INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TECO GUATEMALA HOLDINGS, LLC

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID CASE NO. ARB/10/23

CLAIMANT'S MEMORIAL

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1 September 2017

CLAIMANT'S MEMORIAL

TABLE OF CONTENTS

CLAIMANT'S MEMORIAL

I. INTRODUCTION

1. Claimant TECO Guatemala Holdings, LLC ("TECO" or "Claimant") hereby submits its Memorial in accordance with the procedural schedule established by the Tribunal.[1] Claimant's Memorial is supported by the Third Expert Report of Brent C. Kaczmarek, valuation and damages expert and Managing Director of Navigant Consulting, Inc.[2]

II. SUMMARY OF THE DISPUTE, THE AWARD, AND THE ANNULMENT DECISION

A. Factual Background

1. To Attract Foreign Investment In Its Failing Electricity Sector, Guatemala Adopted A New Legal And Regulatory Framework, Which Guaranteed Both A Depoliticized Tariff Review Process and Fair Returns For Electricity Distributors

2. In the early 1990s, Guatemala faced a serious crisis in its electricity sector, arising in part from the dual role played by the *Instituto Nacional de Electrificación* ("INDE"), which, at that time, was the entity primarily responsible for the generation, transmission, and distribution of electricity throughout Guatemala.[3] As both the regulator and the regulated entity, INDE had no incentive to operate efficiently, and failed to generate an electricity supply that sufficiently met demand.[4] In order to address this crisis and to improve the operating standards of its

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[1] *See* Procedural Order No. 1 dated 4 Apr. 2017, §15, Annex A; Procedural Order No. 3 dated 22 May 2017.

[2] Third Expert Report of Brent C. Kaczmarek dated 1 Sept. 2017 (hereinafter "Kaczmarek III"). Mr. Kaczmarek also served as quantum expert for TECO in the original arbitration, in which he provided expert testimony in two written expert opinions and at the hearing. *See* First Expert Report of Brent C. Kaczmarek dated 23 Sept. 2011 ("Kaczmarek I"); Second Expert Report of Brent C. Kaczmarek dated 24 May 2012 ("Kaczmarek II").

[3] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award of 19 Dec. 2013 ("Award") ¶¶ 80-82; *see also* TECO's Memorial dated 23 Sept. 2011 ("Memorial (Original Arbitration)") ¶¶ 11-12.

[4] Award ¶ 82; *see also* Memorial (Original Arbitration) ¶ 12.

electricity sector, Guatemala decided to privatize certain assets in that sector, including its largest electricity distribution company, Empresa Eléctrica de Guatemala S.A. ("EEGSA").[5]

3. In 1990, the then President of Guatemala Jorge Serrano thus requested, through the U.S. Agency for International Development ("USAID"), a study of privatization options for EEGSA, which was issued by Price Waterhouse in January 1991.[6] As that study concluded, it was too early for Guatemala to privatize EEGSA at that time due to four main factors: (i) EEGSA's continued dependence on State subsidies; (ii) the lack of adequate regulatory mechanisms for the electricity sector; (iii) the low privatization price that EEGSA would attract due to its condition at the time; and (iv) EEGSA's reliance on INDE, which created significant risks of State intervention.[7] Price Waterhouse further advised that, "[u]ntil a regulatory scheme was established for EEGSA . . . investors would be hesitant to invest in EEGSA;"[8] that the "regulatory scheme" adopted by Guatemala "will directly [affect] the way [investors] will value EEGSA's shares, because it will determine EEGSA's potential profitability;" and that "[v]aluations [of EEGSA's shares] will vary depending on the regulatory scheme that is assumed."[9] In view of EEGSA's long history of poor financial and technical performance, as well as the lack of any stable regulatory regime in Guatemala, Price Waterhouse estimated that, in 1991, the net asset value of Guatemala's 91.7 percent shareholding in EEGSA was worth approximately Q297.8 million (US$ 59.6 million), while a valuation based upon EEGSA's earnings indicated a much lower value of approximately Q69.6 million (US$ 13.9 million).[10]

4. In order to attract much needed foreign investment in EEGSA and to maximize its privatization proceeds, Guatemala thus began considering ways of restructuring its electricity sector more broadly, and, with the help of USAID, hired Chilean consultants Juan Sebastián Bernstein and Jean Jacques Descazeaux to prepare a report for restructuring and deregulating the

[5] Award ¶ 83; *see also* Memorial (Original Arbitration) ¶¶ 11, 14-15.

[6] Award ¶ 83; Price Waterhouse, *Estudio de la Empresa Eléctrica de Guatemala* dated 11 Jan. 1991 (C-1001).

[7] Price Waterhouse, *Estudio de la Empresa Eléctrica de Guatemala* dated 11 Jan. 1991, Executive Summary (C-1001).

[8] *Id*. at 17.

[9] *Id*. at 17.

[10] *Id.* at 26.

electricity sector.[11] In their 1993 USAID study, Messrs. Bernstein and Descazeaux concluded that, in order to encourage "the participation of private external investors in competitive generation and distribution," Guatemala must have "objective rules which define the parties' obligations and rights, thus preventing the arbitrary intervention of regulatory entities."[12]

5. Based upon these and other recommendations, Guatemala undertook to establish a new legal and regulatory framework for its failing electricity sector, which would unbundle and depoliticize the generation, transmission, and distribution of electricity, and establish the conditions necessary to attract foreign investment.[13] On 16 October 1996, the Congress of the Republic of Guatemala adopted the General Electricity Law ("LGE"), which set forth new rules for regulating electricity tariffs and created a new regulatory body for the electricity sector, the *Comisión Nacional de Energía Eléctrica* ("CNEE").[14] Shortly thereafter, as contemplated in the LGE,[15] the President of Guatemala and the Ministry of Energy and Mines ("MEM") issued regulations (the "RLGE") relating to the LGE on 21 March 1997.[16]

6. Following the enactment of the LGE and RLGE, Guatemala sought to attract and to induce foreign investment in EEGSA by promoting its new legal and regulatory framework to the foreign electricity companies that it had targeted for EEGSA's privatization, including the TECO group of companies,[17] through various promotional materials, including a Road Show presentation, a Preliminary Information Memorandum, and a Memorandum of Sale.[18] As these

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[11] Award ¶¶ 87-89.

[12] Juan Sebastián Bernstein and Jean Jacques Descazeaux, Restructuring The Power Sector in Guatemala: Analysis of Decentralization and Private Participation Mechanisms, Final Report dated June 1993, at 34 (C-1002); *see also* Award ¶ 90.

[13] Award ¶¶ 91-94.

[14] Decree No. 93-96, General Electricity Law dated 16 Oct. 1996 ("LGE") (C-1003); *see also* Award ¶¶ 95-112.

[15] LGE, Section VII, Transitory Provisions, Ch. 1, Art. 4 ("Within a period of ninety (90) days counted from the date of publication of this law, the Executive Branch shall issue the regulations of the same.") (C-1003).

[16] Government Resolution No. 256-97, Regulations of the General Electricity Law dated 21 Mar. 1997 ("RLGE") (C-1004); *see also* Award ¶ 113.

[17] Award ¶ 126; Empresa Eléctrica de Guatemala, S.A., Investors' Profiles dated 17 Feb. 1998, at 7, 9 (C-1007).

[18] Award ¶¶ 124-131; Empresa Eléctrica de Guatemala S.A., Preliminary Information Memorandum prepared by Salomon Smith Barney dated Apr. 1998 ("Preliminary Information Memorandum") (C-1006); Empresa

materials emphasized, the new legal and regulatory framework adopted by Guatemala guaranteed both a depoliticized tariff review process and fair returns for electricity distribution companies, such as EEGSA, by limiting the role of the regulator in the calculation of a key component of the distributor's tariff, the so-called value added for distribution ("VAD"),[19] which is the portion of the electricity tariff through which the distributor recoups its investment and makes its profit,[20] and by adopting the model efficient company approach using the new replacement value of the assets ("VNR") for calculating the distributor's VAD.[21]

7. Specifically, Guatemala represented that EEGSA's VAD would be recalculated every five years by EEGSA based upon a VAD study prepared by an external engineering firm prequalified by the CNEE and selected by EEGSA; that the CNEE's authority during the VAD-calculation process would be limited to reviewing and making observations on EEGSA's VAD study; and that any differences between the CNEE and EEGSA regarding that study would be resolved by a three-person Expert Commission appointed by the parties.[22] As Guatemala noted in the Memorandum of Sale, "VADs *must be calculated by distributors* by means of a study commissioned [by] an engineering firm," and the CNEE "will review those studies and *can make observations*, but in the event of discrepancy, a Commission of three experts will be convened *to resolve the differences*."[23] LGE Articles 74 and 75 thus provided that "[e]ach distributor shall calculate the VAD components through a study entrusted to an engineering firm prequalified by the [CNEE]," and that the CNEE "shall review the studies performed and may make comments on the same," but, "[i]n case of differences made in writing," the CNEE and the distributor shall

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Eléctrica de Guatemala S.A., Memorandum of Sale prepared by Salomon Smith Barney dated 1998 ("Sales Memorandum") (C-1007); Empresa Eléctrica de Guatemala S.A., Roadshow Presentation dated May 1998 ("Roadshow Presentation") (C-1008).

[19] Award ¶¶ 106-109.

[20] *See id.* ¶¶ 99-101. The VAD thus compensates the distributor for both operating costs (*i.e.*, costs incurred in distributing electricity) and capital costs (*i.e.*, the financial cost of capital). *See id.*; *see also* Kaczmarek I ¶¶ 71-83.

[21] Award ¶¶ 100-103; Kaczmarek I ¶¶ 10, 80-81.

[22] *Id.* ¶¶ 106-112; LGE, Arts. 74-77 (C-1003); Sales Memorandum, at 49 (C-1007); Roadshow Presentation, at 19 (C-1008); Preliminary Information Memorandum, at 9 (C-1006).

[23] Award ¶ 132 (emphasis added); Sales Memorandum, at 49 (emphasis added) (C-1007).

agree on the appointment of a three-person Expert Commission, which "shall rule on the differences in a period of 60 days counted from its appointment."[24]

8. Guatemala also represented that EEGSA's VAD was to be calculated through the model efficient company approach, whereby EEGSA's regulatory asset base would be determined using the VNR method.[25] As Guatemala explained in the Memorandum of Sale, under the LGE and RLGE, "the tariff for a given distribution company is not equal to the costs it incurs, but to the 'market' costs inherent in distribution, which result from the theoretical costs of a highly-efficient 'model company.'"[26] As LGE Article 71 states, "[t]he VAD is the average cost of capital and operation of a distribution network of a benchmark efficient company operating in a given density area."[27] This meant that EEGSA's VAD was to be calculated off of the regulatory asset base of a hypothetical model efficient company. Furthermore, LGE Article 73 provides that the average cost of capital "shall be calculated as the constant annuity of cost of capital corresponding to the *New Replacement Value* of an economically sized distribution network."[28] EEGSA's VAD thus was to be calculated off of a regulatory asset base of a model efficient company whose assets were *new*, rather than off of EEGSA's actual assets, which were dilapidated and in need of significant investment.[29]

9. In order to convert the return on the VNR into cash flow for the distributor, the VNR is multiplied by the capital recovery factor ("FRC").[30] The FRC contains both a return of capital and return on capital portion.[31] Article 73 of the LGE provides that the return of capital

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[24] LGE, Arts. 74, 75 (C-1003); Award ¶¶ 107, 110, 119; *see also* RLGE, Art. 98 ("If discrepancies between the Commission and the Distributor persist, the procedure stipulated in article 75 of the Law shall be followed. The cost of this contracting shall be covered by the Commission and the Distributor in equal parts.") (C-1004).

[25] *See* Sales Memorandum, at 10 (C-1007); Preliminary Information Memorandum, at 9 (C-1006); *see also* Roadshow Presentation, at 19 (C-1008).

[26] Sales Memorandum, at 49 (C-1007).

[27] LGE, Art. 71 (C-1003); Award ¶ 99.

[28] LGE, Art. 73 (C-1003) (emphasis added); *see also* Award ¶ 102.

[29] *See* LGE, Art. 67 (C-1003) ("The New Replacement Value is the cost involved in building the works and physical assets of the authorization with the technology available on the market to provide the same service."); Award ¶ 103.

[30] Kaczmarek I ¶¶ 49-56, 79; *see also* Kaczmarek III ¶¶ 84-95.

[31] Kaczmarek I ¶¶ 56, 76-79; *see also* Kaczmarek III ¶¶ 89-92.

portion of the FRC is calculated based on the estimated useful life of the assets, which in many cases is in the range of 30 years.[32] This allows the distributor to recover the full value of the regulatory asset base (or the VNR) over the life of the assets.[33] For the return on capital portion of the FRC, LGE Article 79 provides that this should be equivalent to the distributor's weighted average cost of capital ("WACC"), but in no case should be lower than 7 percent or higher than 13 percent in real terms (*i.e.*, adjusted for inflation).[34] This cost of capital is applied to the VNR to obtain the distributor's return on capital or profit.[35] Guatemala specifically represented that, while electricity tariffs historically "have been low, which has severely stunted the distributor's potential for gains . . . . The Law addresses this particular issue, empowering the companies (INDE and EEGSA) to fix tariffs by reference to market prices."[36] Assuming that the distributor performed as a model efficient company, the LGE thus entitled EEGSA to achieve a profit equivalent to its WACC, in the range of 7 to 13 percent.

