.)

137. But this is a false distinction. The Constitutional Court examined the entire compatibility of Resolution 144-2008 with the Regulatory Framework and upheld the Resolution. By deciding that the Regulatory Framework contains a further requirement, concerning the level of reasoning or motivation that decisions of the CNEE must observe, and that Resolution 144-2008 breached that requirement, the Tribunal took a different interpretation of the Regulatory Framework. This necessarily implies a revision of the decisions of the Constitutional Court. It involves censuring the Court for having missed no less than what the Tribunal deems a “fundamental” tenet of the Regulatory Framework. The result could not be more divergent: for the Court, Resolution 144-2008 was lawful; for the Tribunal, it was not only unlawful, but contrary to “fundamental principles” of the Regulatory Framework.
138. Thus the Tribunal did review and reverse the Constitutional Court’s decisions. It did so largely adopting the opinion of the dissenting Judge of the Court to the decision of 18 November 2009.
139. Note that EEGSA’s statement of claim in the proceedings that led to the Constitutional Court’s decision of 18 November 2009 read, in part, as follows:

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170 Award, para. 664. *See also Ibid.*, paras. 669-670.

171 Award, para. 668.

172 Award, para. 670.

If the National Electric Energy Commission does not accept as binding what was decided by the Expert Commission, and moreover, such Commission, against what the Expert Commission resolved, includes its observations in the final approval of the tariff study, then: what was the reason<sup>173</sup> for the legislator to have provided that the Commission and the distributor were to submit the discrepancies to the knowledge and decision of an Expert Commission?<sup>174</sup> (Emphasis added.)

140. EEGSA's arguments were rejected by the Constitutional Court. Yet the Tribunal accepted them:

[I]t would not make any sense<sup>175</sup> for the Regulatory Framework to establish a process whereby the distributor is requested to submit a VAD study, the regulator is requested to comment on the same, and a neutral Expert Commission is called to make a pronouncement in case of disagreement, if the regulator had the discretion to disregard the distributor's study.<sup>176</sup>

141. Hence, it is clear that the Tribunal reviewed and reversed the decisions of the Constitutional Court of Guatemala. In so doing, it “ [...] blur[red] the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals [...]” and breached the basic principle of international law outlined above that “arbitral tribunals cannot ‘put themselves in the shoes of international appellate courts’”,<sup>177</sup> and do not sit “[...] as an ultimate appellate court, reviewing decisions of domestic supreme courts for correctness.”<sup>178</sup>

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173 In Spanish original “*qué sentido tiene que el legislador [...]*”, EEGSA Amparo Request against CNEE Resolution No. CNEE-144-2008, **Exhibit R-185**, p. 5.

174 EEGSA Amparo Request against CNEE Resolution No. CNEE-144-2008, **Exhibit R-185**, p.5.

175 In Spanish “en primer lugar no tendría sentido que [...]”, Award, para. 529.

176 Award, para. 529.

177 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 441.

178 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, **Exhibit RL-46**, para. 260.

142. Therefore, the Tribunal clearly exceeded its powers. As the Tribunal itself recognised, it could not ignore local judicial decisions on questions of local law. The Tribunal did not respect this clear limitation to its jurisdiction when it asserted that:

In particular, would the Arbitral Tribunal find – as the Claimant avers – that the CNEE willfully disregarded the fundamental principles of the Regulatory Framework in force at the time of the tariff review process in dispute, such a disregard would amount to a breach of international law.<sup>179</sup>

143. If, as stated by the Tribunal, the issue in the arbitration was “whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor’s study and to apply its own,”<sup>180</sup> then the Tribunal could not decide the case on the merits without double guessing the Constitutional Court’s decisions.

144. Therefore, the Tribunal clearly exceeded its powers. Had the Tribunal respected the limits of its jurisdiction, i.e. that it could not ignore or review local judicial decisions on questions of local law, then it could not hold that “if the CNEE willfully disregarded the fundamental principles of the Regulatory Framework in force at the time of the tariff review process in dispute, such a disregard would amount to a breach of international law.”<sup>181</sup> The Tribunal so held and thus manifestly exceeded its powers.

**3. The Tribunal manifestly exceeded its powers in failing to apply international law, which was the applicable law, and equating a breach of domestic law with a breach of the CAFTA-DR**

145. The CAFTA-DR requires that when a claim is submitted by an investor against a member State, “the tribunal shall decide the issues in dispute in accordance with this [Treaty] and applicable rules of international law.”<sup>182</sup> As the Tribunal in *MINE v Guinea*

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179 Award, para. 481.

180 *Ibid.*, para. 534.

181 Award, para. 481 (emphasis added).

182 CAFTA-DR, art. 10.22(1).

has declared, “the parties’ agreement on applicable law forms part of their arbitration agreement.”<sup>183</sup>

146. TGH based its claim on the minimum standard of treatment under article 10.5 of the CAFTA-DR. In their pleadings, the Parties extensively developed their views on the content of the international minimum standard.<sup>184</sup> Guatemala described in detail its position on the international minimum standard and how it differed from the autonomous standard of fair and equitable treatment.<sup>185</sup>
147. In particular TGH and Guatemala dedicated a total of 447 pages of their pleadings to this subject.<sup>186</sup> Further, both Parties cited no less than 150 legal authorities on the international minimum standard, mainly case law but also doctrinal and scholarship writings.
148. Guatemala for example presented the following cases on the international minimum standard, all of which confirmed that in order to constitute a violation of the international minimum standard under customary international law, the State’s conduct must be extreme and outrageous:
- (a) *Myers Inc v Canada* stands for the proposition that the international minimum standard does not cover conduct that is not more than a supposed violation of domestic law; much to the contrary, it accords the State an ample margin of appreciation, leaving the task of redressing mere irregularities to the local courts and tribunals:

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183 *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para.. 5.03.

184 Claimant’s Memorial, paras. 228-280; Memorial on Objections and Counter-Memorial, paras. 460-590; Reply, paras. 228-282; Rejoinder, paras. 79-213; Claimant’s Rejoinder on Jurisdiction and Admissibility, paras. 14-24; Claimant’s Post-Hearing Brief. Paras. 11-164; Respondent’s Post-Hearing Brief, paras. 247-332; Claimant’s Post-Hearing Brief Reply, paras. 41-123; Respondent’s Post-Hearing Brief Reply, paras. 114-159.

185 Memorial on Objections and Counter-Memorial, paras. 460-494; Rejoinder, paras. 79-104, 182-213; Respondent’s Post-Hearing Brief, paras. 247-332; Respondent’s Post-Hearing Brief Reply, paras. 114-159.

186 Claimant’s Memorial, pgs. 138-170; Memorial on Objections and Counter-Memorial, pgs. 201-258; Reply, pgs. 190-235; Rejoinder, pgs. 41-106; Claimant’s Rejoinder on Jurisdiction and Admissibility, pgs. 7-16; Claimant’s Post-Hearing Brief, pgs. 7-124; Respondent’s Post-Hearing Brief, pgs. 98-131; Claimant’s Post-Hearing Brief Reply, pgs. 30-98; Respondent’s Post-Hearing Brief Reply, pgs. 48-69.

When interpreting and applying the “minimum standard,” a Chapter 11 tribunal does not have an openended mandate to second-guess government decision-making. [...] The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes.<sup>187</sup> [...] (Emphasis added.)

- (b) *ADF Group Inc v United States of America* stands for the proposition that with respect to *ultra vires* governmental acts, something more than simple illegality or lack of authority under domestic law is necessary to breach the minimum standard of treatment;<sup>188</sup>
- (c) *International Thunderbird Gaming Corporation v United Mexican States* stands for the proposition that the threshold to breach the minimum standard of treatment is high and must amount to a “gross denial of justice or manifest arbitrariness falling below acceptable international standards.” In the case of administrative irregularities, they must have been “grave enough to shock a sense of judicial propriety”;<sup>189</sup>
- (d) *Waste Management Inc. v United Mexican States* stands for the proposition that the minimum standard of treatment is infringed by conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, [...] discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety [...]”.<sup>190</sup> In addition, it also stands for the proposition that a failure to perform an obligation is not to be equated with a violation of the minimum standard of treatment, provided that it does not amount to an outright and unjustified repudiation of

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187 *SD Myers Inc v. Canada* (UNCITRAL Case) First Partial Award, 13 November 2000, **Exhibit CL-41**, paras. 261-263.

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

189 *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, January 26, 2006, **Exhibit CL-25**, paras. 194, 195, 200.

190 *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, **Exhibit CL-46**, paras. 98.

the transaction and provided that some remedy is open to the creditor to address the problem”;<sup>191</sup>

- (e) *GAMI Investments, Inc v Mexico* stands for the proposition that failure to fulfill the objectives of administrative regulations will only violate international law if it amounts to an “outright and unjustified repudiation” of the relevant regulations. Maladministration alone will not suffice;<sup>192</sup>
- (f) *Cargill, Incorporated v United Mexican States* stands for the proposition that in order to determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine “whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive”;<sup>193</sup>
- (g) *Glamis Gold Ltd. v United States of America*<sup>194</sup> stands for the proposition that under international customary law arbitrariness exists only when it is manifest, that is, when conduct is clearly unfair, or when the measures in question are blatantly or obviously without legal basis and were adopted in violation of due process. It also stands for the proposition that a mere violation of local law is not sufficient to trigger an international breach. For this, the conduct must constitute a deliberate violation of the regulatory authority’s duties and obligations or an insufficiency of action falling far below international standards:

[T]o violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA,

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191 *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, **Exhibit CL-46**, paras. 115.

192 *GAMI Investments, Inc v. Mexico* (UNCITRAL Case) Final Award, 15 November 2004, **Exhibit RL-7**, paras. 97, 103-104.

193 *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, **Exhibit CL-12**, para. 296.

194 *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, paras. 616-617, 762, 779.

an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1). [...] a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning. [...]

[T]he Tribunal first notes that it is not for an international tribunal to delve into the details of and justifications for domestic law. If Claimant, or any other party, believed that [the] interpretation of [the civil servant of] the undue impairment standard was indeed incorrect, the proper venue for its challenge was domestic court. [...] It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.<sup>195</sup> (Emphasis added.)

149. All of the above decisions support the proposition that the fair and equitable treatment standard, when interpreted independently from customary international law, is more demanding on the State than the international minimum standard.<sup>196</sup> Conversely, the international minimum standard is less stringent and the State must commit a particularly egregious act in order to be held liable.
150. Guatemala's position was also supported by the detailed written submissions of four of the six other (other than Guatemala) CAFTA-DR member States,<sup>197</sup> including the United States –the State of nationality of the Claimant– which defined the content of the standard restrictively.<sup>198</sup> The United States stated in its brief that the applicable standard

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<sup>195</sup> *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, paras. 616-617, 762, 779.

<sup>196</sup> *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, **Exhibit CL-12**, para. 296; *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, **Exhibit CL-23**, paras. 616-617; *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL Case) Award, January 26, 2006, **Exhibit CL-25**, paras. 194.

<sup>197</sup> Non-Disputing Party Submission of the Dominican Republic, 5 October 2012; Non-Disputing Party Submission of the Republic of El Salvador, 5 October 2012; Non-Disputing Party Submission of the United States of America, 23 November 2012; Non-Disputing Party Submission of the Republic of Honduras, undated.

<sup>198</sup> Non-Disputing Party Submission of the United States of America, 23 November 2012, paras. 6-7.



is the international minimum standard and not the autonomous fair and equitable treatment standard:

These provisions demonstrate the State Parties' intention that Article 10.5 articulate a standard found in customary international law –i.e.,– the law that develops from State practice and opinio juris – rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment. Arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 10.5.<sup>199</sup> (Emphasis added.)

151. The presentation of the United States also made clear that said standard protects investors only against the denial of justice and manifestly arbitrary actions, and accords a wide margin of deference to the regulatory powers of domestic authorities:

States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's “expectations” about the state of regulation in a particular sector. Regulatory action violates “fair and equitable treatment” under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or manifest arbitrariness falling below the international minimum standard.

The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and opinio juris. “The party which relies on a custom”, therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.” Once a

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<sup>199</sup> Non-Disputing Party Submission of the United States of America, 23 November 2012, para. 4 (emphasis added).

rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule. Determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”<sup>200</sup> (Emphasis added.)

152. El Salvador confirmed the limited scope of the protection granted by the international minimum standard:

As discussed in this submission, El Salvador believes that: 1) the concept of “fair and equitable treatment” in Article 10.5 of CAFTA-DR is used and must be understood strictly with reference to the Minimum Standard of Treatment in accordance with customary international law; 2) customary international law can only be established based on State practice followed out of a sense of legal obligation (*opinio juris*); 3) the burden of proof to establish the existence of a norm in customary international law falls on the Party that alleges its existence, and must be proven based on State practice and *opinio juris*, not based on decisions of arbitral tribunals; 4) the text of Article 10.5 only includes the applicability of the concept of “fair and equitable treatment” to the context of denial of justice, unless a party proves otherwise based on general and consistent State practice and *opinio juris*; 5) the concept of “fair and equitable treatment” included in the Minimum Standard of Treatment in Article 10.5 of the Treaty is very different from the autonomous concept by the same name; and 6) the concept of “fair and equitable treatment” in Article 10.5 of the Treaty does not include the protection of an investor’s legitimate expectations and does not include protection against merely arbitrary measures.<sup>201</sup> (Emphasis added.)

153. The submission of the Dominican Republic, in turn, read:

From this it is derived that the “Fair and Equitable Treatment” established in the contract must be viewed as part of the “Minimum Standard of Treatment afforded to aliens according to Customary International Law,” a concept that is very different from the standard of “Fair and Equitable Treatment”

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200 Non-Disputing Party Submission of the United States of America, 23 November 2012, paras. 6-7 (emphasis added).

201 Non-Disputing Party Submission of the Republic of El Salvador, 5 October 2012, para. 17.

included in many investment protection treaties in an autonomous manner without reference to the Minimum Standard of Treatment under the Law.

[...]

8. Therefore, in the Dominican Republic's view, in order to violate the Minimum Standard of Treatment under Customary International Law included in Article 10.5 of the Treaty, a measure attributable to the State must be sufficiently egregious so as to fall below internationally accepted standards. Accordingly, only conduct which is manifestly arbitrary, blatantly condemnable and very serious conduct may be claimed under CAFTA-DR 10.5 and not a mere breach or mere arbitrariness. [...]

10. Because the focus must be on State practice and conduct, the Dominican Republic also notes that it is incorrect to make reference to the expectations of investors concerning the treatment they expect to receive based on what has been offered, to decide if the State has complied with the Minimum Standard of Treatment. State conduct is the only relevant factor for this purpose, because the Minimum Standard of Treatment must be an objective concept that evaluates the treatment that a State accords to an investor.<sup>202</sup> [...] (Emphasis added.)

154. For its part, Honduras described the standard as follows:

6. Therefore, the terms of Article 10.5 of the Treaty clearly reflect the State Parties' intention to adopt the most limited concept possible of "fair and equitable treatment" as part of the minimum standard of treatment under customary international law. [...]

8. In order to determine the current status of customary international law it is necessary to refer to State practice, not to decisions by arbitration tribunals that have not examined the minimum standard of treatment. From the time of the Permanent Court of Justice, it has been established that the party alleging the existence of a customary international law standard has the burden to prove the existence of general and consistent State practice followed from a sense of legal obligation that has given rise to the alleged standard.

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<sup>202</sup> Non-Disputing Party Submission of the Dominican Republic, 2 October 2012, paras. 3, 8, 10.

9. Due to the origin of the “Minimum Standard of Treatment” in customary international law, as an absolute “floor” to the obligation of States to provide to aliens at least the same standard of treatment that States afford to their own nationals, only State actions of an extreme, excessive or injurious nature can violate the minimum standard of treatment, including fair and equitable treatment as a concept included in the minimum standard of treatment.

10. The Republic of Honduras views as valid the following specific examples of conduct that may be considered to be a violation of the minimum standard of treatment: a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or a manifest failure to state reasons for a decision. However, because the focus must be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to make reference to the expectations of investors for deciding whether the minimum standard of treatment has been violated.<sup>203</sup> (Emphasis added.)