2. The TECO Group Of Companies Invested In EEGSA In Reliance Upon The Guarantees And Protections Provided By This Legal And Regulatory Framework

10. In reliance upon Guatemala's representations and its new legal and regulatory framework, the TECO group of companies decided to invest in EEGSA as part of a consortium comprised of Iberdrola Energía, S.A. ("Iberdrola"), a Spanish utility company; TPS de Ultramar Guatemala, S.A. ("TPS"), an indirect, wholly-owned Guatemalan company within the TECO group of companies; and Electricidade de Portugal, S.A. ("EDP"), a Portuguese utility company

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[32] LGE, Art. 73 ("The cost of capital per unit of power shall be calculated as the constant annuity of cost of capital corresponding to the New Replacement Value of an economically sized distribution network. The annuity will be calculated with the typical useful life for distribution facilities and the discount rate that is used in calculation of the rates.") (C-1003); Kaczmarek I ¶¶ 82, 116; *see also* Kaczmarek III ¶¶ 95, 129.

[33] Kaczmarek I ¶ 82; *see also* Kaczmarek III ¶ 129.

[34] LGE, Art. 79 ("In any event, if the discount rate should be less than an annual real rate of seven percent or greater than an annual real rate of thirteen percent, the latter values, respectively, will be used.") (C-1003); Kaczmarek I ¶ 77; *see also* First Expert Report of Rodolfo Alegría Toruño dated 22 Sept. 2011 ("Alegría I") ¶ 25; Kaczmarek III ¶ 90; First Witness Statement of Leonardo Giacchino dated 23 Sept. 2011 ("Giacchino I") ¶ 6.

[35] Kaczmarek I ¶¶ 50, 77; First Witness Statement of Carlos Manuel Bastos dated 21 Sept. 2011 ("Bastos I") ¶ 20; *see also* Kaczmarek III ¶¶ 83, 90; Giacchino I ¶ 6.

[36] Sales Memorandum, at 49 (C-1007).

(collectively, the "Consortium").[37] Pursuant to the Terms of Reference for the public offering, the Consortium had established an investment company in Guatemala, Distribución Eléctrica Centro-Americana S.A. ("DECA"), to purchase EEGSA's shares.[38]

11. On 30 July 1998, after being prequalified by Guatemala and obtaining analyses of EEGSA's future cash flows based upon the new legal and regulatory framework, the Consortium submitted its bid of US$ 520 million for 80 percent of EEGSA's shares, and was declared the winner of the auction, beating the second highest bid of US$ 475 million from a consortium formed by a subsidiary of Enron Corporation, a U.S. energy company, and Union Fenosa, a Spanish utility company.[39]

12. By adopting the legal and regulatory framework that it did, Guatemala thus was able to obtain substantial privatization proceeds for the sale of its shareholding in EEGSA, even though EEGSA's network was deteriorated and in need of significant investment.[40] Had Guatemala adopted a legal framework in which tariff rates were based upon EEGSA's actual assets and costs, rather than the new replacement value of the assets of a model company, the sale of EEGSA would have generated significantly less revenue.[41]

3. EEGSA's VAD For The First Two Tariff Periods Post-Privatization Were Set In Accordance With The Legal Framework

13. The Sales Memorandum for EEGSA represented that EEGSA's first tariff post-privatization would not be calculated in accordance with the model efficient company approach set out in the newly-adopted LGE and RLGE; rather, the CNEE would rely upon a VAD taken

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[37] Award ¶ 135; *see also* Memorial (Original Arbitration) ¶ 45.

[38] Award ¶ 3; Empresa Eléctrica de Guatemala S.A., Terms of Reference dated May 1998, Art. 3.2 (C-1009). In 1999, DECA merged with EEGSA, and Iberdrola, TPS, and EDP formed a new company, Distribución Eléctrica Centro-Americana Dos, S.A. ("DECA II"), incorporated in Guatemala, to hold their shares in EEGSA. *See* Award ¶¶ 5-7, 140; TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up dated July 1999 (C-1010).

[39] Award ¶ 138; Empresa Eléctrica de Guatemala S.A., Notarized Minutes of the Award dated 30 July 1998, at 2 (C-1011).

[40] Award ¶¶ 93-95, 124-140; Memorial (Original Arbitration) ¶ 62.

[41] Memorial (Original Arbitration) ¶ 62.

from a country that applied a similar regulatory framework, such as Chile, Peru, or El Salvador.[42] The CNEE accordingly adopted a VAD for EEGSA calculated by reference to a VAD study of electricity distribution companies in El Salvador prepared by the engineering firm Synex.[43] The Synex study recommended that EEGSA's pre-privatization tariff rates be increased gradually over a two-year period.[44] In addition to saving the time necessary to conduct a full VAD study, the CNEE's decision to delay the implementation of the VAD-setting mechanism set forth in the LGE and RLGE appears to have been motivated by a desire to provide the Guatemalan public with a transition period to slowly adjust to higher electricity rates.[45] As explained by Claimant's witnesses and experts in the original arbitration proceedings (the "Original Arbitration"), El Salvador proved to be a poor benchmark.[46] Although TECO and its partners invested significant funds into improving and expanding EEGSA's network during this period,[47] the 1998-2003 VAD did not adequately compensate them, as EEGSA's return on invested capital ("ROIC") was as low as 4 percent and did not exceed 6 percent during this tariff period, and, thus, was below the lower bound of the 7 to 13 percent range established by the LGE.[48]

14. EEGSA's second tariff review for the 2003-2008 tariff period was the first tariff review conducted pursuant to the criteria set forth in the LGE and RLGE, and was conducted by the CNEE in a spirit of collaboration and cooperation.[49] EEGSA hired NERA, a consulting firm that had been prequalified by the CNEE, to prepare its VAD study.[50] During the course of the tariff review, the CNEE made several observations on NERA's VAD study; NERA, in turn,

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[42] Sales Memorandum, at 49 (C-1007).

[43] Synex, *Assessment of Electric Power Tariffs at a Generational Level- Transmission and Distribution in Guatemala* dated 27 May 1997 (C-1012); Kaczmarek I ¶ 86; *see also* Kaczmarek III ¶ 99; Giacchino I ¶ 5.

[44] Synex, *Assessment of Electric Power Tariffs at a Generational Level - Transmission and Distribution in Guatemala* dated 27 May 1997, at 165 (C-1012); *see also* Kaczmarek I ¶ 86; Kaczmarek III ¶ 99.

[45] Kaczmarek I ¶ 86; *see also* Kaczmarek III ¶ 15.

[46] Kaczmarek I ¶ 124; First Witness Statement of Gordon L. Gillette dated 23 Sept. 2011 ("Gillette I") ¶ 17; *see also* Kaczmarek III ¶ 138; Giacchino I ¶ 5 n.3.

[47] Kaczmarek I, Appendix 3.b; Gillette I ¶ 17; *TECO Power Services Corp. Distribution Companies Activities, Board Book Write-up* dated Apr. 2004, at 2-29 (C-1013); *see also* Kaczmarek III ¶ 106.

[48] Kaczmarek I ¶¶ 95-96, Figure 10; *see also* Kaczmarek III ¶¶ 108, 109, Figure 11.

[49] Award ¶¶ 144-148; *see also* Memorial (Original Arbitration) ¶¶ 72-83.

[50] Memorial (Original Arbitration) ¶ 72.

revised its VAD study to incorporate some of CNEE's comments and, in other instances, the CNEE withdrew some observations after discussions with NERA.[51]

15. One issue of initial disagreement between NERA and the CNEE was the FRC formula. The CNEE had proposed an annuity formula, whereby the VAD payment would remain constant over the tariff term, but the return of capital would increase over time, whereas the return on capital would decrease over time – akin to a mortgage formula.[52] As Mr. Giacchino testified in the Original Arbitration, although NERA objected that this formula would not permit EEGSA to fully recover its capital invested (to the extent that the formula was reset during each tariff period), it ultimately agreed to use the CNEE's formula in its revised study,[53] which calculated a VNR of US$ 584 million and produced a revenue stream for EEGSA of US$ 110 million annually.[54] The CNEE accepted the revised study, and, on 31 July 2003, published decrees setting EEGSA's tariffs in accordance with the study for the period covering 2003 to 2008.[55]

[51] Memorial (Original Arbitration) ¶¶ 74-80; *see, e.g.*, Letter No. CNEE-4748-2003, GT-NotaS-398 from R. Urdiales to L. Giacchino and F. Calleja dated 4 July 2003 (C-1015); Letter No. CNEE-4614-2003, GT-NotasS-377 from R. Urdiales to L. Giacchino and F. Calleja dated 16 June 2003 (C-1016); Letter No. CNEE-3687-2003, GT-NotaS-267 from R. Urdiales to L. Giacchino and F. Calleja dated 3 Mar. 2003 (C-1017). As Mr. Giacchino testified in the Original Arbitration, "[i]n some cases, after discussion, the CNEE withdrew its objection. In all instances, we were able to reach agreement with the CNEE as to what, if any, changes needed to be made on any particular point." Giacchino I ¶ 11.

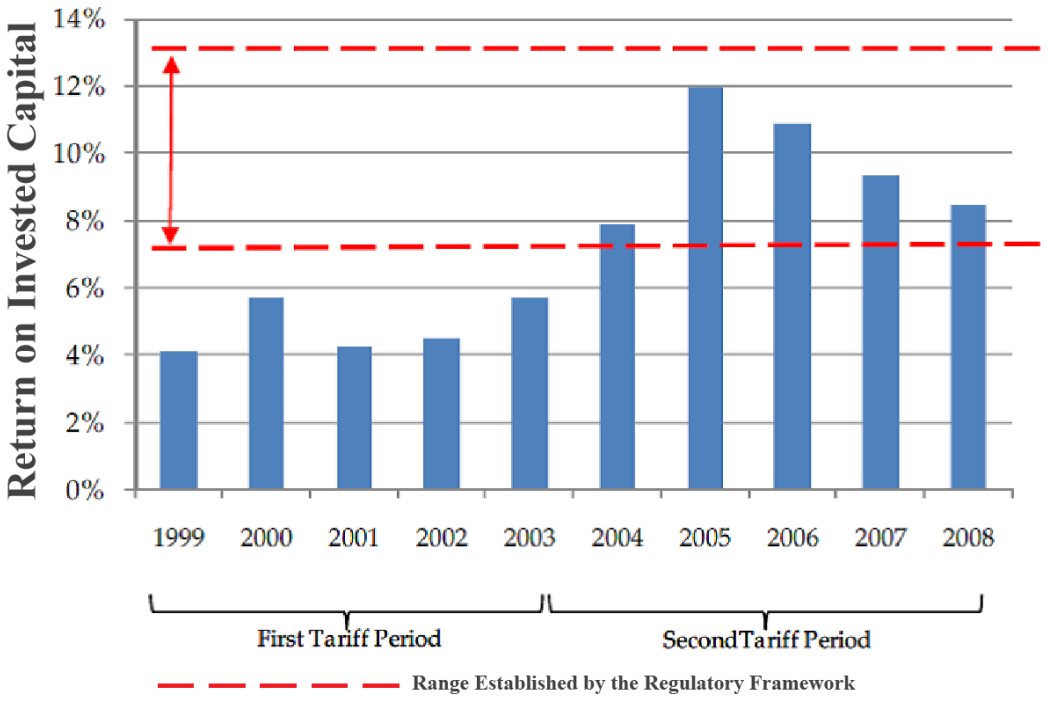
[52] Kaczmarek I ¶ 89; *see also* Memorial (Original Arbitration) ¶ 77; Giacchino I ¶ 13 (citing NERA, Report Stage E: Distribution Added Value and Energy and Power Balance dated 30 July 2003, at 11-15 (C-1018)).

[53] Giacchino I ¶ 13 (noting that EEGSA "agreed to use the annuity formula to calculate the FRC as long as the ultimate calculation of the VAD resulted in a revenue stream of at least US$ 110 million"); NERA, Report Stage E: Distribution Added Value and Energy and Power Balance dated 30 July 2003, Art. III, Chart 2 (C-1018); Kaczmarek I ¶ 90.

[54] Memorial (Original Arbitration) ¶ 79; *see also* NERA, Report Stage E: Distribution Added Value and Energy and Power Balance dated 30 July 2003, Art. III, Chart 2 (C-1018); Giacchino I ¶¶ 13, 73.

[55] *Comisión Nacional de Energía Eléctrica*, Resolution No. CNEE-66-2003 dated 30 July 2003 (C-1019); *Comisión Nacional de Energía Eléctrica*, Resolution No. CNEE-67-2003 dated 1 Aug. 2003 (C-1020); *see also* Memorial (Original Arbitration) ¶ 79; Gillette I ¶ 18; Giacchino I ¶ 13.

16. The VAD for the 2003-2008 tariff review period resulted in increased revenue and cash flows for EEGSA. As shown in the bar graph below, during every year of this second tariff period, EEGSA's ROIC fell within the range of 7 to 13 percent provided by the LGE.[56]



4. EEGSA's Tariff Review For The 2008-2013 Tariff Period Was Conducted In An Unlawful, Arbitrary, And Non-Transparent Manner, To Obtain The Lowest VAD

17. By the time of EEGSA's tariff review for the third tariff period (2008-2013), the President of the CNEE was replaced by Mr. Carlos Colom, a then 27 year-old with no prior experience in electricity distribution and the nephew of Álvaro Colom, who would be elected President of Guatemala in September 2007.[57] During this tariff review, the newly-comprised CNEE deliberately and arbitrarily disregarded the regulatory framework put in place by the LGE

[56] Kaczmarek I ¶ 96, Figure 10 (Y-axis labels and note added by Counsel); *see also* LGE, Art. 79 (setting the minimum and maximum real rate of return at 7% and 13%, respectively) (C-1003); Gillette I ¶ 19 (stating that, "[a]lthough still below the expected level that the company required to invest in DECA II, the cumulative returns did start approaching the 8% range of utility returns in the U.S. during the second VAD period").