155. Three of these four States that filed written submissions, the United States, El Salvador and the Dominican Republic, also made oral presentations at the hearing, raising the same points as in their written submissions.<sup>204</sup>
156. The Parties also paid particular attention to describing the type of action that would result in arbitrary conduct<sup>205</sup> and the content of the obligation to grant due process of law under article 10.5 of the Agreement.<sup>206</sup> This includes the submissions of the non-disputing parties, which also dealt with the content of the “arbitrariness” and “due process” concepts. Guatemala specifically addressed the seminal decision of the

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<sup>203</sup> Non-Disputing Party Submission of the Republic of Honduras, undated, paras. 6, 8-10.

<sup>204</sup> Tr. (English), Day Five, 822:2-824:7, United States; Tr. (English), Day Five, 808:18-816:14, El Salvador, and Tr. (English), Day Five, 817:2-821:20, Dominican Republic.

<sup>205</sup> Memorial on Objections and Counter-Memorial, paras. 525-534; Rejoinder, paras. 165-171; Respondent’s Post-Hearing Brief, paras. 247-283; Respondent’s Post-Hearing Brief Reply, paras. 17-22, 126-152.

<sup>206</sup> Memorial on Objections and Counter-Memorial, paras. 480-486; Rejoinder, paras. 90-95; Respondent’s Post-Hearing Brief, paras. 247-285; Respondent’s Post-Hearing Brief Reply, paras. 144-147.

International Court of Justice in the *ELSI (United States v Italy)* case on the definition of “arbitrary conduct”:<sup>207</sup>

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of “arbitrary action” being “substituted for the rule of law” (Asylum, Judgment, I.C.J. Reports 1950, p. 284). It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.<sup>208</sup>

157. In spite of all of the above, the discussion of international law in the Award is extremely scarce. This is remarkable in particular given that, the Award affirmed repeatedly the Tribunal’s duty to apply the Treaty and international law:

[...] whether the facts alleged by the Claimant are capable, if proven, of constituting breaches of the Respondent’s international obligations under CAFTA-DR.<sup>209</sup>

Claimant essentially avers that Guatemala failed to accord its investment treatment in accordance with customary international law, in particular fair and equitable treatment.<sup>210</sup>

[...] this dispute is about whether the Respondent breached its obligations under the minimum standard of treatment. It is an international dispute.<sup>211</sup> [...]

[...] [T]he fundamental question that this Arbitral Tribunal ultimately has to decide is, on the evidence, whether the Respondent’s behavior is such as to constitute a breach of the minimum standard of treatment under international law.<sup>212</sup>

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207 Memorial on Objections and Counter-Memorial, paras. 528; Rejoinder, paras. 165-166; Respondent’s Post-Hearing Brief, paras. 274, 277; Respondent’s Post-Hearing Brief Reply, para. 147.

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

209 Award, para. 444.

210 Award, para. 446.

211 Award, para. 467.

212 Award, para. 470.

The Arbitral Tribunal has to assess whether the regulator's conduct materializes a breach of the State's obligations under the customary international law minimum standard.<sup>213</sup>

158. In fact, the issue of the application of international law to the dispute was particularly relevant given the crucial debate in the case around the pure domestic law nature of the claim. Indeed the Tribunal insisted on its duty to apply international law, in order to distinguish the dispute submitted to arbitration from the domestic regulatory dispute:

In order to assess whether it has jurisdiction to decide the present dispute, the Arbitral Tribunal must determine whether the facts alleged by the Claimant are capable, if proven, of constituting breaches of the Respondent's international obligations under CAFTA-DR.<sup>214</sup>

159. The Tribunal was also clear in that in addition to apply international law, "it is necessary, as a threshold matter, to define the applicable standard under article 10.5 of the CAFTA-DR."<sup>215</sup>

160. However, despite all the Tribunal's emphasis on the need to apply international law to resolve the dispute, as clearly established under the CAFTA-DR, and despite the fact that the Parties' as well as the non-disputing parties' submissions extensively address these issues, the Award ignores international law almost completely.

161. The international law analysis in the award is limited to four paragraphs from the section on jurisdiction,<sup>216</sup> in which the Tribunal briefly enunciates, based on two references to case-law and scarce references to four academic writings, the content of the standard:

The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is

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213 Award, para. 517.

214 Award, para. 444.

215 Award, para. 447.

216 Award, paras. 454-457.

discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.<sup>217</sup>

162. There is no analysis of the extensive case law cited by the Parties and no examination of the difference between the international minimum standard and the rule of fair and equitable treatment. Further, the submissions of the non-disputing parties deserved no mention in the merits sections of the Award, except to just one reference to one of those submissions in a footnote.<sup>218</sup>
163. Overall the paragraphs of the Award that examine, to some degree, international law are barely nine.<sup>219</sup>
164. Yet, crucial in the Tribunal's Award were concepts such as "arbitrariness" and "due process" in the State's regulatory process, under international law:

[A] lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard.<sup>220</sup> (Emphasis added.)

There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable Regulatory Framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.<sup>221</sup> (Emphasis added.)

The Claimant's case is in fact not based on denial of justice before the Guatemalan courts, but primarily on the arbitrary conduct of the CNEE in establishing the tariff, as well as on an alleged lack of due process in the tariff review process.<sup>222</sup> (Emphasis added.)

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217 Award, para. 454.

218 Award para. 621, footnote 513.

219 Award, 447.448, 454-459, 478.

220 Award, para. 457.

221 Award, para. 465.

222 Award, para. 473.

As a consequence, although the role of an international tribunal is not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.<sup>223</sup> (Emphasis added.)

165. But the Tribunal does not elaborate on the meaning or content of any of those two concepts, “arbitrariness” and “due process” under international law, despite the fact that these concepts are essential in the Tribunal’s conclusion that Guatemala breached the Treaty:

Teco states that Guatemala violated its obligation to accord its investment fair and equitable treatment when it [...] acted arbitrarily, illegally, and in bad faith during the 2008 tariff review process.<sup>224</sup> (Emphasis added.)

In the Arbitral Tribunal’s view, in adopting Resolution No. 144-2008, [...] the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.<sup>225</sup> (Emphasis added.)

The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the Regulatory Framework. [...] [T]he CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.<sup>226</sup> (Emphasis added.)

The Arbitral Tribunal finds that such repudiation of the two fundamental regulatory principles applying to the tariff review process is arbitrary and breaches elementary standards of due process in administrative matters. Such behavior therefore breaches Guatemala’s obligation to grant fair and equitable treatment under article 10.5 of CAFTA-DR.<sup>227</sup> (Emphasis added.)

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223 Award, para. 493.

224 Award, para. 321.

225 Award, para. 664.

226 Award, para. 681.

227 Award, para. 711.



166. Additionally, the Tribunal refers to the notion of “abuse of power” as relevant to describing the basis of the dispute at hand:

The present dispute essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process.<sup>228</sup> (Emphasis added.)

167. However, there is no other reference and no analysis of such notion of abuse of power in international law in the Award.

168. Thus, the Tribunal failed to delimit the international law concepts relevant to its decision. There is a manifest lack of international law analysis in the Award. The Tribunal simply did not apply international law.

169. This is particularly important in this case because the Tribunal insisted, at least in theory, on the distinction between a breach of international law from one under domestic law. The reality is that instead of applying international law, the Tribunal simply relied on Guatemalan domestic law and then equated a breach of local law with a breach of international law. That is, the Tribunal never showed how Guatemala’s alleged breach of the Regulatory Framework also resulted in a breach of international law. While the analysis of the Regulatory Framework is well present in the Award; that of international law is absent.

170. Examples abound in the Award showing that the Tribunal conflated the concepts of a domestic and an international breach, as if they were one and the same thing. First, the Tribunal held that it was called upon to resolve, as admitted by the Tribunal itself, “an allegation of abuse of power by the regulator and disregard of the Regulatory Framework [...]”,<sup>229</sup> whether “the CNEE willfully disregarded the fundamental principles of the Regulatory Framework,”<sup>230</sup> and “whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor’s

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228 Award, para. 489.

229 Award, para. 489.

230 Award, para. 481.

study and to apply its own”.<sup>231</sup> As we can observe, all these matters regarded the legality of the conduct of the CNEE under domestic law; none of them referred to international law.