[57] *See* Tr. (4 Mar. 2013) 1064:3-1065:13, 1089:17-22 (Colom); *see also* TECO's Post-Hearing Brief dated 10 June 2013 ("TECO's Post-Hearing Brief") ¶ 200.

and RLGE, as well as the process it had followed during EEGSA's prior tariff review, in order to achieve the outcome that it wanted, namely, an unjustified sharp reduction in EEGSA's VAD and resulting tariffs.[58]

18. At the time of EEGSA's 2008-2013 tariff review, several factors indicated that EEGSA's VAD would increase significantly, including that EEGSA's network had grown considerably; the cost of materials used in electricity distribution, such as copper and aluminum, had far outpaced the rate of inflation from 2003 to 2008; and electricity prices had increased, requiring the use of wider, more expensive cables to decrease electricity losses.[59] In order to prevent an inevitable increase in EEGSA's VAD, the CNEE undertook from the beginning of EEGSA's 2008-2013 tariff review to manipulate and to control its outcome, culminating in the CNEE's arbitrary and unjustified rejection of EEGSA's tariff study and the rulings of an Expert Commission that had been convened to resolve the parties' differences regarding that study, and the unlawful approval of the CNEE's own VAD study, which neither EEGSA nor its prequalified consultant even had an opportunity to review.[60]

19. Specifically, shortly before EEGSA's 2008-2013 tariff review was scheduled to commence, Guatemala amended RLGE Article 98 to allow the CNEE to rely upon its own VAD study in certain limited circumstances to calculate the distributor's VAD, a possibility not contemplated in the LGE or RLGE.[61] Guatemala, moreover, excluded this amendment from the drafts of proposed amendments to the LGE and RLGE that it circulated to the electricity industry for comment, thereby preventing EEGSA and other distributors from raising any objections before it went into effect.[62] This amendment subverted the requirement in LGE Article 74 that the distributor calculate the VAD through its own consultant prequalified by the CNEE, and introduced the possibility for the very first time that the CNEE could calculate the distributor's

[58] *See* Award ¶¶ 153-230, 224-226, 266-317.

[59] *See* TECO's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility dated 24 May 2012 ("Reply (Original Arbitration)") ¶ 313; Giacchino ¶ 80.

[60] Award ¶¶ 163-164, 185-186, 224-226, 314-317.

[61] *Id.* ¶¶ 120-121, 625; Government Resolution No. 68-2007 dated 2 Mar. 2007, Art. 21 (amending RLGE Art. 98) (C-1021).

[62] Reply (Original Arbitration) ¶ 99.

VAD itself on the basis of its own VAD study.[63] According to its terms, however, the newly-adopted regulation only gave the CNEE the ability to perform its own VAD study and to rely upon that study in two limited circumstances: (i) where the distributor fails to submit a VAD study; and (ii) where, after the distributor submits a VAD study and the CNEE has made observations on the same, the distributor fails to respond to the CNEE's observations by correcting its VAD study in accordance with the observations or indicating its disagreement with the CNEE's observations in writing.[64]

20. On 30 April 2007, after Guatemala had amended RLGE Article 98, the CNEE issued Terms of Reference for EEGSA's 2008-2013 tariff review ("ToR"), which, in Article 1.9, granted the CNEE unlimited discretion to declare EEGSA's VAD study as "not received," if it disagreed with the results, thereby allowing itself to unilaterally calculate the distributor's VAD based upon its own VAD study under newly-amended RLGE Article 98.[65] EEGSA challenged these ToR before the Guatemalan courts,[66] and obtained a provisional protection of its constitutional rights ("*amparo*"), as well as the temporary suspension of the ToR.[67] In order to persuade EEGSA to withdraw its provisional *amparo*, the CNEE subsequently agreed to amend certain objectionable provisions in the ToR, including Article 1.9.[68] Although EEGSA was able to reach agreement with the CNEE on several issues, the ToR still contained numerous objectionable articles regarding the manner in which EEGSA's VAD was to be calculated. As a condition for withdrawing its provisional *amparo*, EEGSA therefore insisted on the addition of a new Article 1.10, which, in accordance with the hierarchy of legal norms under Guatemalan law, expressly provided that the ToR were "guidelines to follow in preparation of the Study," and thus

[63] *See* Award ¶¶ 107, 522, 524-526; Reply ¶ 250.

[64] *See* Award ¶¶ 120-121, 625, 633.

[65] *Id.* ¶¶ 153-155; Memorial (Original Arbitration) ¶ 99.

[66] Award ¶¶ 157-158.

[67] *Id.* ¶ 159.

[68] *Id.* ¶¶ 159, 165-170.

were subject to and did not amend the LGE or RLGE, and that EEGSA's consultant could deviate from the ToR, if it provided a reasoned justification for doing so.[69]

21. After EEGSA and the CNEE reached agreement on Article 1.10, the CNEE issued a revised ToR in January 2008, which included for the very first time a formula for calculating the FRC (the FRC, as noted above, being the mechanism that converts the VNR into cash flow payments to the distributor).[70] As confirmed by the CNEE's own internal emails, the FRC formula was devised by Mr. Jean Riubrugent of Mercados Energéticos, one of the CNEE's consultants, for the express purpose of achieving the lowest tariff.[71] As recommended by Mr. Riubrugent, the FRC formula used the steady-state model applied in Brazil, rather than the VNR method adopted by Guatemala.[72] In particular, contrary to the express requirement in LGE Article 67 that the distributor's VAD be "calculated based on the *New* Replacement Value of the optimally designed facilities,"[73] the formula calculated EEGSA's return off of a regulatory asset base that had been depreciated by 50 percent.[74] Understandably, believing that there must have been a typographical error in the CNEE's formula, EEGSA's prequalified consultant, Bates White (whose team was led by Mr. Leonardo Giacchino, the same consultant who had led NERA's team in EEGSA's prior tariff review),[75] applied the FRC formula disregarding a "2" that appeared in the denominator of the formula.[76] In its observations on EEGSA's VAD study, the CNEE maintained that its FRC formula was correct, but did not explain that it was applying the steady-state model used in Brazil, rather than the VNR method adopted by Guatemala, or

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[69] *Id.* ¶¶ 169, 303; 2007 Terms of Reference dated Jan. 2008, Art. 1.10 (C-1022).

[70] Award ¶¶ 169, 303, 392; Terms of Reference dated Jan. 2008, Art. 8.3 (C-1022).

[71] Award ¶¶ 161, 164; Reply (Original Proceeding) ¶ 139; Sigla, Supporting Report for the Representative of the CNEE before the Experts Commission dated 27 May 2008 (C-1023); Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 (C-1024); Email chain between M. Peláez and J. Riubrugent dated 18 June 2008 (C-1025); Email from J. Riubrugent to M. Quijivix dated 11 July 2008 (C-1026); Email chain between M. Quijivix, A. Brabatti, and J. Riubrugent dated 23 June 2008 (C-1027); Email from J. Riubrugent to M. Quijivix dated 7 July 2008 (C-1028).

[72] Email chain from J. Riubrugent to M. Peláez, M. Quijivix, M. Perez Yat, and A. Garcia dated 13 Dec. 2007 (C-1029).

[73] LGE, Art. 67 (emphasis added) (C-1003).

[74] Award ¶¶ 177, 225.

[75] Memorial (Original Arbitration) ¶¶ 66, 72; *see also* Giacchino I ¶ 1.

[76] Memorial (Original Arbitration) ¶ 159.

otherwise acknowledge that its formula resulted in calculating EEGSA's VAD off of a depreciated asset base.[77]

22. Following a bid process, the CNEE entered into a contract with the consultancy Sigla-Electrotek ("Sigla") on 12 November 2007 to prepare its own VAD study for EEGSA, more than four months before EEGSA was even due to deliver its VAD study to the CNEE.[78] In the Original Arbitration, Guatemala argued that this VAD study was to be used both as a benchmark and as an "escape valve," which could be adopted by the CNEE, if EEGSA's VAD study did not comply with the regulatory framework.[79] Although the CNEE and its consultants had worked directly with EEGSA and its prequalified consultant during EEGSA's 2003-2008 tariff review, the CNEE held only one meeting with EEGSA and Bates White during EEGSA's 2008-2013 tariff review to discuss EEGSA's Stage A Report, following which neither the CNEE nor its consultants submitted any comments for several months.[80] Bates White nonetheless finished all nine stage reports on time, and EEGSA delivered the complete VAD study, along with revised versions of each stage report, to the CNEE on 31 March 2008, as scheduled.[81]

23. That VAD study calculated a VNR of US$ 1,695 million.[82] The increase in the VNR from the prior tariff period was attributable to the fact that the cost of constructing a distribution network had increased by 54 percent, well in excess of the inflation rate;[83] to the inclusion of the cost of working capital in the 2008 VNR calculation;[84] to an increase in electricity prices caused by rising oil prices, which required either the use of wider, more

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[77] *Id.* ¶ 159.

[78] *Comisión Nacional de Energía Eléctrica*, Accord No. CNEE 116-2007 dated 27 July 2007 (publishing a request for a firm to assist the CNEE in preparing its own VAD study) (C-1030); Contract No. 11-189-2007 between the CNEE and Sigla dated 12 Nov. 2007 (C-1031); *see also* Alegría I ¶ 69.

[79] Guatemala's Post-Hearing Brief dated 10 June 2013 ("Guatemala's Post-Hearing Brief") ¶ 218.

[80] Award ¶¶ 171-174.

[81] *Id.* ¶ 185.

[82] Bates White Stage D Report: Annuity of the Investment dated 31 Mar. 2008, at 24 (C-1032); *see also* Bates White Stage G Report: Components of the VAD Costs and Consumer Charge dated 31 Mar. 2008 (C-1033); Giacchino I ¶¶ 29, 31.

[83] Kaczmarek I ¶¶ 105-106.

[84] Kaczmarek I ¶ 107; *see also* Giacchino I ¶ 78.

expensive cables to decrease electricity losses or the use of narrower and cheaper cables, but factoring in increased technical losses of electricity;[85] and to an increase in the size of EEGSA's network, as EEGSA had laid more than 1,000 kilometers of new lines and its customer base had increased by 23 percent.[86] In addition, Guatemala's new safety standards required a model company to utilize more underground, rather than overhead, lines as compared with the prior tariff period.[87]

24. Although the CNEE had two months under amended RLGE Article 98 to analyze that study, to accept or reject it, and to provide its observations, on 11 April 2008 – only eleven days after EEGSA had delivered its VAD study – the CNEE issued Resolution No. 63-2008, through which it declared EEGSA's VAD study "inadmissible," and advised that EEGSA "must perform the corrections to same pursuant to the [CNEE's] observations" therein "within a term of 15 days."[88] On 5 May 2008, Bates White submitted its revised VAD study to the CNEE, as required, responding to the totality of the CNEE's observations in Resolution No. 63-2008, either by revising its study to incorporate those comments or by explaining the reasons that justified their exclusion under Article 1.10 of the ToR.[89] This revised VAD study calculated EEGSA's VNR as US$ 1,301 million, a decrease of US$ 394 million from its March VAD study;[90] this decrease was due almost entirely to reducing the number of underground lines, pursuant to the CNEE's observations.[91] Because, however, Bates White did not accept all of the CNEE's observations in Resolution No. 63-2008, and because the CNEE did not accept Bates White's

[85] Kaczmarek I ¶ 109; *see also* Giacchino I ¶ 80.

[86] Kaczmarek I ¶ 111; *see also* Giacchino I ¶ 77.

[87] Kaczmarek I ¶ 98; Bates White Stage C Report: Optimization of the Distribution Grid dated 31 Mar. 2008, at 43, Table 15 (C-1034); *see also* Giacchino I ¶ 30.

[88] Award ¶ 186; *Comisión Nacional de Energía Eléctrica*, Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 3 (C-1035).

[89] Award ¶ 188.

[90] Bates White Stage D Report: Annuity of the Investment dated 5 May 2008, at 34 (C-1036); *see also* Bates White Report Stage G: VAD Cost Components and Consumer Charges dated 5 May 2008 (C-1037); Giacchino I ¶ 29.

[91] Kaczmarek I ¶ 99; Bates White Stage C Report: Network Optimization dated 5 May 2008, at 73-76 (C-1038); *Comisión Nacional de Energía Eléctrica*, Resolution No. CNEE-63-2008 dated 11 Apr. 2008, at 9 (C-1035) ("[T]he following corrections must be made: . . . 2. Exclude the underground installations contemplated in the Study. . . ."); Memorial (Original Arbitration) ¶ 122; *see also* Giacchino I ¶¶ 30-31.

justifications under Article 1.10 of the ToR, discrepancies persisted between the parties, which were to be resolved by an Expert Commission as required under LGE Article 75.[92] On 15 May 2008, the CNEE thus issued Resolution No. CNEE-96-2008, notifying EEGSA that discrepancies persisted between the parties with regard to its VAD study, and calling for the establishment of an Expert Commission to "decide on the discrepancies," which had been identified therein.[93]

25. Four days after the CNEE called for the establishment of an Expert Commission to resolve the discrepancies between the parties, the Government enacted RLGE Article 98 *bis*, which granted the Government the right to select the presiding member of the Expert Commission, if the parties failed to agree on the selection within three days.[94] This amendment subverted the requirement in LGE Article 75 that the third member of the Expert Commission be appointed "by mutual agreement" of the parties and the objective of the LGE and the Expert Commission process in particular, which was to provide a depoliticized tariff review process and an independent means of resolving disputes between the regulator and the distributor with respect to the calculation of the distributor's VAD.[95] Following the enactment of RLGE Article 98 *bis*, the CNEE attempted to apply this Article retroactively to EEGSA's tariff review, and relented only after EEGSA threatened to bring a legal action in the Guatemalan courts.[96]

26. Immediately after the CNEE called for the establishment of an Expert Commission, the CNEE and EEGSA also began negotiating the operating rules that would govern the Expert Commission's procedure.[97] One of the main areas of disagreement at that time was who would review EEGSA's revised VAD study, after the Expert Commission had

[92] Award ¶ 190; LGE, Art. 75 (C-1003); Amended RLGE, Art. 98 (C-1039).

[93] Award ¶¶ 192-193; Resolution No. CNEE-96-2008 dated 15 May 2008, at 3 (C-1040).