171. Then the Tribunal concluded that a domestic law breach had occurred:

The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the Regulatory Framework. By rejecting the distributor’s study because it had failed to incorporate the totality of the observations that the CNEE had made in April 2008, with no regard and no reference to the conclusions of the Expert Commission, the CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.<sup>232</sup> (Emphasis added.)

The Arbitral Tribunal disagrees with the Respondent for the reasons that will be explained below. In the Arbitral Tribunal’s view, in adopting Resolution No. 144–2008, in disregarding without providing reasons the Expert Commission’s report, and in unilaterally imposing a tariff based on its own consultant’s VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.<sup>233</sup>

In so doing, the CNEE in fact repudiated the two fundamental principles upon which the tariff review process Regulatory Framework is premised: the principle that, save in the limited exceptions provided by the LGE and the RLGE, the tariff would be based on a VAD calculation made by a prequalified consultant appointed by the distributor; and the principle that, in case of a disagreement between the regulator and the distributor, such disagreement would be resolved having regard to the conclusions of a neutral Expert Commission.<sup>234</sup> (Emphasis added.)

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231 Award, para. 534.

232 Award, para. 681.

233 Award, para. 664.

234 Award, para. 665.

The Arbitral Tribunal also considers that the regulator’s decision to apply its own consultant’s study does not comport with Article 98 of the RLGE.<sup>235</sup> (Emphasis added.)

As a matter of fact, in order for the regulator’s decision to comport with Article 98, it should have said that the distributor failed to correct its study according to the pronouncements of the Expert Commission, or explained why the regulator decided not to accept the Expert Commission’s pronouncements.<sup>236</sup>

172. The legal analysis of the Tribunal stops there. The next thing that the Tribunal did was to automatically equate the breach of domestic law it had identified with a breach of international law without further discussion; that is, without showing how one thing led to the other:

[T]he Arbitral Tribunal considers that, pursuant to Article 10.5 of CEFTA-DR, a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard. In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules.<sup>237</sup>

In particular, would the Arbitral Tribunal find – as the Claimant avers - that the CNEE willfully disregarded the fundamental principles of the Regulatory Framework in force at the time of the tariff review process in dispute, such a disregard would amount to a breach of international law.

The present dispute essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process.<sup>238</sup>

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235 Award, para. 679. In complete opposition to this claim, the Constitutional Court stated that “proceedings conducted by both parties prior to the challenged authority deciding to dissolve the Expert Commission and based on a study carried out independently to dictate the challenged act, adhered to the provisions of article 98 of the Regulations of the General Electricity Law”. (Emphasis added.), **Exhibit R-105**, p. 22.

236 Award, para. 680.

237 Award, para. 457.

238 Award, para. 489.

The question here is whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and to apply its own.<sup>239</sup>

In the Arbitral Tribunal's view, both the Regulatory Framework and the minimum standard of treatment in international law obliged the CNEE to act in a manner that was consistent with the fundamental principles on the tariff review process in Guatemalan law.<sup>240</sup> (Emphasis added.)

173. Nowhere does the Award show the link between the infringement of local law and the infringement of the international minimum standard. Apart from mentioning arbitrariness and lack of due process, the Award does not examine how the breaches of domestic law translate into a breach of the international standards under review. In short, the Tribunal claimed to apply international law but the Award shows that the only law applied was Guatemalan law. The Award did not indicate how a breach of local law became a breach of international law.
174. This failure to apply the proper law to the facts of the case and conflating a regulatory breach with a breach of international law also constitutes a manifest excess of powers by the Tribunal. In the words of the *Sempra* annulment committee, the tribunal "made a fundamental error in identifying and applying the applicable law," and thus the Tribunal "failed to conduct its review on the basis [of] the applicable legal norm" and "this failure constitutes an excess of powers within the meaning of the ICSID Convention."

#### **4. Conclusion on the Tribunal's manifest excess of powers**

175. The Tribunal manifestly exceeded its powers essentially due to its failure to acknowledge that the dispute submitted by TGH was a purely domestic law dispute, the same that had been resolved by the Constitutional Court, and did not raise genuine claims for breach of the Treaty. This fundamental error permeates all the Award.
176. It led to a flawed decision on jurisdiction in which the Tribunal affirmed jurisdiction without any analysis of either the Treaty provision setting out the limits of the Tribunal's

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239 Award, para. 534.

240 Award, para. 682.

jurisdiction *ratione materiae* (article 10.16 of the DR-CAFTA), the fundamental basis of the claim or the test *prima facie* and accepted blindly TGH's characterisation of the facts. A wrong decision on jurisdiction as obvious as this one, given the Tribunals' abdication from any analysis of the relevant issues, is a manifest excess of powers

177. Further, since TGH had submitted to arbitration the same dispute already litigated locally, the Tribunal could not rule in favour of TGH unless it reversed the Constitutional Court's decisions. This is precisely what happened, in spite of the Tribunal's recognition that it could not do so.
178. Finally, and consistently with the above, the tribunal effectively decided the case on the basis of Guatemalan law not international law. It is remarkable the lack of international law analysis in the Tribunal's Award. In a case where the main issue was whether the dispute was domestic or international, it was important for the Tribunal to explain clearly how the alleged local regulatory breaches amounted to a breach of international law. Yet the international law discussion is practically absent. The Tribunal thus simply equates the domestic law breach and the supposed international law breach. This is of course incorrect and a manifest excess of powers for failure to apply the applicable law.
179. The Tribunal manifest excess of powers requires the annulment of the Award as a whole.

## **B. THE AWARD FAILS TO STATE THE REASONS ON WHICH IT IS BASED**

180. The lack of reasoning of an ICSID award constitutes a ground for annulment under article 52(1)(e) of the ICSID Convention. Both the total absence of reasons,<sup>241</sup> as well as insufficient, inadequate or contradictory reasoning,<sup>242</sup> may constitute a ground for

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<sup>241</sup> *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para.126; *MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, paras. 50, 78; *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) Decision on Annulment, 29 June 2012, **Exhibit RL-53**, para.17.

<sup>242</sup> *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, paras 5.08-5.09; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, paras. 64-65; *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on Annulment, 5 February 2002, **Exhibit RL-64**, paras. 77-78;

annulment under this ground. An award must allow the reader to understand how the Tribunal went from the initial facts to its conclusions.<sup>243</sup> The reasoning in the Award at hand presents serious omissions and deficiencies in reasoning and it therefore fails to state the reasons on which it is based.

181. The first annulment committee in *Vivendi v Argentina* summarized the circumstances in which annulment on this ground would be justified:

In the Committee's view, annulment under Article 52 (1) (e) [...] entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.<sup>244</sup>

182. Here the conditions for the annulment of the Award for failure to state reasons are satisfied. The Tribunal failed to express any true rationale for most of its conclusions in the Award, and incurred in major contradictions that make the Award incomprehensible. We examine the Award's missing, deficient and contradictory reasoning in the sections below.

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*Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 23; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment 29 June 2005, **Exhibit RL-58**, para. 70; *Consortium RFCC v. Kingdom of Morocco* (ICSID Case No. ARB/00/6) Decision on Annulment, 18 January 2006, **Exhibit RL-78**, paras. 243, 260; *Patrick Mitchell v. The Democratic Republic of Congo*, (ICSID Case No. ARB/99/7) Decision on the Application for Annulment of the Award, 1 November 2006, **Exhibit RL-79**, paras. 21, 65.

<sup>243</sup> *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.09.

<sup>244</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 3 July 2002, **Exhibit RL-50**, paras. 64-65.