[94] Award ¶ 195; Government Resolution No. 145-2008 dated 19 May 2008, Art. 1 (C-1041).

[95] Award ¶¶ 110, 195; Memorial (Original Arbitration) ¶ 267.

[96] Award ¶¶ 308-309; Memorial (Original Arbitration) ¶ 135. In the Original Arbitration, Guatemala took the position that RLGE Article 98 *bis* was intended solely to fill a lacuna in circumstances where the parties fail to reach agreement upon the presiding member of the Expert Commission, and that, in any event, the appointment of the third member of the Expert Commission pursuant to RLGE Article 98 *bis* would have to be made from a list of candidates provided by both parties. *See* Award ¶¶ 401-402.

[97] Award ¶¶ 192-193, 197.

rendered its decisions on the discrepancies, to ensure that it fully incorporated the Expert Commission's rulings—the CNEE or the Expert Commission—as this issue is not expressly regulated by the LGE or RLGE.[98] Given the CNEE's actions during the tariff review, including its attempt to subvert the Expert Commission's role by enacting Article 98 *bis*, EEGSA, with good reason, did not believe that the CNEE could be trusted to faithfully review EEGSA's VAD study to ensure that it comported with the Expert Commission's rulings. EEGSA thus proposed 12 operating rules,[99] including Rule 12, according to which the Expert Commission, and not the CNEE, would review and confirm that its decisions had been fully incorporated into EEGSA's revised VAD study.[100]

27. After discussing the operating rules for the Expert Commission, EEGSA and the CNEE proceeded to discuss the third member of the Expert Commission, and agreed to appoint Mr. Carlos Bastos, the former Secretary of Energy of Argentina.[101] On 6 June 2008, the Expert Commission thus was formally constituted, consisting of the CNEE's appointee, Mr. Riubrugent of Mercados Energéticos; EEGSA's appointee, Mr. Giacchino of Bates White; and Mr. Bastos as the third member of the Expert Commission by mutual agreement.[102] Although the members of the Expert Commission subsequently agreed to act independently and impartially, and to refrain

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[98] *Id.* ¶ 198; *see also* Memorial (Original Arbitration) ¶¶ 190-191.

[99] Although Claimant introduced evidence from the third member of the Expert Commission, Mr. Bastos, and the former president of the CNEE (a witness presented by Guatemala) that the operating rules had been agreed by the parties, the Original Tribunal "[found] no evidence in the record that [the] [o]perating [r]ules were ever agreed . . . ." *See* Bastos I ¶¶ 31-34; Second Witness Statement of Carlos M. Bastos dated 20 Apr. 2012 ("Bastos II") ¶¶ 2-6; Tr. (4 Mar. 2013) 1120:3-18 (Colom) ("[A.] . . . [W]e basically, said, well, we have no problem in you meeting here or there, or how long. [Q.] So some of those rules were [agreed], Procedural Rules . . . ? [A.] Yes. . . . [Q.] Yes, so you're [talking] in your statement about the ones that there was an agreement for. [A.] Yes, during the discussions. [Q.] So there was an agreement in connection with the Procedural Rules? [A.] Yes."); *id.* at 1121:4-7 ("[T]he agreement that we put forth in these meetings was oral . . . ."); Award ¶¶ 649-650; *see also* Claimant's Post-Hearing Brief dated 10 June 2013 ¶ 145.

[100] Memorial (Original Arbitration) ¶ 137; Email from M. Quijivix to M. Calleja dated 15 May 2008, attaching Operating Rules proposed by CNEE, at 2 (C-1043); Operating Rules proposed by EEGSA on 19 May 2008, Rule 14 (C-1042); Email from M. Calleja to L. Giacchino dated 28 May 2008, forwarding email from M. Quijivix to L. Maté and M. Calleja (C-1044); Email from M. Calleja to C. Bastos dated 2 June 2008 (submitting the Operating Rules for the Expert Commission) (C-1045); Bastos I ¶¶ 8-9; Bastos II ¶¶ 3-6; Tr. (1 Mar. 2013) 727:3-729:6 (Bastos); *see also* Giacchino I ¶ 36.

[101] Award ¶ 203.

[102] *Id.* ¶ 206; Notarized Record dated 6 June 2008, at 2-3, attached to Email from M. Quijivix (CNEE) to J. Riubrugent, L. Giacchino, and C. Bastos cc: M. Calleja dated 6 June 2008 (C-1046).

from communicating with the parties during the Expert Commission process, TECO submitted evidence showing that the CNEE and its appointee, Mr. Riubrugent, in violation of the experts' agreement, engaged in a series of *ex parte* communications.[103]

28. The Expert Commission members agreed among themselves to rule on the discrepancies in descending order according to the time it would take to revise the VAD study if the CNEE's objections to the study were upheld.[104] The Expert Commission members also agreed that the interim rulings could be disclosed to Bates White—but not to either EEGSA or the CNEE—so that it could begin revising the VAD study, as called for, while the Expert Commission continued deliberating on the other discrepancies.[105] TECO also submitted evidence showing that, in contravention of this express agreement, Mr. Riubrugent disclosed the Expert Commission's interim rulings, as well as its deliberations, to the CNEE.[106]

29. The Expert Commission concluded its mandate and issued its Report dated 25 July 2008. Although the Expert Commission decided certain discrepancies in favor of the CNEE, the majority of the discrepancies that had the most significant impact on the VNR and the VAD were decided by the Expert Commission in Bates White's favor.[107] In particular, the Expert Commission rejected many of the CNEE's observations to Bates White's study that, if they had been accepted, would have drastically lowered the VNR and would have cut by nearly half the return on the VNR that EEGSA could recover through the FRC.[108]

30. With respect to the VNR calculation, the Expert Commission agreed with Bates White that implementing the CNEE's positions would significantly understate the assets needed by a model efficient company to service EEGSA's area. The Expert Commission, for example, ruled in Bates White's favor regarding the proper methodology for calculating the demand

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[103] Award ¶¶ 312, 651.

[104] *See* Memorial (Original Arbitration) ¶¶ 144-146.

[105] *See* TECO's Post-Hearing Brief ¶ 148; Bastos II ¶¶ 11-12; *see also* Second Witness Statement of Leonardo Giacchino dated 24 May 2012 ("Giacchino II") ¶ 23.

[106] *See* TECO's Post-Hearing Brief ¶ 150; Bastos II ¶¶ 11-13; *see also* Giacchino II ¶ 23.

[107] *See* Reply (Original Arbitration) ¶¶ 161-164; Memorial (Original Arbitration) ¶¶ 158-164.

[108] *See* Bastos I ¶¶ 20-28; Memorial (Original Arbitration) ¶ 158; *see also* Giacchino I ¶¶ 54-62.

density in designing a model efficient grid.[109] Specifically, to determine the assets needed by a model efficient company to service the distributor's area, that area is first divided into zones characterized by density.[110] For each zone, a determination is made regarding the assets needed in a portion of that zone, and those results are extrapolated to calculate the total assets needed in the density zone.[111] The Expert Commission ruled that the methodology proposed by the CNEE for extrapolating the density of each zone had the effect of underestimating the assets needed to service the area and, therefore, undervaluing the VNR.[112] By contrast, the Expert Commission determined that the method used by Bates White in its study comported with the LGE because it led "to an optimally adapted grid."[113]

31. The Expert Commission also ruled that Bates White was correct in calculating costs using prices from 2007,[114] rather than updating 2006 prices for inflation as the CNEE had insisted.[115] Although the terms of reference provided that it was preferable that prices from the base year be used, defined the base year as 2006, and that these prices should be adjusted for inflation to make them current,[116] Bates White observed that because the study took place in 2008, 2007 prices for most materials were available.[117] Bates White further observed that because prices between 2006 and 2007 for materials used by distribution companies had increased by more than inflation, simply adjusting 2006 prices for inflation would have

[109] EC Report, Discrepancy A.2.a, Spatial Unbundling of the Demand, at 16-29 (C-1047); Bastos I ¶¶ 23-26.

[110] Bastos I ¶ 23.

[111] Bastos I ¶¶ 23-24.

[112] Bastos I ¶ 26; EC Report, Discrepancy A.2.a, Spatial Unbundling of the Demand, at 17 (C-1047).

[113] *Id.*

[114] EC Report, Discrepancy B.1.b, Age of the Prices, at 32-33 (C-1047); Bastos I ¶ 28; *see also* Giacchino I ¶ 57.

[115] EC Report, Discrepancy B.1.b, Age of the Prices, at 33 ("CNEE disagrees with the Study because it does not comply with what is established in the Terms of Reference, since most of the quote and purchases support documentation continue to correspond to transactions performed in the year 2007 and not to what is required in relation to the use of prices from the base year . . . .") (quoting CNEE observation) (C-1047).

[116] Resolution No. CNEE-124-2007 dated 9 Oct. 2007, Art. 1.2 (defining base year as 2006) (C-1048); *id.*, Art. 3.3 (stating preference for prices based on base year).

[117] EC Report, Discrepancy B.1.b, Age of the Prices, at 32 ("For the base year of a tariff review, typically, the last 12 months of available data are used. In the case of EEGSA, this practice implies using the year 2007, not 2006.") (quoting Bates White's observations) (C-1047).

undervalued the asset base, and thus the VNR, on which the distributor was to receive its return.[118] The Expert Commission adopted Bates White's approach and rejected the CNEE's efforts to artificially decrease the VNR.[119] As the Expert Commission noted, the purpose of the VAD study was "to determine the cost of replacement of the grid of that model company under study" and, thus, "the effective prices for all goods and services must be taken at the latest possible time."[120]

32. With respect to the FRC calculation that the CNEE and Mr. Riubrugent had devised for the express purpose of decreasing EEGSA's VAD and tariffs,[121] the Expert Commission determined that the CNEE had incorrectly equated the Ta and To variables in the FRC formula, which had the effect of depreciating EEGSA's VNR by 50 percent and cutting its return on capital by half.[122] The Expert Commission thus found that "[the CNEE's FRC formula] may not be used to calculate [the] VAD . . . since it . . . corresponds to half the [] amortization period, which would imply considering the Grid is at half its service life, whereas the legal provisions establish that the new replacement value of the Grid must be considered."[123] Instead, the Expert Commission decided upon an FRC formula that "calculates the capital cost [] taking into account that the grid the cost of which is being calculated must provide service for five years, until the next tariff review[.]"[124] The net effect of the Expert Commission's decision was to depreciate EEGSA's VNR by 7 percent rather than 50 percent.[125] This is because EEGSA's asset base was to be considered as new at the beginning of the tariff period, but the

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[118] EC Report, Discrepancy B.1.b, Age of the Prices, at 32 ("The market data show that the prices have increased considerably in dollars, since the prior tariff review, including during the last year. . . . [U]sing prices of the year 2006 as stated by CNEE for all the prices, does not reflect the market trends and delivers a poor project representation of costs for the tariff period 2008-2013.") (quoting Bates White's observations) (C-1047).

[119] EC Report, Discrepancy B.1.b, Age of the Prices, at 33, 36 (C-1047); *see also* Bastos I ¶ 28; Giacchino I ¶ 57 (C-1047).

[120] *Id.*

[121] Award ¶¶ 209, 224; *see also* TECO's Post-Hearing Brief ¶¶ 7, 76.

[122] EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 91-93 (C-1047).

[123] EC Report, Discrepancy D.1, Annuity of the Investment, Capital Recovery Factor, at 92 (C-1047).

[124] *Id.*

[125] *See* Kaczmarek I ¶ 121.

Expert Commission ruled that it would depreciate during the five-year tariff period:[126] EEGSA's return in year 2, for instance, would be calculated off of a tariff base that had depreciated over 1 year, whereas its return in year 3 would be calculated off of an asset base that had depreciated over 2 years. During each subsequent tariff period, however, the asset base would again be valued as if it were new. The table below compares the FRC formula, as determined by the Expert Commission, with the FRC formulas and their effective depreciation rates proffered by the CNEE and Bates White:[127]

1) **CNEE/Sigla**:	$FRC = (1/To) + \frac{r}{(1-g)} * .\ 50\%$
2) **Bates White:**	$FRC = (1/To) + \frac{r}{(1-g)} * \ 100\%$
3) **Expert Commission:**	$FRC = (1/To) + \frac{r}{(1-g)} * \ 93\%$

33. The next step in the process of setting the VAD and tariffs was for Bates White to revise and re-submit its VAD study in accordance with the Expert Commission's Report for the Expert Commission's review and approval, as set forth in the Operating Rules.[128] In its letter delivering the Report dated 25 July 2008, the Expert Commission thus requested that the CNEE and EEGSA notify Bates White of the Report so that Bates White could amend its VAD study as necessary to comply with each ruling.[129] Bates White promptly revised its study and delivered it

[126] Expert Commission's Report dated 25 July 2008, Discrepancy 5.D.1 (Annuity of the Investment, Capital Recovery Factor), at 89-93 (C-1047); *see also* Bastos I ¶¶ 20-22.

[127] Kaczmarek I ¶ 121 & Fig. 15.

[128] *See* Bastos I ¶ 29; Expert Commission's Report dated 25 July 2008, Section 4.2 (Operating Rules), at 10 (C-1047); *see also* Giacchino I ¶¶ 64-65.