## 1. Failure to State Reasons for the Decision on Jurisdiction

183. As explained above, Guatemala filed an objection *ratione materiae* alleging that TGH's claim did not qualify as a claim under the Treaty in accordance with article 10.16 of the CAFTA-DR, which contains Guatemala's consent to arbitration.<sup>245</sup> Guatemala argued this point extensively in its submissions.<sup>246</sup> However, this article is not analysed or even cited in the Award's section on jurisdiction or in any other part of the Award containing the Tribunal's analysis of the claim.
184. In contrast with this attitude many tribunals have taken the view that it is fundamental to examine the treaty provision granting jurisdiction *ratione materiae* to a treaty tribunal. In *UPS v Canada* the tribunal examined the very similar jurisdictional limitation found in the North American Free Trade Agreement (article 1116) and held that "[t]here is a contrast, for instance, between a relatively general grant of jurisdiction over 'investment disputes' and the more particularised grant in article 1116."<sup>247</sup> The tribunal in *Azinian v Mexico* also examined this limitation *ratione materiae* and stated that "[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level."<sup>248</sup>
185. The *Iberdrola v Guatemala* tribunal, deciding on a factual matrix identical to the one at play here, was also clear that the claimant must submit an international dispute under the relevant treaty:

It is clear then that consent is the fundamental requirement for disputes between a Contracting State and an investor of another Contracting State to be submitted to arbitration under the ICSID Convention.

However, the Tribunal cannot limit itself to affirm that the State concerned, in this case the Republic of Guatemala, has

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<sup>245</sup> See paras. 5-7; Application for Annulment, Section III.A.1.

<sup>246</sup> Memorial on Objections and Counter-Memorial, paras. 99-112; §§

<sup>247</sup> *United Parcel Service of America, Inc. v. Canada* (UNCITRAL case) Decision on Jurisdiction, November 22, 2002, **Exhibit RL-4**, para. 34.

<sup>248</sup> *Robert Azinian et al. v. United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, **Exhibit RL-2**, para. 97.

consented to ICSID jurisdiction. Instead, it must verify the scope of such consent, that is, if it is a broad consent, including any dispute that may be included within the scope of application of Article 25 of the ICSID Convention, or if such consent is in any way restricted or limited.

The consent of the Republic of Guatemala to the arbitration with Spanish investors is contained in the Treaty and, therefore, the matters in respect of which such consent was given are those that determine the competence of the Tribunal. It is then up to the latter, considering the matter of the dispute raised by the claimant investor, to establish whether or not this is covered in the consent to arbitration and, therefore, if it is a matter about which the Tribunal can decide. For this purpose, the instrument by which the Republic of Guatemala consented to arbitration, i.e. the Treaty, must be analyzed.<sup>249</sup> (Emphasis added.)

186. This is not the only omission in the reasoning of the Tribunal. As stated above, when faced with an objection *ratione materiae* like the one raised by Guatemala here, a treaty tribunal must examine what is the fundamental basis of the claim.<sup>250</sup> In doing so the tribunal must examine whether the facts of the case, if proven, may *prima facie* give rise to a genuinely international claim rather than merely raising issues concerning local law.<sup>251</sup>
187. Instead of all this, the Tribunal in the present case concludes that it has jurisdiction by merely stating the following:

The Arbitral Tribunal considers that the Claimant has made allegations that are such, if proved, as to establish a breach of Guatemala's obligations under the minimum standard, as defined in previous sections of this award.<sup>252</sup>

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<sup>249</sup> *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, **Exhibit RL-32**, paras. 293-295.

<sup>250</sup> Memorial on Objections and Counter-Memorial, paras. 99-112; Rejoinder, paras. 31-37, 77-78; Respondent's Post-Hearing Brief, paras. 33-39, 67; Respondent's Post-Hearing Brief Reply, paras. 45-52.

<sup>251</sup> Memorial on Objections and Counter-Memorial, paras. 3, 79-97, 100-106; Rejoinder, paras. 21, 29, 62-78; Respondent's Post-Hearing Brief, paras. 35-39, 59-60; Respondent's Post-Hearing Brief Reply, paras. 11-12, 14, 44-52.

<sup>252</sup> Award, para. 464.



188. The allegations to which the Tribunal referred were the mere formal characterisations that TGH gave to its claims:

There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted arbitrarily and in complete and willful disregard of the applicable Regulatory Framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard.<sup>253</sup>

189. Thus, the Tribunal decided that it had jurisdiction merely because TGH had made allegations of arbitrariness and wilful disregard of the Regulatory Framework. All the analysis of whether the facts alleged could give rise to credible claims under those concepts, at least *prima facie*, is missing from the decision of jurisdiction. This reasoning was required to understand the decision of jurisdiction, but is missing from the Award.

190. The Tribunal instead relied entirely on the characterization of the dispute as presented by the claimant, abdicating from its function, as described by the annulment committee in *Duke v Peru*: “the tribunal must objectively characterise those facts in order to determine finally whether they fall within or outside the scope of the parties’ consent. In making this determination, the tribunal may not simply adopt the claimant’s characterisation without examination.”<sup>254</sup>

191. Here, the fundamental basis of TGH’s claim was the dispute over whether the CNEE breached the Regulatory Framework in the manner in which it applied it in the context of EEGSA’s 2008 tariff review. The Tribunal described the dispute as follows:

This dispute arose from the alleged violation by the Comisión Nacional de Energía Eléctrica (National Commission of Electric Energy) (“CNEE”) of the Guatemalan Regulatory Framework for setting tariffs for distribution of energy by

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253 Award, paras. 464-465.

254 *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ARB/03/28) Decision on Annulment, 1 March 2011, **Exhibit RL-57**, para 118 (emphasis added).

EEGSA, the electricity company in which the Claimant had an indirect share.<sup>255</sup>

192. A similar description is contained in other paragraphs of the Award:

The present dispute essentially rests on an allegation of abuse of power by the regulator and disregard of the Regulatory Framework in the context of an administrative tariff review process.<sup>256</sup>

The question here is whether the Regulatory Framework permitted the regulator, in the circumstances of the case, to disregard the distributor's study and to apply its own. The Parties are in disagreement in this regard.<sup>257</sup>

193. However, in order to explain how this conduct of the CNEE complained of by TGH could give rise to a credible claim of breach of the Treaty, the Tribunal had to examine the fundamental basis of the claim and whether it passed the *prima facie* test.

194. The Tribunal did nothing of the sort and accepted jurisdiction merely on the basis of the unproven allegations of TGH,<sup>258</sup> that the conduct of the CNEE amounted to a breach of the international minimum standard of treatment, without examining the fundamental basis of the claim.

195. Thus, when the Tribunal rejected Guatemala's jurisdictional arguments it did so without giving substantive reasons other than plain refusal:

The Arbitral Tribunal disagrees with Guatemala's argument that Teco's claim, in spite of its "labeling" as a breach of international law, would be no more than a domestic dispute on the interpretation of Guatemalan law, which does not fall within the jurisdiction of an international tribunal.<sup>259</sup>

196. In short, the Tribunal rejected Guatemala's claim that TGH had submitted a merely regulatory dispute without examining either the Treaty that conferred jurisdiction on the

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255 Award, para. 79.

256 *Ibid.*, para. 489.

257 Award, para. 534.

258 *See* para. 38.

259 Award, para. 466.

Arbitral Tribunal or the fundamental basis of TGH's claims. It reached its conclusions but failed to give reasons as to how it reached those conclusions, in breach of the ICSID Convention.

## 2. Failure to state reasons regarding the test of applicable international law

197. The Tribunal's analysis is also clearly insufficient with respect to the test of international law applicable to the merits of the dispute. As explained above,<sup>260</sup> the Tribunal's analysis of the content of the minimum standard of fair and equitable treatment is limited to a brief statement that the standard "is infringed by conduct [that] is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."<sup>261</sup> But it fails to link the facts to that test. By failing to define the content of the standard beyond the sentence above, it becomes impossible for any objective reader of the Award to understand why or how Guatemala breached or did not breach such standard.

198. As also noted above,<sup>262</sup> the Tribunal does not indicate what consideration, if any, it gave to the submissions of the Parties and of the non-disputing parties on the international minimum standard. Further, the Tribunal does not define the terms "arbitrariness" and "due process" in the State's regulatory process which, as seen above, were crucial in the Tribunal's decision. The two concepts were repeated throughout the Award:

Teco states that Guatemala violated its obligation to accord its investment fair and equitable treatment when it [...] acted arbitrarily, illegally, and in bad faith during the 2008 tariff review process.<sup>263</sup> (Emphasis added.)

In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, [...] the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.<sup>264</sup> (Emphasis added.)

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260 See para. 59 and section IV.A.1.

261 Award, para. 454.

262 See paras. 160, 162.

263 Award, para. 321.

264 Award, para. 664.

The Arbitral Tribunal therefore concludes that Resolution No. 144-2008 is inconsistent with the Regulatory Framework. [...] [T]he CNEE acted arbitrarily and in breach of the administrative process established for the tariff review.<sup>265</sup> (Emphasis added.)

The Arbitral Tribunal finds that such repudiation of the two fundamental regulatory principles applying to the tariff review process is arbitrary and breaches elementary standards of due process in administrative matters. Such behavior therefore breaches Guatemala's obligation to grant fair and equitable treatment under article 10.5 of CAFTA-DR.<sup>266</sup> (Emphasis added.)

199. But nowhere in the Award is there an examination of the terms “arbitrariness” or “due process” under international law. Nor did the Tribunal explain how the facts in this case could be characterized as being arbitrary or lacking in due process.
200. For example, the Tribunal does not even refer to the now classic definition of arbitrariness by the International Court of Justice in the *ELSI* case, which Guatemala cited in the Arbitration Proceedings:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [...].<sup>267</sup>

Thus, the Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an “arbitrary” act.<sup>268</sup>

201. Arbitrariness is not something to be assumed lightly. In their submissions, the State members of CAFTA-DR emphasized this point.<sup>269</sup> Arbitrariness, as explained in the

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<sup>265</sup> Award, para. 681.

<sup>266</sup> Award, para. 711.

<sup>267</sup> *Elettronica Sicula S.p.A. (ELSI)* Judgment, ICJ Reports, 1989, p. 15, **Exhibit RL-1**, para. 128.

<sup>268</sup> *Elettronica Sicula S.p.A. (ELSI)* Judgment, ICJ Reports, 1989, p. 15, **Exhibit RL-1**, para. 129.

<sup>269</sup> For example, the Dominican Republic expressed the view that the minimum level of treatment would be violated by “A manifest arbitrariness or questionable arbitrariness inconsistent to the legal and administrative policies or procedures so as to constitute a repudiation of the objective and goals of the policy, among others” and that, in order for there to exist a violation of that standard under CAFTA-DR, “only manifestly arbitrary behavior, blatant unfairness and very egregious actions may be claimed [...]”

*ELSI* decision, refers to acts which not only breach national law but also show disregard for the principles of the rule of law – in other words, the principle that all public authorities are subject to the rule of law. There is no arbitrariness when acts, even if censurable, have been performed on the basis of an effective legal system providing appropriate judicial remedies.

202. The lack of definition and analysis of the test applicable in international law permeates the entire Award. For example, the Tribunal does not define why the behaviour of the CNEE, even if it was in breach of the Regulatory Framework (for example, due to Resolution 144-2008 not being sufficiently reasoned, which is the basis for the Tribunal’s decision), was also arbitrary under international law. This analysis, which would be essential to an understanding of the Tribunal’s decision, is nowhere to be found. The Tribunal simply concluded that there was arbitrariness, without defining the standard of arbitrariness under international law and thus without applying international law to the facts.
203. To sum up, the Tribunal committed serious omissions and shortcomings in reasoning also in relation to the decision on the merits. It did not define the test of applicable international law, nor, therefore, how that test applies to the facts of the case. Consequently, the Award does not give the reasons on which the Tribunal based its decision.

### **3. The manifest contradiction regarding the possibility of reviewing the decisions of the Constitutional Court**

204. As stated above,<sup>270</sup> the highest Guatemalan court, the Constitutional Court, ruled that the CNEE had not breached the Regulatory Framework.<sup>271</sup>

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and not just simply arbitrariness or mere breach” (Non-Disputing Party Submission of the Dominican Republic, paras. 6 and 8). The Republic of El Salvador noted, for its part, that State practice had not shown that “conduct that is merely arbitrary constitutes a breach of the Minimum Standard of Treatment” (Non-Disputing Party Submission of the Republic of El Salvador, para. 15).

270 See paras. 47-49 and section IV.A.2.

271 See paras. 47-49.

205. In its decision of 18 November 2009<sup>272</sup> regarding Resolution 144-2008,<sup>273</sup> the Constitutional Court concluded that the CNEE acted within the scope of its jurisdiction and that it “followed the process regulated by law.”<sup>274</sup> It also held that the Expert Commission report was not binding, did not require the CNEE to adopt a corrected Bates White study to set the tariff and could instead use the Sigla study for this purpose.
206. In its decision of 24 February 2010<sup>275</sup> the Constitutional Court concluded also that Resolution 144-2008 was issued in accordance with the law,<sup>276</sup> that the Expert Commission issued a non-binding report, and also that the Expert Commission was lawfully dissolved after issuing its report.<sup>277</sup>
207. Hence the Constitutional Court had examined all the aspects of the CNEE’s regulatory conduct and its compatibility with Guatemalan law. Further, the Tribunal acknowledged in the Award that “[t]his Tribunal’s task is not and cannot be to review the findings made by the courts of Guatemala under Guatemalan law.”<sup>278</sup>
208. In spite of this, the Tribunal then asserted as follows:

[T]he Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the Regulatory Framework is based [...] would constitute a breach of the minimum standard.<sup>279</sup>

209. This is in plain contradiction with the assertion that the Tribunal could not review the decisions of the Constitutional Court: how could the Tribunal consider whether “the CNEE willfully disregarded the fundamental principles of the Regulatory

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<sup>272</sup> Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**.

<sup>273</sup> CNEE Resolution 144-2008, 29 July 2008, **Exhibit R-95**.

<sup>274</sup> Judgment of the Constitutional Court, 18 November 2009, **Exhibit R-105**, p. 31.

<sup>275</sup> Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**.

<sup>276</sup> Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, pgs. 27-28.

<sup>277</sup> Judgment of the Constitutional Court, 24 February 2010, **Exhibit R-110**, p. 32 (emphasis added).

<sup>278</sup> Award, para. 477 (emphasis added).

<sup>279</sup> Award, paras. 458.

Framework,”<sup>280</sup> without reviewing the Constitutional Court’s decisions that already ruled out that disregard? The contradiction is manifest.

210. The contradiction continues throughout the Award. The Tribunal’s decision on the merits is based on CNEE Resolution 144-2008. The Tribunal acknowledged that the Constitutional Court’s decision of 18 November 2009 resolved the dispute regarding that Resolution: “in a majority decision dated November 18, 2009, the Constitutional Court reversed the judgment of the second civil court of first instance, thus putting an end to the judicial proceedings against Resolution No. 1444-2008.”<sup>281</sup> However, in spite of this and the Tribunal’s self-proclaimed prohibition to review the Constitutional Court decisions, it found Guatemala responsible precisely because Resolution 144-2008 allegedly breached the Regulatory Framework:

In the Arbitral Tribunal’s view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission’s report, and in unilaterally imposing a tariff based on its own consultant’s VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.<sup>282</sup> [...] (Emphasis added.)

211. Thus, the Tribunal also concluded that Guatemala’s administrative decisions were not taken in accordance with the law, reversing further findings of the Constitutional Court of Guatemala:

The Arbitral Tribunal also considers that the regulator’s decision to apply its own consultant’s study does not comport with Article 98 of the RLGE. (Emphasis added.)

As a matter of fact, in order for the regulator’s decision to comport with Article 98, it should have said that the distributor failed to correct its study according to the pronouncements of the Expert Commission, or explained why

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280 Award, para. 481.

281 Award, para. 233.

282 Award, para. 664.

the regulator decided not to accept the Expert Commission's pronouncements.<sup>283</sup>

212. The Award is therefore patently inconsistent. On the one hand it states that decisions of the Constitutional Court cannot be reviewed, but then it condemns Guatemala because of a CNEE Resolution (Resolution 144-2008) that the Court expressly stated was in accordance with the Regulatory Framework. The result is that the Award is plainly contradictory, and this amounts to a lack of reasoning, and failure to state reasons.

**4. The lack of reasoning and manifest contradiction regarding the decision on damages for historical losses**

213. The decision according to which Guatemala's actions violated its obligation to accord fair and equitable treatment is based upon Resolution 144-2008, in which the CNEE considered the Expert Commission's report as non-binding, rejected the Bates White study and decided to rely on the Sigla study to establish the tariffs.<sup>284</sup>
214. The Tribunal found that the violation was not in the fact that the CNEE had made these decisions, but rather that the CNEE had not provided sufficient reasons for such decisions. In the Tribunal's words:

In the Arbitral Tribunal's view, in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, and in unilaterally imposing a tariff based on its own consultant's VAD calculation, the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters.