[129] Letter from the Expert Commission to the CNEE and EEGSA dated 25 July 2008 (C-1049); Bastos I ¶ 29.

to the Expert Commission on 28 July 2008.[130] As Claimant's expert, Dr. Barrera of Frontier Economics testified in the Original Arbitration, each of the Expert Commission's rulings was incorporated into Bates White's revised model and VAD study.[131]

34. After the Expert Commission issued its Report, the CNEE, however, immediately proceeded to dissolve the Expert Commission unilaterally in an attempt to prevent it from reviewing and approving EEGSA's revised VAD study, on the alleged ground that the Expert Commission had completed its work.[132] Although EEGSA succeeded in obtaining an *amparo* from the Guatemalan courts ordering the CNEE to "comply in full with the decision of the Expert Commission" and to allow the Expert Commission "to conclude its work, especially the final review of the changes presented to the Expert Commission by the Firm Bates White,"[133] the First Civil Court of First Instance reversed itself by order of the same date, suddenly concluding that it was "unable to hear and decide the merits of the case," because EEGSA allegedly had not exhausted its administrative remedies.[134]

35. These actions led to uncertainty amongst the members of the Expert Commission, and, although Mr. Riubrugent indicated that he was "certain" that Bates White's revised VAD study dated 28 July 2008 had fully incorporated the Expert Commission's decisions on the discrepancies,[135] he refused to participate in the Expert Commission's review and approval of that study, after the CNEE issued a veiled threat warning him not to do so.[136] Despite the

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[130] Bates White Revised Study dated 28 July 2008 (C-1050 to C-1059); *see also* Bastos I ¶ 31; Memorial (Original Arbitration) ¶¶ 168-169.

[131] *See* Expert Report of Fernando Barrera-Rey dated 24 May 2012 ("Barrera"). The experts additionally demonstrated that each of the Expert Commission's rulings was correct and, in fact, the CNEE benefitted from a number of decisions "as to which a decision in favour of EEGSA would have been justified from an economic and engineering perspective." *Id.* ¶ 209.

[132] Award ¶¶ 209-213, 653; Notification Document dated 28 July 2008, enclosing CNEE Resolution No. GJ-Providencia-3121 dated 25 July 2008 (C-1060).

[133] Award ¶ 217; First Court of the First Civil Instance Decision dated 30 July 2008, at 2 (C-1061).

[134] Award ¶ 218; Resolution of the First Court of the First Civil Instance dated 30 July 2008 (C-1062).

[135] Memorial (Original Arbitration) ¶ 181; Email from J. Riubrugent to L. Giacchino and C. Bastos dated 29 July 2008 (C-1063).

[136] Award ¶ 219; *see also* Email Chain from J. Riubrugent to C. Bastos and L. Giacchino dated 30-31 July 2008 (C-1064) (transcribing the CNEE's instructions that Mr. Riubrugent "represent[s] CNEE within the Expert Commission," and that, "[o]nce the report has been delivered, [he] ha[s] no further responsibilities with

CNEE's interference, Messrs. Bastos and Giacchino met in Washington, D.C. to review and analyze Bates White's revised VAD study and concluded that Bates White had revised its VAD study in accordance with the Expert Commission's rulings on each discrepancy, and so advised the CNEE and EEGSA.[137]

36. As the CNEE's records confirm, the CNEE itself also reviewed and analyzed the Expert Commission's Report, and determined that setting EEGSA's VAD in accordance with the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD, and thus result in higher tariffs.[138] The CNEE concluded, among other things, that "[t]he decisions of the Expert Commission would tend to make significant changes [to] EEGSA's [VNR] by reducing it ([by] approximately 50%)," as compared with the VNR calculated by Bates White in its 5 May 2008 study, but that "it remains higher than the [VNR] of the CNEE's Independent Study" prepared by its consultant, Sigla; that "[t]he effect of the [Expert Commission's ruling on the FRC] formula increases the [VNR's] Annuity [by] 47% compared to the formula set forth in the ToR;" and that, "[a]ssuming that neither SIGLA's [VNR] nor the costs are changed and that the new [FRC] formula is applied, the [VAD] would be increased [by] approximately 25%."[139]

37. Having determined that complying with the Expert Commission's decisions would substantially increase EEGSA's VNR and VAD, the CNEE thus proceeded to disregard both the Expert Commission's decisions and EEGSA's 28 July 2008 revised VAD study, and to approve its own VAD study, which did not comply with the Expert Commission's decisions and which had never been reviewed by EEGSA or Bates White, as the basis for setting EEGSA's 2008-2013 VAD.[140]

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the parties and [his] contract shall be paid according to the scope and clauses thereof. Otherwise, it could be considered in Guatemala to be an overstepping of bounds.").

[137] Award ¶¶ 220-221; Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, *attached to* Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008 (C-1065); Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008, *attached to* Email from L. Giacchino to M. Quijivix (CNEE) and M. Calleja (EEGSA) dated 1 Aug. 2008 (C-1066).

[138] *See* Award ¶¶ 690-692; Reply (Original Arbitration) ¶ 174; Analysis of the Expert Commission Opinion (undated) (C-1067).

[139] Award ¶ 692; Analysis of the Expert Commission Opinion (undated), at 9 (C-1067).

[140] Award ¶¶ 222-224, 664-665.

38. By Resolution No. CNEE-144-2008 dated 29 July 2008, the CNEE, moreover, approved Sigla's VAD study on the purported basis that the Expert Commission's Report had confirmed that Bates White's VAD study *of 5 May 2008* (*i.e.*, the study that had been submitted to the CNEE *before* the establishment of the Expert Commission) had "failed to perform all the corrections pursuant to the [CNEE's] observations" in Resolution No. CNEE-63-2008 of 11 April 2008.[141] The CNEE thus took the position that the parties had appointed the Expert Commission not to resolve the discrepancies between the parties, but rather to determine solely whether Bates White had incorporated all of the CNEE's observations in its Resolution No. CNEE-63-2008 (which Bates White never had represented it had done), and that it made no difference whether the Expert Commission had ruled that some—or even all—of the CNEE's observations were contrary to the LGE and RLGE and/or otherwise unfounded.[142]

39. By Resolutions Nos. CNEE-145-2008 and CNEE-146-2008 dated 31 July 2008, the CNEE then proceeded to establish the tariffs and periodic adjustment formulas for EEGSA's customers, effective from 1 August 2008 to 31 July 2013, as calculated in Sigla's VAD study.[143]

40. Immediately following the CNEE's publication of EEGSA's new tariff schedules based upon Sigla's VAD study, which was in complete disregard of the Expert Commission's rulings, EEGSA filed administrative appeals with the CNEE challenging Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008, which the CNEE summarily rejected,[144] as well as *amparo* petitions for constitutional relief.[145] Although EEGSA prevailed

[141] *Id.* ¶ 223; Resolution No. CNEE-144-2008 dated 29 July 2008, at 3 (C-1068).

[142] Award ¶¶ 223, 551-552, 659.

[143] *Id.* ¶ 224; Resolution No. CNEE-145-2008 dated 30 July 2008, Art. I, at 3-4 (C-1069); Resolution No. CNEE-146-2008 dated 30 July 2008, Art. I, at 4 (C-1070).

[144] Award ¶ 227; EEGSA Appeal to Revoke Resolution No. CNEE-144-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 (C-1071); EEGSA Appeal to Revoke Resolution No. CNEE-145-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 (C-1072); EEGSA Appeal to Revoke Resolution No. CNEE-146-2008 dated 1 Aug. 2008, received by the CNEE on 4 Aug. 2008 (C-1073).

[145] Award ¶ 227; EEGSA *Amparo* Request against CNEE Resolution GJ-Providencia-3121 and Resolutions Nos. CNEE-144-2008, CNEE-145-2008, and CNEE-146-2008 dated 14 Aug. 2008 (C-1074).

before both the Second Civil Court and the Eighth Civil Court in the first instance,[146] the Constitutional Court, with two dissenting judges, subsequently reversed the lower courts' rulings, thus ending EEGSA's legal challenges.[147]

5. EEGSA's Unjustifiably Low VAD Was Economically Devastating, And Caused TECO To Sell Its Investment At A Substantial Loss

41. By approving Sigla's VAD study as the basis for setting EEGSA's 2008-2013 tariffs, the CNEE unilaterally reduced EEGSA's VAD by more than 45 percent and its revenue by approximately 40 percent.[148] In fact, in real terms (*i.e.*, adjusted for inflation), EEGSA's VAD was lower than the transitional VAD set for EEGSA during the first tariff period post-privatization,[149] as illustrated in the figure below. This defies economic logic and common sense, given the expansion of the network and the increase in the cost of constructing a distribution network over that 10-year period.[150]

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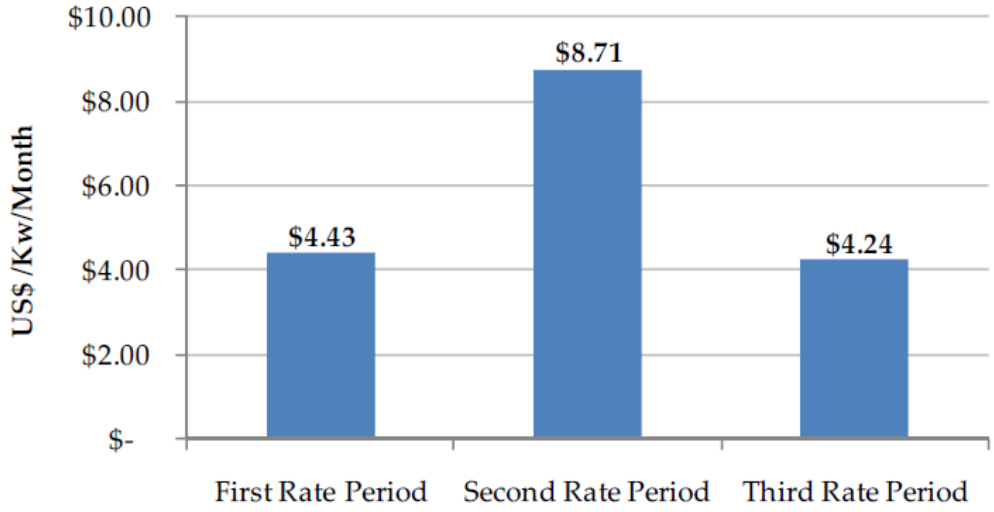
[146] *See* Award ¶ 232; Resolution of the Second Civil Court dated 15 May 2009 granting *Amparo* C2-2008-7964 (C-1025); Resolution of the Eighth Civil Court of First Instance regarding *Amparo* 37-2008 dated 31 Aug. 2009 (C-1076).

[147] *See* Award ¶¶ 233, 235; Resolution of the Constitutional Court regarding *Amparo* C2-2008-7964 dated 18 Nov. 2009 (C-1077); Resolution of the Constitutional Court regarding *Amparo* 37-2008 dated 24 Feb. 2010 (C-1140). Notably, although two Constitutional Court magistrates dissented from the Court's reversal of the Second Civil Court's grant of EEGSA's *amparo* petition regarding Resolution No. CNEE-144-2008, opining that the CNEE had violated LGE Article 75 and RLGE Article 98 when it issued Resolution CNEE-144-2008, these two magistrates were not chosen to hear the CNEE's appeal of the Eight Civil Court's grant of EEGSA's *amparo* petition regarding Resolution GJ-Providencia-3121, through which the CNEE had dissolved the Expert Commission. *See* Alegría I ¶ 80; Memorial (Original Arbitration) ¶¶ 216-218.

[148] *See* Award ¶¶ 212, 225-226; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 (C-1078); Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (C-1079); TECO's Post-Hearing Brief ¶ 79.

[149] Carlos E. Colom Bickford, President of the CNEE, Evolution of the Tariff Calculation Method in Guatemala, dated Apr. 2010, at 5 (C-1080); *see also* Kaczmarek I ¶¶ 123-124.

[150] Kaczmarek I ¶ 114.



42. The CNEE's actions in imposing Sigla's VAD on EEGSA required EEGSA to take drastic cost-cutting measures and led to downgrades of EEGSA by the two major and internationally-renowned rating agencies.[151] Indeed, in downgrading EEGSA, Standard & Poor's specifically blamed EEGSA's reduced tariffs, noting that the rating downgrade reflects the CNEE's announcement of the "applicable tariffs for the 2008-2013 period, establishing a value-added distribution (a component of the tariff that reimburses the distribution company for its investment) that is about 55% lower than EEGSA's tariffs for the previous period," and that "[t]his change will result in deteriorated profitability and cash flow measures as well as limited liquidity during the second half of 2008 and going forward."[152]

43. Moody's similarly observed that "[t]he rating action is driven by the anticipated material deterioration in the near term of EEGSA's credit metrics, in the wake of the August 2008 tariff decision by the Comision Nacional de Electricidad y Energia ('CNEE') regarding the reduction of the Value Added of Distribution-charge ('VAD-charge') by 45% and the subsequent

[151] *See* Award ¶¶ 212, 225-226; Standard & Poor's, "Empresa Eléctrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 (C-1078); Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (C-1079); TECO's Post-Hearing Brief ¶ 79.

[152] Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008, at 2 (C-1078).

disputes among the CNEE and EEGSA."[153] Moody's further noted that, while historically it "had considered the Guatemalan Regulatory framework to be relatively stable but still untested and developing,"[154] EEGSA's "VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework," and that, "[b]ased upon the results of the VAD-review process, EEGSA's financial profile will deteriorate substantially from historical results due to a material weakening in its ability to recover operating costs and generate a sufficient rate of return."[155]

44. In view of the significant financial losses that Guatemala's arbitrary and unfair treatment had caused to EEGSA, TECO and its partners searched for a purchaser in order to divest their interest in EEGSA. In mid-2010, Iberdrola—which, as majority shareholder of the Consortium had taken the lead on finding a purchaser for EEGSA—received an indication from Empresas Públicas de Medellín ("EPM") that it was interested in purchasing EEGSA.[156] In a non-binding offer letter to Iberdrola dated 26 July 2010, EPM indicated that it would be willing to purchase DECA II, whose main asset was EEGSA, for US$ 597 million, and that it had based its price offer on a "[d]iscounted free cash flow" analysis of EEGSA "appl[ying] different adjustments and assumptions," but "not includ[ing] an increase in tariffs for the years 2013 and 2014."[157] After several weeks of negotiations, EPM sent TECO and its partners a binding offer letter to purchase DECA II for US$ 605 million.[158]

45. TECO retained Citibank to assess the reasonableness of this offer, and Citibank prepared a Fairness Opinion dated 14 October 2010, which concluded that the "TECO Consideration to be received in the Transaction is fair, from a financial point of view, to

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[153] Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008, at 1 (C-1079).