In so doing, the CNEE in fact repudiated the two fundamental principles upon which the tariff review process Regulatory Framework is premised [...].

[...]

The CNEE, once it had received the Expert Commission's report, should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reason to consider that such

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283 Award, paras. 679-680.

284 Award, para. 711.



conclusions were inconsistent with the Regulatory Framework, in which case it had the obligation to provide valid reasons to that effect. However, no such reasons were provided.<sup>285</sup> (Emphasis added.)

215. According to the Tribunal, the CNEE should have given more explanations as to why the Expert Commission's report could not be given greater consideration, particularly to correct the Bates White study instead of using the Sigla study.
216. However, the Tribunal concluded that the Expert Commission report was not binding.<sup>286</sup> It follows that CNEE was not under any obligation to accept either the Expert Commission's report or Bates White's study revised in July 2008 allegedly to incorporate (unilaterally) the Expert Commission report, i.e. the Bates White July 2008 Study.
217. The Tribunal appeared concerned solely by the fact that the CNEE did not sufficiently analyse the Expert Commission's report before taking its decision. Especially since, from the Tribunal's point of view, the CNEE failed to state reasons upon which it took the decision.<sup>287</sup>

The Arbitral Tribunal is of the view that, although the conclusions of the Expert Commission were not binding in the sense that it had no adjudicatory powers, the CNEE nevertheless had the duty, under the Regulatory Framework, to give them serious consideration and to provide valid reasons in case it decided to depart from them.<sup>288</sup> (Emphasis added)

218. In other words, had the CNEE paid sufficient consideration to the report of the Expert Commission, and had it provided sufficient reasons to depart from it and from the Bates White study and adopt the Sigla study instead, there would have been no breach of the Treaty. This is so because, as confirmed by the Tribunal, there was no absolute obligation under the Regulatory Framework for the CNEE to follow the Expert

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285 Award, paras. 664, 665 and 683.

286 Award, para. 565

287 Award, para. 683

288 Award, para. 565

Commission report and even less the Bates White study that constituted one party's unilateral interpretation of the conclusions of the Expert Commission.

219. However, in the damages section of the Award, the Tribunal contradicts this decision. The Tribunal determines TGH's compensable historical losses by calculating the net income that EEGSA lost due to the fact that the CNEE used the Sigla study in lieu of the Bates White 28 July 2008 Study, which supposedly incorporated the Expert Commission's pronouncements to set the tariffs.<sup>289</sup>

The amount of such losses must be quantified in the "but for" scenario discussed by the Parties, on the basis of what the tariffs should have been had the CNEE complied with the Regulatory Framework. As said in § 728 above, such assessment is properly made on the basis of the Bates White's July 28, 2008 study. The Arbitral Tribunal has accepted the Claimant's views on the three issues that are in dispute in respect of that study (i.e. the VNR, the FRC and the CAPEX). As a consequence, the Arbitral Tribunal accepts the Claimant's claim for its historical losses of US\$21,100,552.<sup>290</sup>

220. This reasoning plainly contradicts the merits decision. The Tribunal states repeatedly throughout the Award that the CNEE was not bound by the Expert Commission's report or the Bates White study.<sup>291</sup> Yet damages are calculated on the contrary assumption that that report and study were fully binding. This means that Guatemala must ultimately pay for consequences of conduct that was not found to be in breach of the Treaty. In other words, given the conclusion that the Tribunal reached on liability, the Tribunal could never have quantified damages based upon a tariff study, that of Bates White, that the Tribunal itself specified was not binding. There is a clear contradiction.
221. This is a major logical leap in the reasoning of the Tribunal which cannot be condoned. The situation is similar to that in *Pey Casado v Chile*, where the committee annulled the award for contradictory reasoning and failure to state reasons. The tribunal's error was that it accepted the damages calculation based on the claim for expropriation while at the

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289 Award, paras. 728, 742

290 Award, para. 742

291 Award, paras. 531, 533, 542, 545, 563, 565, 588

same time rejected the expropriation claim because it “was outside the temporal scope of the BIT.”<sup>292</sup> In the committee’s own words:

The Tribunal’s use of the expropriation-based damage calculation is manifestly inconsistent with its decision a few paragraphs earlier that such an expropriation-based damage calculation is irrelevant and that all evidence and submissions relevant to such a calculation could not be considered.<sup>293</sup>

222. This is plainly applicable here: there is an obvious inconsistency between the decision on the merits of TGH’s claim and the damages decision.
223. The annulment committee in *MINE v Guinea* was also clear that “the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the tribunal on points of fact and law.”<sup>294</sup> In the case at hand, any reader is unable to understand why the Tribunal calculated damages on the basis of a tariff study, that of Bates White, that the CNEE was never under an absolute obligation to apply to set the tariffs.
224. This patent contradiction and inconsistency amount to a failure to state reasons requiring the annulment of the Tribunal’s decision on damages.

##### **5. Failure to state reasons for the decision on costs**

225. In accordance with article 61(2) of the ICSID Convention and Rule 28(1) of the Rules, the Tribunal had the power to determine the costs of the arbitration and their distribution between the parties.
226. However, it is impossible to understand the reasoning of the Tribunal on costs. Firstly, TGH stated that its costs in the arbitration, a short one (about 2.5 years of proceedings from start to the post-hearing briefs) without any bifurcation of jurisdictional issues,

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<sup>292</sup> *Victor Pey Casado and Foundation “Presidente Allende” v Chile* (ICSID Case No. ARB/98/2) Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **Exhibit RL-80**, para. 282.

<sup>293</sup> *Victor Pey Casado and Foundation “Presidente Allende” v Chile* (ICSID Case No. ARB/98/2) Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **Exhibit RL-80**, para. 285.

<sup>294</sup> *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) Decision on Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08

were more than US\$10 million. The Tribunal, without any explanation held that these costs were “justified” and “appropriate”.<sup>295</sup> It made no attempt whatsoever to use the obvious benchmark of Guatemala’s own legal costs to determine reasonableness, which were approximately 50 per cent of TGH’s costs even though Guatemala had constituted a similar legal team of international and local legal counsel.

227. Secondly, the Tribunal ordered Guatemala to pay 75 per cent of such costs. However, in investment arbitration practice, it is unusual for one party to be ordered to pay the other party’s costs,<sup>296</sup> unless there are “exceptional circumstances.”<sup>297</sup> This was not an exceptional case. There was no misconduct on the part of Guatemala during the proceedings.

228. Nevertheless, the Tribunal still decided that Guatemala should pay 75 per cent of TGH’s costs on the basis of the principle that costs follow the event. However, even if this principle were to apply, there is no possible correlation between such principle and the amount of costs that Guatemala was ordered to pay. TGH failed in most of its substantive claims, including those based on legitimate expectations, changes in the Regulatory Framework, reprisals against EEGSA’s executives, and many others.<sup>298</sup> TGH prevailed only in one of such claims; that based on arbitrariness and lack of due process with respect to the CNEE Resolution 144-2008. More importantly, on damages, TGH prevailed in less than 10 per cent of its claim. It claimed US\$243.6 million<sup>299</sup> and

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<sup>295</sup> Award, para. 775.

<sup>296</sup> For example, *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Award, July 7 2011, **Exhibit RL-81**, para. 296; *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, June 19 2007, **Exhibit RL-82**, para. 125; *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3) Award, May 19 2010, **Exhibit RL-83**, para. 62.

<sup>297</sup> In most cases in which one party was ordered to pay the costs of the other party, the decision was based on serious or improper conduct by the former. For example, *Europe Cement Investment and Trade SA v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, August 13 2009, **Exhibit RL-84**, paras. 182-186; *Phoenix Action Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, April 15 2009, **Exhibit RL-85**, paras. 148-152; *ADC Affiliate Limited. and ADC & ADMC Management Limited. v. Republic of Hungary* (ICSID Case No. ARB/03/16) Award, October 2 2006, **Exhibit RL-86**, para. 537.

<sup>298</sup> Award, paras. 638, 650, 652, 657, 715.