[154] *Id*.

[155] *Id*.

[156] Award ¶ 236.

[157] Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (C-1081). EPM further indicated that it also had used EBITDA multiples based on comparable publicly traded companies and transactions involving comparable companies in order to calculate its price offer. *See id*.

[158] Award ¶ 236; Letter from EPM to Iberdrola, TPS and EDP dated 6 Oct. 2010 (C-1082); First Witness Statement of Sandra Callahan dated 16 Sept. 2011 ("Callahan I") ¶ 11.

TECO,"[159] considering that "DECA II's operating and financial performance was heavily impacted by the tariff revision process of 2008, which has resulted in lower revenues and margin contraction,"[160] and in light of Citibank's projection of EEGSA's financial performance from 2010 until 2018, which Citibank based on the assumption that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013."[161] In other words, as Ms. Callahan, TECO Energy, Inc.'s then Senior Vice President of Finance and Accounting, Chief Accounting Officer, and Chief Financial Officer, testified in the Original Arbitration, the transaction price reflected the fact that EPM was "buying damaged goods."[162]

46. The transaction closed for US$ 605 million on 21 October 2010.[163] TECO's share of the purchase price, based upon its 30 percent equity interest in DECA II, was US$ 181.5 million.[164]

6. TECO Suffered Damages In The Amount of US$ 237.1 Million, Plus Interest, As A Result Of Guatemala's Breach

47. With respect to the Parties' positions regarding TECO's damages in the event that the Tribunal in the Original Arbitration (the "Original Tribunal") found a breach of the Treaty, both Parties relied predominantly upon analyses presented by their respective quantum experts,

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[159] Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at PDF p. 3 (C-1083).

[160] Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at PDF p. 24 (C-1083).

[161] Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF p. 26 (summarizing the assumptions underlying Citibank's DCF analysis of EEGSA, including, among other things, a projection period of 2010-2018, that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013," and a terminal value to EEGSA in 2018) (C-1083); *see also id.* at PDF p. 15 (explaining that, to conduct its DCF, Citibank projected EEGSA's VAD through 2018 relying upon DECA II's financial documentation, and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate); *id.* at PDF p. 28 (listing macroeconomic assumptions underlying Citibank's analysis, such as the projected inflation rates for Guatemala); *id.* at PDF p. 32 (showing a projected business plan for EEGSA, taking into account factors such as projected changes in electricity demand); *id.* at PDF p. 36 (providing a DCF analysis); *id.* at PDF p. 15 (explaining that, in addition to conducting a DCF, Citibank's financial analysis utilized the comparable transaction method, and the comparable publicly-traded company method).

[162] Arbitration Tr. (22 Jan. 2013) 589:2-17 (Callahan).

[163] Award ¶ 237.

[164] *Id.* ¶ 236.

i.e., Mr. Brent Kaczmarek of Navigant Consulting, Inc. for TECO, and Dr. Manuel Abdala of Compass Lexecon for Guatemala.[165] In this connection, it was undisputed between the Parties and acknowledged by the Original Tribunal that the value of a distribution company, such as EEGSA, is determined on the basis of its future expected cash flows, which is determined by its VAD.[166] It also was undisputed that the cost components of the VAD are established at the beginning of each tariff period for the duration of the entire five-year period.[167]

48. Applying these principles, both experts divided the calculation of TECO's damages into two parts, *i.e.*, (i) the *loss of cash flow* portion of damages, based on EEGSA's lost cash flows from the date of imposition of the Sigla tariff on 1 August 2008 until the sale of EEGSA to EPM on 21 October 2010, and (ii) the *loss of value* portion of damages, reflecting the difference between the fair market value of EEGSA in the actual and but-for scenarios at the

[165] *See id.* ¶¶ 333-359, 413-433; Kaczmarek I; Kaczmarek II; Opinion on Damages and Economic Regulation by Manuel A. Abdala & Marcelo A. Schoeters dated 24 Jan. 2012 ("Abdala I"); Opinion on Damages and Economic Regulation by Manuel A. Abdala & Marcelo A. Schoeters, Second Report dated 24 Sept. 2012 ("Abdala II").

[166] *See, e.g.*, Kaczmarek I ¶ 70 (explaining that, in Guatemala, the "'net revenue' earned by the distributor and charged to the consumer includes only the costs of distribution (including the financial cost of capital) as well as the costs of energy lost in the distribution process," and that "[t]hese cost elements form the portion of the electricity tariff called the Value Added for Distribution ('VAD')"); *id.* ¶ 76-77 (explaining that the VAD is the source of the distribution company's return of capital as well as return on capital, or profit); *id.* ¶ 83 (explaining that the "cost components of the VAD were to be calculated every five years through an independent study," and that, "[i]n between these study or 'rate periods,' the VAD was to be adjusted for inflation and energy prices on a quarterly basis."); Abdala I ¶ 38 (stating that "the VAD is the portion of the end-user tariff paid by users that allows the distributor to remunerate its operating costs, replace the depreciated investments, to have the opportunity to earn a return on the immobilized capital, and to cover efficient system losses."); Arbitration Tr. (22 Jan. 2013) 552:9-553:17 (Gillette) (explaining that the Consortium's bid for EEGSA in the 1998 privatization was based on assumptions regarding the future levels of the VAD, and that "obviously a scenario that would result in a lower bid price would be if you assumed a low VAD and high expenses, because that would mean a small cash flow stream."); Arbitration Tr. (4 Mar. 2013) 1002:21-1003:10 (Moller) (testifying that he recalled being told that "the potential interested parties in buying the shares of EEGSA were more interested in the consumers and in their consumption profile than in the wires[,]" and that "the consumption related to the sale price or rate, and especially the VAD that is what the Distributor receives from the tariff"); *id.* 1004:5-16 (Moller) (confirming that "the setting of tariffs was an element that [ ] directly impacted the purchase price of EEGSA"); Arbitration Tr. (22 Jan. 2013) 553:14-17 (Tribunal President) (stating that a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that."). The fact that the value of a distribution company is driven by the VAD also was the reason why the rating agencies downgraded EEGSA after the CNEE imposed upon EEGSA the unjustifiably low Sigla VAD. *See supra* ¶¶ 42-33.

[167] *See* Award ¶¶ 112, 222-226; Kaczmarek I ¶ 83; Abdala I ¶ 39.

time of the 21 October 2010 sale.[168] The experts also agreed that damages should be calculated as the difference between an actual scenario reflecting Guatemala's unlawful conduct and a but-for scenario assuming that Guatemala had not violated its Treaty obligations.[169]

a. Loss Of Cash Flow Portion Of Damages

49. With respect to the loss of cash flow portion of damages from 1 August 2008, when the CNEE arbitrarily and unlawfully imposed the Sigla VAD on EEGSA, until 21 October 2010, when TECO sold its investment in EEGSA as a result of Guatemala's breach, Mr. Kaczmarek compared EEGSA's actual cash flows with the cash flows that EEGSA would have received "but for" Guatemala's breach.[170] Between August 2008 and July 2010, Mr. Kaczmarek relied upon EEGSA's historical results for cash flows in the actual scenario.[171] Beginning in August 2010, when historical results no longer were available, Mr. Kaczmarek used the Sigla VAD study as the basis for projecting EEGSA's actual cash flows.[172] Mr. Kaczmarek concluded that TECO's portion of EEGSA's actual cash flows until 21 October 2010 amounted to US$ 20.1 million.[173]

50. Guatemala's quantum expert, Dr. Abdala, did not prepare his own valuation model, but rather used Mr. Kaczmarek's model, which he modified.[174] Dr. Abdala calculated EEGSA's actual cash flows until 21 October 2010 using the same methodology as Mr. Kaczmarek, and concluded that the actual cash flows to TECO until 21 October 2010 amounted

[168] *See* Award ¶ 719; Kaczmarek I ¶¶ 126-129; Kaczmarek II ¶ 6; Abdala I ¶ 27.

[169] *See* Award ¶ 719; Kaczmarek I ¶¶ 126-129; Kaczmarek II ¶ 6; Abdala I ¶ 25.

[170] *See* Award ¶¶ 335-336, 719; Kaczmarek I ¶¶ 155-156; Kaczmarek II ¶¶ 8, 9.

[171] *See* Kaczmarek I ¶ 153.

[172] *See* Award ¶ 337; Kaczmarek I ¶ 126; Kaczmarek II, Appendix 3.A (calculating cash flows in the actual scenario based on the Sigla VAD study).

[173] *See* Kaczmarek II ¶ 141, Table 14.

[174] *See* Abdala I § IV entitled "Corrected Valuation of Alleged Damages" (using Mr. Kaczmarek's model, and making certain adjustments, to arrive at his calculation of damages); Abdala II § IV (presenting a "[c]orrected [v]aluation of the [a]lleged [d]amage" based on his modifications to Mr. Kaczmarek's updated model).

to US$ 24.4 million, *i.e.*, approximately US$ 4 million *higher* than Mr. Kaczmarek's calculation.[175]

51. With respect to the cash flows that EEGSA would have received until 21 October 2010 but-for Guatemala's unlawful measures, Mr. Kaczmarek based his analysis upon Bates White's 28 July 2008 VAD study, which, as set forth above, calculated EEGSA's VAD and tariffs for the 2008-2013 tariff period in accordance with the Expert Commission's rulings.[176] Mr. Kaczmarek concluded that TECO's portion of EEGSA's but-for cash flows until 21 October 2010 amounted to US$ 41.2 million.[177] Deducting from this amount the actual cash flows to TECO of US$ 20.1 million, Mr. Kaczmarek concluded that TECO's loss of cash flow damages until 21 October 2010 amounted to US$ 21.1 million (before interest).[178]

52. By contrast, Dr. Abdala based his but-for analysis upon a VAD study prepared for purposes of the arbitration by Guatemala's industry expert, Mr. Mario Damonte, who provided his own recalculation of EEGSA's VNR by incorporating what he described as the Expert Commission's "possible and economically relevant" rulings into Bates White's earlier VAD study dated 5 May 2008, ignoring several of the Expert Commission's decisions.[179] Mr. Damonte's analysis resulted in a VNR and VAD that were unjustified and significantly

[175] *See* Abdala II ¶ 15, Table I.

[176] *See* Award ¶¶ 337, 729; Kaczmarek I ¶¶ 126, 153-154; Kaczmarek II ¶ 14; Memorial (Original Arbitration) ¶ 286.

[177] *See* Kaczmarek II ¶ 141, Table 14.

[178] *See* Award ¶ 336; Kaczmarek II ¶ 141, Table 14.

[179] *See* Award ¶¶ 724-728 (noting that "in correcting the Bates White May 2008 study, Mr. Damonte disregarded the Expert Commission pronouncements at least on one important question, i.e. the FRC"); *id.* ¶ 417 n.403 (noting that "Mr. Damonte states that to apply many of the pronouncements of the Expert Commission, additional information and optimizations impossible to achieve in the time available are required"); Abdala I ¶ 92 (stating that his calculation of damages was based on a "substitution of the value of VNR (and other parameters) of BW July 2008 Study, with the corrections that Damonte made to the BW May 2008 Study" and the "substitution of the CRF formula with the one corrected by Damonte."); Abdala II ¶ 75 (stating that his assessment of damages involved "[r]eplacing the VNR value (and other relevant parameters) of the Bates White study of July 2008 with the corrections introduced by Damonte to the Bates White study of May 2008" and "[r]eplacing the CRF formula with the one corrected by Damonte."); Guatemala's Post-Hearing Brief ¶ 192 (stating that "Guatemala asked Mr. Damonte to conduct the same exercise as Mr. Giacchino (incorporating the pronouncements [of the Expert Commission] into the 5 May study)" and that "[b]ased on said instructions, Mr. Damonte proceeded to incorporate all the possible and economically relevant pronouncements" into Bates White's 5 May 2008 study).

understated.[180] Mr. Damonte, for instance, used his own FRC calculation, that depreciates EEGSA's asset base by 30%,[181] in lieu of that set forth in the Expert Commission's ruling, resulting in a significant reduction of the VAD.[182] As Dr. Abdala admitted at the Hearing, by using Mr. Damonte's VAD calculation as the basis of his but-for analysis, Dr. Abdala did not perform any "calculation of damages using the FRC formula as recommended by the Expert Commission."[183]

53. Mr. Damonte also ignored the Expert Commission's ruling that the revised study must add two international prices for each material and adopt the lowest of the local price and the two international prices.[184] Instead, Mr. Damonte calculated prices based on the Sigla study and the tariffs of two other Guatemalan companies, DEORSA and DEOCSA, none of which accorded with the Expert Commission's requirements.[185] In addition, Mr. Damonte made unrealistic assumptions concerning the model company's network. For example, Mr. Damonte assumed that the model company would require only 32% of the number of transformers in urban areas as compared to the actual number used in EEGSA's network.[186] Because transformers constitute a large portion of EEGSA's assets, this had the effect of significantly undervaluing the VNR.[187]

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[180] Barrera ¶ 193.

[181] *See* Barrera ¶ 198.

[182] *See* Award ¶¶ 724-728; Abdala I ¶ 92; Abdala II ¶ 75; Guatemala's Post-Hearing Brief ¶ 192.

[183] Arbitration Tr. (5 Mar. 2013) 1560:22-1561:2 (Abdala); *see also* TECO's Post-Hearing Brief ¶¶ 175-180 (explaining that Dr. Abdala's but-for valuation did not calculate the value that EEGSA would have had, assuming that its VAD had been set on the basis of all of the Expert Commission's rulings); Guatemala's Post-Hearing Reply dated 8 July 2013 ("Guatemala's Post-Hearing Reply") ¶ 164 (not disputing that Dr. Abdala's but-for valuation was not based on the 28 July 2008 Bates White study, and arguing that the Original Tribunal "must determine the damage resulting from using the May 5 study according to how the CNEE may have corrected it and not based on the study corrected by Bates White itself [*i.e.*, Bates White's 28 July 2008 VAD study]," and that "[t]his is precisely the exercise that Mr. Damonte carried out and that Dr. Abdala used as a *but for* scenario"); Award ¶ 726 (observing that "[i]t is . . . undisputed that, in correcting the Bates White May 2008 study, Mr. Damonte disregarded the Expert Commission pronouncements at least on one important question, i.e. the FRC").

[184] Barrera ¶ 197.

[185] *See* Barrera ¶ 197; *see also* Kaczmarek I ¶¶ 39-41.

[186] Barrera ¶¶ 202-203.

[187] Barrera ¶ 200.

54. In the Original Arbitration, Guatemala argued that Mr. Damonte was justified in departing from Bates White's 28 July 2008 VAD study to calculate EEGSA's but-for cash flows, because that revised study did not properly incorporate the rulings of the Expert Commission.[188] As TECO explained, this was *not* the basis for the CNEE's refusal to use Bates White's revised study to set EEGSA's tariffs; Guatemala, instead, raised this excuse for the first time during the arbitration in an attempt to justify its past, arbitrary behavior.[189] In any event, Guatemala's assertion was belied by Messrs. Bastos and Giacchino, who both concluded contemporaneously that Bates White had revised its VAD study in accordance with the Expert Commission's rulings, and so advised the CNEE and EEGSA.[190] In addition, after conducting an extensive analysis of whether Bates White had properly incorporated each of the Expert Commission's decisions, Claimant's expert in the arbitration, Dr. Barrera, concluded that "the 28 July 2008 Bates White study fully implemented the EC Report decisions, and . . . Guatemala's assertions to the contrary are unfounded."[191] As Dr. Barrera confirmed, Mr. Damonte "acknowledge[d] that he failed to fully implement the Expert Commission's decisions," "ignore[d] key decisions of the Expert Commission and implement[ed] unjustified alternative approaches," and "made unjustified assumptions about the regulatory asset base that result in an undervaluation of the VNR."[192]

55. Dr. Abdala also used essentially the same amount of capital expenditures as Mr. Kaczmarek, notwithstanding that Dr. Abdala, at the same time, used Mr. Damonte's significantly

[188] Counter-Memorial (Original Arbitration) ¶ 424.

[189] Reply (Original Arbitration) ¶¶ 172-180.

[190] *See* Memorial (Original Arbitration) ¶ 187; Letter from C. Bastos to the CNEE and EEGSA dated 1 Aug. 2008, attached to Email from C. Bastos to M. Calleja and M. Quijivix dated 1 Aug. 2008 (C-1065); Letter from L. Giacchino to the CNEE and EEGSA dated 31 July 2008, attached to Email from L. Giacchino to M. Quijivix (CNEE) and M. Calleja (EEGSA) dated 1 Aug. 2008 (C-1066); *see also* Bastos I ¶ 35; Giacchino I ¶ 90; First Witness Statement of Luis Maté dated 21 Sept. 2011 ("Maté I") ¶ 55; First Witness Statement of Miguel Francisco Calleja Mediano dated 22 September 2011 ("Calleja I") ¶ 53.

[191] Barrera ¶ 65.

[192] Barrera ¶¶ 193-207.

lower VNR.[193] As a consequence, relative to revenues, capital expenditures in Dr. Abdala's calculation were significantly higher than in Mr. Kaczmarek's calculation.[194]

56. Having used a different FRC calculation, as well as relatively higher capital expenditures, and refusing to incorporate some of the Expert Commission's other rulings relating to the VNR calculation,[195] Dr. Abdala concluded that the but-for cash flows to TECO until 21 October 2010 amounted to only US$ 13.8 million.[196] Deducting the actual cash flows of US$ 24.4 million, Dr. Abdala's calculation therefore produced a *negative figure* of US$ 10.6 million,[197] implying, absurdly, that TECO obtained a significant *benefit* from having the Sigla VAD imposed upon EEGSA, even though that VAD was more than 45 percent lower than EEGSA's previous VAD, resulting in revenues that were approximately 40 percent lower than in the prior tariff period.[198]

b. Loss Of Value Portion Of Damages

57. With respect to the loss of value portion of damages, both experts based their analysis upon an assessment of EEGSA's fair market value in the actual scenario reflecting Guatemala's unlawful conduct and in the but-for scenario assuming that Guatemala had not violated its Treaty obligations.

i. TECO's Share Of EEGSA's Fair Market Value In The Actual Scenario

58. With respect to EEGSA's fair market value in the actual scenario, although Mr. Kaczmarek acknowledged that the purchase price that EPM paid for DECA II reflected

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[193] *See* Award ¶¶ 737-741; TECO's Post-Hearing Brief ¶¶ 181-184; TECO's Post-Hearing Reply dated 8 July 2013 ("TECO's Post-Hearing Reply") ¶ 131; Kaczmarek II ¶ 55.

[194] *Id.*

[195] *See* Award ¶ 726; Guatemala's Post-Hearing Reply ¶ 164; *see also* TECO's Post-Hearing Brief ¶ 179; Award ¶ 417 n.403.

[196] Abdala II ¶ 78, Table VI.

[197] *See* Abdala I ¶ 109 (stating that his damages calculation "impl[ies] a historical damage with a negative sign."); Abdala II ¶ 80 (stating that his damages calculation results in "the peculiarity of having a negative historical damage"); *id.* ¶ 78, Table VI (providing an "[u]pdated [v]aluation" and showing but-for historical cash flows to EEGSA of US$ 13.8 million and actual historical cash flows to EEGSA of US$ 24.4 million).

[198] *See* TECO's Post-Hearing Brief ¶¶ 184-186.

EEGSA's fair market value, Mr. Kaczmarek noted that, because "DECA II contained a portfolio of companies, the price paid by EPM for DECA II does not yield a directly observable price for EEGSA."[199] For that reason, Mr. Kaczmarek calculated EEGSA's actual value as of the date of the sale using three accepted valuation approaches, *i.e.*, (i) the DCF method, (ii) the comparable publicly-traded company method, and (iii) the comparable transaction method.[200]

59. In conducting a DCF to calculate EEGSA's future financial performance in the actual scenario, Mr. Kaczmarek projected EEGSA's cash flows until the end of the 2013-2018 tariff period, whereupon he assigned a terminal value to EEGSA.[201] This projection was based upon the fact that the Sigla VAD imposed by the CNEE on 1 August 2008 would remain in place for the remainder of the 2008-2013 tariff period,[202] and that, in the subsequent 2013-2018 tariff period, the VNR could be expected to increase in accordance with the implied growth rate of the network determined in the Sigla study.[203]

60. Mr. Kaczmarek's projection of EEGSA's cash flows in the 2013-2018 tariff period also assumed that the CNEE would continue to use the Sigla FRC formula in subsequent tariff review periods and, thus, continue to calculate EEGSA's VAD off of a VNR that was depreciated by 50 percent.[204] This assumption was consistent with the fact that Guatemala had insisted throughout EEGSA's 2008-2013 tariff review, before the Expert Commission, and in the domestic administrative and court proceedings that calculating the VAD on a regulatory asset base that was depreciated by 50 percent was consistent with the regulatory framework, and the fact that the CNEE would have had no incentive to *increase* the VAD by adopting the Expert Commission's FRC ruling after TECO and its partners had sold EEGSA.[205] The correctness of this assumption was confirmed during the course of the arbitration, both by the fact that

[199] Kaczmarek II ¶ 134; *see also* Award ¶ 347.

[200] *See* Award ¶ 347; Kaczmarek I ¶¶ 157-219; Kaczmarek II ¶¶ 132-134.

[201] *See* Kaczmarek I ¶ 197; TECO's Post-Hearing Brief ¶¶ 169-173; TECO's Post-Hearing Reply ¶ 126.

[202] *See* Kaczmarek I ¶¶ 161-181; Kaczmarek II, Appendix 3.

[203] *Id.*

[204] *See* Kaczmarek I ¶¶ 161-181; Kaczmarek II ¶¶ 80-89; TECO's Post-Hearing Brief ¶¶ 169-170; Memorial (Original Arbitration) ¶¶ 288-293.

[205] *Id.*

Guatemala continued to argue in the arbitration in favor of the Sigla VAD and that the CNEE's ToR for EEGSA's subsequent 2013-2018 tariff review, which were published at a late stage of the arbitration and which were submitted into evidence, contained the very same FRC formula used to calculate the Sigla VAD.[206]

61. Mr. Kaczmarek's projection of EEGSA's cash flows in the 2013-2018 tariff period also was based upon the Sigla study.[207] As Mr. Kaczmarek has explained, with respect to consumer costs, "low tension consumers were projected to grow at the average rate of growth predicted during the last two years in the Third Rate Period [*i.e.*, 2008-2013] while medium tension consumers were projected to remain flat."[208] Similarly, Mr. Kaczmarek's projections assumed that "[energy losses] would be held constant throughout [the] projection period."[209] As Mr. Kaczmarek further explained, "[i]n essence, [he] projected the network to grow between 2 to 3 percent each year."[210]

62. In applying the publicly-traded company method, Mr. Kaczmarek identified seventy publicly-traded companies potentially comparable to EEGSA, twelve of which were sufficiently comparable to EEGSA so as to provide a reasonable basis upon which to value EEGSA.[211] Mr. Kaczmarek then assigned a weighting to each of the companies based upon its similarities with EEGSA, and computed the Enterprise Value to Earnings Before Interest Taxes Depreciation and Amortization multiple ("EV/EBITDA") for each of the comparable companies.[212] Mr. Kaczmarek then calculated a weighted-average EV/EBITDA multiple for

[206] *See* TECO's Post-Hearing Brief ¶ 170; CNEE Resolution 161-2012 dated 23 July 2012, at 27 (containing the Terms of Reference for EEGSA's 2013 tariff review) (C-1084).

[207] *See* Kaczmarek I ¶¶ 157-170.

[208] Kaczmarek I ¶ 165.

[209] Kaczmarek I ¶ 168.

[210] Kaczmarek I ¶ 163.

[211] Kaczmarek I ¶¶ 199-200.

[212] Kaczmarek I ¶¶ 201-210; Kaczmarek II ¶ 105-131.

these companies and multiplied that result by EEGSA's EBITDA to obtain EEGSA's value in the actual scenario.[213]

63. Similarly, in applying the comparable transaction method, Mr. Kaczmarek identified sixty-seven transactions involving the sale of companies potentially comparable to EEGSA, nine of which were sufficiently comparable to EEGSA so as to provide a reasonable basis upon which to value EEGSA.[214] Mr. Kaczmarek then assigned weights to the distributors, giving the highest weightings to transactions of distribution companies in Chile, Peru, and El Salvador, where the regulatory regime is closer to that in Guatemala, and lower weightings to companies located in Brazil and Argentina.[215] As with the comparable publicly-traded company approach, Mr. Kaczmarek calculated the EV/EBITDA multiple for each of the companies and an average weighted multiple, and then multiplied that result by EEGSA's EBITDA to obtain EEGSA's value in the actual scenario.[216]

64. Mr. Kaczmarek then weighted the results of these three methods based upon his assessment of the quality of the information available to implement each method, which is standard valuation practice.[217] Mr. Kaczmarek concluded that the fair market value of TECO's interest in EEGSA in the actual scenario as of 21 October 2010 was US$ 115.2 million.[218]

65. As a reasonableness check, Mr. Kaczmarek compared this result against the implied value of EEGSA that he derived from the sale of DECA II and found that the two values were within a close range, indicating that his calculation of EEGSA's value in the actual scenario was accurate.[219]

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[213] *See* Award ¶ 342; Kaczmarek I ¶¶ 146-147, 198-210; Kaczmarek II ¶¶ 105-131.

[214] Kaczmarek I ¶¶ 211-213.

[215] Kaczmarek I ¶¶ 214-216; Kaczmarek II ¶¶ 105-131.

[216] *See* Kaczmarek I ¶¶ 148, 211-216; Kaczmarek II ¶¶ 105-131.

[217] *See* Award ¶ 338; Kaczmarek I ¶¶ 17, 201-208, 214 (assigning a weight of 60 percent to the DCF approach, 30 percent to the comparable publicly-traded company approach, and 10 percent to the comparable transaction approach); Kaczmarek II ¶ 118.

[218] *See* Award ¶ 340; Kaczmarek II ¶ 141, Table 14.

[219] *See* Award ¶ 351; Kaczmarek I ¶¶ 239-241; Kaczmarek II ¶ 132.

66. Mr. Kaczmarek's approach for calculating EEGSA's value in the actual scenario also was consistent with Citibank's Fairness Opinion, in which Citibank analyzed the fairness to TECO of EPM's proposed purchase price for DECA II based upon a DCF analysis, the publicly-traded company method, and the comparable transaction method. In its analysis, like Mr. Kaczmarek, Citibank projected EEGSA's future financial performance from 2010 until 2018, assuming that the VAD methodology imposed by the CNEE during EEGSA's 2008-2013 tariff review would not change, and assigned a terminal value to EEGSA.[220] Notably, Mr. Kaczmarek's conclusion that the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 amounted to US$ 115.2 million was within the range of the results of Citibank's DCF analysis, according to which the implied value of TECO's stake in EEGSA was between US$ 112 million and US$ 134.4 million.[221]

67. EPM's non-binding offer letter to Iberdrola provided further confirmation of Mr. Kaczmarek's valuation conclusion. This letter, signed by Mr. Federico Restrepo, the then Chief Executive Officer of EPM, explains to EEGSA the "methodologies [] used" by EPM to calculate the purchase price that EPM had offered for DECA II, and notes that EPM had based its price offer on a "[d]iscounted free cash flow" analysis of EEGSA "appl[ying] different adjustments and assumptions," but "*not includ[ing] an increase in tariffs for the years 2013 and 2014*."[222]

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[220] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at PDF p. 15 (explaining that Citibank's financial analysis utilized the "Discounted Free Cash Flow Analysis," the "Selected Precedent Transactions Analysis," and the "Selected Companies Analysis") (C-1083); *id*. (explaining that, to conduct its DCF, Citibank projected EEGSA's VAD through 2018 relying upon DECA II's financial documentation, and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate) (C-1083); *id.* at PDF p. 26 (summarizing the assumptions underlying Citibank's DCF, including, among other things, a projection period of 2010-2018, that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013," and a terminal value to EEGSA in 2018); *id.* at PDF p. 27 (listing macroeconomic assumptions underlying Citibank's analysis, such as the projected inflation rates for Guatemala); *id.* at PDF p. 32 (showing a projected business plan for EEGSA, taking into account factors such as projected changes in electricity demand); *id.* at PDF p. 36 (providing a DCF of EEGSA); Kaczmarek II ¶¶ 9, 110-111, 128-129 (discussing same); TECO's Post-Hearing Brief ¶¶ 169-171.