<sup>299</sup> Reply, para. 321; Claimant’s Post-Hearing Brief, para. 203. Specifically, Claimant requested US\$21.1 million as “*historical losses*”, i.e. for the period between August 2008, when the new tariff was approved,

obtained US\$21,100,552.<sup>300</sup> Indeed, TGH has also challenged the award in clear evidence of its own view that it has lost the arbitration. Similarly, the Tribunal recognised that Guatemala had been largely successful in the case.<sup>301</sup>

229. Thus the application of 75 per cent of TGH's costs to Guatemala, when Guatemala's position on the merits was upheld in most respects and Guatemala managed to reduce the compensation claimed by 90 per cent, is totally inconsistent with the Tribunal's decision to apply the costs follow the event principle. It makes no sense under the principle of costs follow the event or any other principle. A clear demonstration of the lack of proportion of the costs imposed upon Guatemala is that the costs that Guatemala is ordered to pay represent about 35 per cent of the total compensation awarded by the Tribunal and one of the highest costs awards ever found against a state in ICSID history.
230. In sum, the Tribunal did not explain why TGH's costs were considered reasonable and incurred in clear contradictions and inconsistencies in applying the principle that costs follow the event. This amounts to a failure to state reasons requiring the annulment of the Tribunal's decision on costs.

## **6. Conclusion on the failure to state reasons**

231. The Tribunal failed to state reasons for its decisions on jurisdiction and on the merits, and in plainly contradicting itself in relation to the Constitutional Court decisions. This failure to state reasons requires the annulment of the totality of the Award.
232. On jurisdiction the real analysis of the objection *ratione materiae* raised by Guatemala, the Treaty provision establishing it, the fundamental basis of the claim and the test *prima facie*, are all issues absent from the Award. The Tribunal's reasoning is incomprehensible because it appears to rely on TGH's own characterisation of the claim, but that amounts to the Tribunal's abdication of its adjudicatory function.

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and October 2010, when TGH sold its investment; and US\$222.5 million for the period from that date until the expiration of the concession (*See* Award, paras. 335-336, 340).

300 Award, para. 780.

301 Award, para. 778.

233. On the merits the absence of international law analysis is such that any objective and neutral reader cannot understand ultimately how the alleged domestic law breach becomes an international law breach. Further, even the Tribunal's finding on the existence of a domestic law breach is inexplicable given that the Constitutional Court of Guatemala had ruled out the existence of such a breach, and the Tribunal admitted that it could not and would not reverse such decisions. The contradiction is manifest and is another failure to state reasons.
234. Another instance of contradictory reasoning is the manner in which the Tribunal calculated TGH's historical losses. Such calculation was based on the premise the CNEE should have set the tariffs on the basis of the Expert Commission's report and the Bates White study. However, the Tribunal's decision on liability excludes such obligation of the CNEE; the Treaty breach lies in the failure by the CNEE to provide sufficient motivation for not using the Expert Commission's report and the Bates White study. Thus, the decision on damages amounts to condemning Guatemala to pay for conduct that the Tribunal did not consider unlawful. This is an absurd and a ground for annulment for failure to state reasons, requiring a partial annulment of the Award, specifically referred to the decision on historical damages.
235. Finally, the decision on costs is also unmotivated. Not only there is no examination of the reasonableness of TGH's costs. Also Guatemala is ordered to pay 75 per cent of TGH's costs, in spite of the fact that Guatemala prevailed on most substantive issues and clearly on damages, reducing the claim by 90 per cent. This failure to state reasons requires the annulment of the cost decision of the Award.

**C. THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE**

236. An award may be annulled on the ground that the Tribunal seriously departed from a fundamental rule of procedure. Rules of procedure should not be understood as referring only to the ICSID Arbitration Rules, but to rules of a fundamental nature, such as the

principles of natural justice, which include the parties' right to be heard and to have equal opportunity to present their cases.<sup>302</sup>

237. The seriousness of the departure by the Tribunal from a fundamental rule of procedure has been interpreted by reference to the importance of such departure for the outcome of the case.<sup>303</sup> As the *Wena v Egypt* committee put it:

In order to be a “serious” departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed. In the words of the ad hoc Committee's Decision in the matter of MINE, “the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.”<sup>304</sup> (Emphasis added.)

238. In the present case, the Tribunal committed a serious departure from a fundamental rule of procedure when it ignored evidence submitted by Guatemala on damages. Such evidence, on the basis of the Tribunal's own reasoning, would have been crucial for the decision on damages for historical losses.
239. As a consequence, the Tribunal decided on damages solely on the basis of the TGH's expert evidence. It did so because, in its opinion, Guatemala had not presented an expert report assessing the tariff that would have applied had the CNEE adopted entirely the Expert Commission's report to define the VAD:

It is however undisputed that, in correcting the Bates White May 2008 study, Mr. Damonte disregarded the Expert

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<sup>302</sup> *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No. ARB/06/7) Decision on Annulment, 16 September 2011, **Exhibit RL-87**, para. 59.

<sup>303</sup> *Victor Pey Casado and Foundation “Presidente Allende” v Chile* (ICSID Case No. ARB/98/2) Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, **Exhibit RL-80**, para. 76. See also *Consortium RFCC v. Kingdom of Morocco* (ICSID Case No. ARB/00/6) Decision on Annulment, 18 January 2006, para. 278 **Exhibit RL-78**; *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment 29 June 2005, **Exhibit RL-58**, para. 49; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), 1 September 2009, **Exhibit RL-59**, para. 234; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/01/10) Decision on the Application for Annulment, 8 January 2007, **Exhibit RL-88**, para. 81.

<sup>304</sup> *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on Annulment, 5 February 2002, **Exhibit RL-64**, para. 58.

Commission's pronouncements on at least one important question, i.e. the FRC. [...]

Because the May 2008 study as corrected by Mr. Damonte departs from the Expert Commission's pronouncement on this important question, the Arbitral Tribunal cannot usefully refer to it as a basis for the but for scenario.

As a consequence, the Arbitral Tribunal will work on the basis of the July 28, 2008 version of the study, and assess whether Respondent's criticism to such study and the resulting but for scenario are reasonable on each of the three main areas of disagreement. [...].<sup>305</sup> (Emphasis added.)

240. However, this is incorrect. Mr. Damonte, Guatemala's expert in the proceedings on electricity tariff reviews, did present in his expert reports a scenario considering the application of the Expert Commission to establish the tariff (including the much debated issue of the FRC, or "*factor de recuperación de capital*"). Such study is contained in Damonte's two expert reports and presented in Guatemalas' Post-Hearing Brief.<sup>306</sup> Following Mr. Damonte's calculations, the resulting alleged damage for historical losses would have been reduced.<sup>307</sup> The Tribunal failed to consider all of this. Instead, the Tribunal directly applied TGH's calculations, and by doing so it failed to consider the evidence before it and to accord due process of law to Guatemala.
241. Thus, the Tribunal disregarded arguments and evidence produced by Guatemala which had a direct bearing on the valuation of the alleged historical losses of TGH. This omission constitutes "a serious departure from a fundamental rule of procedure" under article 52 (1) (d) of the ICSID Convention.

## V. REQUEST FOR RELIEF

242. For all the reasons explained, Guatemala respectfully requests the Committee:

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<sup>305</sup> Award, paras. 726-728.

<sup>306</sup> Damonte, **Apendix RER-2**, para. 188 and Table 5; Direct examination of Mario Damonte, slide 16, Tr. (English), Day Six, 1414:7-1415:15, Damonte; Respondent's Post-Hearing Brief, para. 194.

<sup>307</sup> Memorial on Objections to Jurisdiction and Counter-Memorial, para. 618.



- (a) To ANNUL the Award in its entirety or any part thereof in exercise of the Committee's power;;
- (b) To ORDER TGH to pay all costs of these annulment proceedings, including the costs of Guatemala's legal representation, with interest.

243. In addition, Guatemala reiterates its request for a stay of enforcement of the Award pending the decision on annulment.

Respectfully submitted,



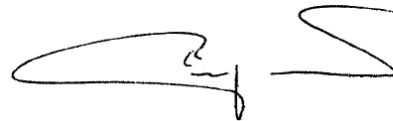
Nigel Blackaby



Alejandro Arenales



Alfredo Skinner Klée



Rodolfo Salazar