[221] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc. at PDF p. 17 (C-1083).

[222] Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (emphasis added) (C-1081).

As explained above,[223] Mr. Kaczmarek's DCF analysis incorporated similar adjustments and assumptions, including that the VNR would continue to be calculated as in the Sigla study.

68. Unlike Mr. Kaczmarek, Dr. Abdala based his calculation of EEGSA's value in the actual scenario solely upon the sale of DECA II.[224] Dr. Abdala accepted that the sales price paid by EPM reflected EEGSA's actual fair market value as of that date;[225] in other words, Dr. Abdala concluded that EPM neither underpaid nor overpaid for EEGSA. Indeed, Guatemala observed in this connection that "it is reasonable to assume that EPM's purchase price *reflects the actual tariff level of the 2008 VAD (adjusted for inflation), at least up to 2013*."[226]

69. Because, as noted above, the sales price for DECA II covered a portfolio of companies and the portion of the purchase price attributable to EEGSA was not contemporaneously specified, Dr. Abdala estimated what portion of the purchase price was attributable to EEGSA.[227] Dr. Abdala concluded that TECO's share of the purchase price attributable to EEGSA ranged from US$ 104.5 million to US$ 120 million.[228] Mr. Kaczmarek's conclusion that the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 amounted to US$ 115.2 million therefore was within and towards the higher end of the range of values calculated by Dr. Abdala, where a higher actual value means a smaller difference with but-for value and, thus, lower damages.

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[223] *See supra* ¶¶ 56-61.

[224] *See* Award ¶¶ 421-422 (noting Guatemala's position that "the best reference for establishing EEGSA's value in the actual scenario is the price paid by EPM to acquire the DECA II block of shares"); Abdala I ¶ 80.

[225] *See* Abdala I ¶ 80 (stating that the sale to EPM "is the best available reference of EEGSA's value under the *actual* scenario, since it has been agreed between two independent parties under free market conditions (*i.e.*, under the arm's length transactions principle") (emphasis in original); Award ¶ 422.

[226] Guatemala's Post-Hearing Brief ¶ 362 (emphasis added).

[227] *See* Award ¶¶ 422-424; Abdala I ¶¶ 79-83; Abdala II ¶ 32.

[228] Abdala II ¶ 78, Table VI.

70. The Parties thus agreed that their "conclusions as to EEGSA's actual value are not significantly different and, thus, have no material impact on the calculation of damages,"[229] and that they "are essentially in agreement regarding EEGSA's value in the actual scenario."[230]

ii. TECO's Share Of EEGSA's Fair Market Value In The But-For Scenario

71. The Parties, however, disagreed greatly with respect to the but-for scenario.[231] With respect to EEGSA's fair market value in the but-for scenario, Mr. Kaczmarek again applied the three accepted valuation approaches discussed above, *i.e.*, the DCF method, the comparable publicly-traded company method, and the comparable transaction method, and calculated a weighted average of the results of the three methods.[232] Mr. Kaczmarek's implementation of these methods in the but-for scenario was essentially identical to that in the actual scenario, with the difference being that, in the but-for scenario, he based his calculations on Bates White's 28 July 2008 VAD study, rather than the Sigla study.[233]

72. In calculating EEGSA's future but-for financial performance using the DCF method, Mr. Kaczmarek relied upon Bates White's 28 July 2008 VAD study for the remainder of the 2008-2013 tariff period, and, for the period after 2013, Mr. Kaczmarek assumed that the

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[229] TECO's Post-Hearing Brief ¶ 165; *see also* TECO's Post-Hearing Reply ¶ 153 ("At bottom, the only disagreement that Respondent's expert has with Claimant's damages analysis concerns the calculation of EEGSA's capital expenditures *in the but-for scenario*") (emphasis added); Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2012, Slide 13 (stating that "[t]here [was] no material difference in the [experts'] measurement of actual cash flows and actual value.").

[230] Guatemala's Post-Hearing Brief ¶ 334; *see also* Guatemala's Post-Hearing Reply ¶ 161 (stating that the "truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM"); Abdala I ¶ 25 (stating that Mr. Kaczmarek "estimates the alleged damages to Claimant through the difference between a *but-for* scenario and an *actual* scenario," that the "difference between both (*i.e.*, *but for* less *actual*) represents the presumed economic damages suffered by TGH," and that the "methodology to calculate damages by difference between these two scenarios is standard and appropriate for this case") (emphasis in original); Abdala II ¶ 2 (stating that "[t]here [were] no major differences with [Mr. Kaczmarek] in the valuation of EEGSA in the *actual* scenario") (emphasis in original).

[231] *See* Award ¶ 750 (stating with respect to the actual scenario that the Parties are in "slight disagreement" regarding the "share of the price" paid by EPM "that is attributed to EEGSA"); *id.* ¶ 751 (stating that the "Parties nevertheless differ substantially as to EEGSA's *but for* value") (emphasis in original).

[232] *See* Award ¶ 338; Kaczmarek I ¶¶ 161-181; Kaczmarek II ¶ 140.

[233] Kaczmarek I ¶ 126.

Expert Commission's FRC calculation, rather than the FRC calculation arbitrarily imposed by the CNEE, would apply.[234] Consistent with his calculation of EEGSA's value in the actual scenario,[235] to forecast EEGSA's VNR, he made conservative adjustments to account for factors that would affect the VAD calculation in the next tariff period, such as the projected growth of the network.[236]

73. Mr. Kaczmarek also applied the publicly-traded company method and the comparable transaction method, implemented in the same manner as in the actual scenario, except based on Bates White's 28 July 2008 VAD study, rather than the Sigla study.[237] He then weighted the results of these three methods in the same manner as in the actual scenario.[238]

74. Mr. Kaczmarek concluded that the fair market value of TECO's interest in EEGSA in the but-for scenario as of 21 October 2010 was US$ 337.7 million.[239] Deducting from this amount the actual fair market value of TECO's interest in EEGSA of US$ 115.2 million Mr. Kaczmarek concluded that the loss of value portion of TECO's damages amounted to US$ 222.5 million (before interest).[240] TECO's aggregate damages therefore amounted to US$ 243.6 million.[241]

75. The VNRs calculated by Sigla and Bates White demonstrated the reasonableness of Mr. Kaczmarek's valuation of EEGSA in the actual and but-for scenarios. As Mr. Kaczmarek explained, because the VNR was the replacement value of EEGSA, off of which EEGSA's return was based, the VNR "should [have been] a reasonable proxy for the fair market value of the EEGSA enterprise."[242] After adjusting for the fact that EEGSA's WACC changed over time,

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[234] *See* Award ¶ 337; Kaczmarek I ¶ 161; Kaczmarek II ¶ 81.

[235] *See supra* ¶ 61.

[236] *See* Kaczmarek I ¶¶ 161-181; Kaczmarek II Appendix 2.

[237] Kaczmarek I ¶¶ 126, 198-216.

[238] Kaczmarek I ¶¶ 126, 209-210, 215-216.

[239] Award ¶ 340; Kaczmarek II ¶ 141, Table 14.

[240] *Id.*

[241] Award ¶ 434; Kaczmarek II ¶ 14, Table 3 (providing an updated total damages amount before interest of US$ 243.6 million); TECO's Post-Hearing Brief ¶ 10; Award ¶ 340 (noting the foregoing figure).

[242] Kaczmarek I ¶ 234.

Mr. Kaczmarek showed that his actual and but-for valuations of EEGSA were within close range of the Sigla and Bates White VNRs, respectively.[243]

76. Calculation of TECO's internal rate of return ("IRR") on its investment in EEGSA also demonstrated the reasonableness of Mr. Kaczmarek's damages calculation. An IRR measures the compound average annual return for a series of cash investments and cash returns over time.[244] In the actual scenario, TECO's nominal IRR (*i.e*, with inflation) was 3.2 percent and its real IRR (*i.e.*, without inflation) was 0.6 percent.[245] This IRR was much less than TECO's cost of equity of 13.97 percent (11.01 percent real), as calculated by the CNEE in 2008, indicating that TECO suffered significant economic loss in the actual scenario.[246]

77. To verify the reasonableness of his damages calculation, Mr. Kaczmarek calculated TECO's IRR with the damages of US$ 267.4 million (including interest through 1 June 2012) as a cash return to TECO on 1 June 2012. This analysis indicated that, if TECO's IRR were calculated to include an award of damages in accordance with the amounts calculated by Mr. Kaczmarek, TECO's IRR would be 10.47 percent on a nominal basis and 7.81 percent on a real basis.[247] This IRR was within the range of the 7 to 13 percent return anticipated by the LGE and was, in fact, still lower than EEGSA's cost of equity as calculated by the CNEE in 2008, and also was lower than EEGSA's nominal cost of equity of 15.1 percent (11.66 percent real), as calculated by Dresdner Kleinwort when TECO made its investment in 1998.[248]

78. By contrast, Dr. Abdala relied solely upon the DCF method to calculate EEGSA's but-for value,[249] and calculated that value using Mr. Damonte's VAD study, which did not

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[243] Kaczmarek I ¶¶ 234-238; *see also* Kaczmarek II ¶¶ 162-165.

[244] Kaczmarek I ¶¶ 226-228.

[245] Kaczmarek I ¶ 230; *see also* Kaczmarek II ¶ 145 & Appendix 5.

[246] Kaczmarek I ¶ 231; *see also* Kaczmarek II, at Appendices 3, 5.

[247] Kaczmarek II ¶ 145 (updating Kaczmarek I ¶ 232).

[248] DresdnerKleinwort EEGSA Base Case Scenario dated June 1998, at 1 (C-1085); CNEE Resolution 04-2008 dated 17 Feb. 2008 (C-1086); *see also* Kaczmarek II ¶ 146.

[249] Award ¶ 421; Abdala I ¶ 92; Abdala II ¶ 14.

incorporate critical Expert Commission rulings, as set forth above.[250] As with calculating the loss of cash flow portion of damages, when calculating EEGSA's but-for value, Dr. Abdala, by way of his reliance upon Mr. Damonte's study, did not incorporate into his calculations key Expert Commission rulings on the VNR relating to, for example, the reference prices to be used for materials;[251] did not use the FRC formula ruled upon by the Expert Commission; and also used capital expenditures that were nominally similar to, but in reality (when considered relative to revenues) significantly higher than those used by Mr. Kaczmarek.[252] As a result of these assumptions, Dr. Abdala's calculations yielded EEGSA's but-for equity value of US$ 507.3 million, resulting in but-for future cash flows to TECO of US$ 123.1 million, and loss of value damages for TECO ranging from US$ 3.1 million to US$ 18.6 million (before interest).[253]

79. The difference in the Parties' valuations resulted from the fact that Guatemala had refused to calculate damages based upon the Expert Commission's rulings as implemented by Bates White in its 28 July 2008 VAD study, and instead based its damages calculation upon the VNR and FRC calculation in Mr. Damonte's VAD study, which disregarded the Expert Commission's rulings with which Guatemala disagreed. Indeed, as Mr. Kaczmarek explained, if Dr. Abdala had input into his calculation the VNR presented in Bates White's 28 July 2008 VAD study, and if he had used the FRC formula per the Expert Commission's ruling, keeping all other factors constant, Dr. Abdala's calculation would have produced slightly *higher* damages than Mr. Kaczmarek's calculation.[254]

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[250] *See* Award ¶¶ 417, 724, 730.

[251] *See* Barrera ¶ 199; *supra* ¶ 53.

[252] *See* Award ¶¶ 737-741; TECO's Post-Hearing Brief ¶¶ 181-184; TECO's Post-Hearing Reply ¶ 131; Kaczmarek II ¶ 55.

[253] *See* Abdala II ¶ 78, Table VI (showing but-for equity value of EEGSA of US$ 507.3 million, but-for future cash flows to TECO of US$ 123.1 million, actual equity value of EEGSA as ranging from US$ 104.5 million to US$ 120 million, and actual future cash flows to TECO as ranging from US$ 104.5 million to US$ 120 million; deducting the latter future cash flows to TECO from the former, results in loss of cash flow damages ranging from US$ 3.1 million to US$ 18.6 million). Because Dr. Abdala absurdly had concluded that damages arising from EEGSA's loss of cash flows until 21 October 2010 amounted to a *negative* US$ 10.6 million, he calculated TECO's overall damages to be in a range from zero to US$ 8.1 million. *See* Award ¶ 426; Abdala II ¶ 78.

[254] Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 19.

c. Interest

80. In the Original Arbitration, TECO sought an award of pre- and post-award compound interest on its damages at an appropriate commercial rate.[255] TECO also submitted that, while damages amounting to TECO's lost cash flows and lost share value would compensate it for Guatemala's Treaty breach, interest must also be awarded to compensate it for the lost opportunity to invest these funds.[256]

81. With respect to the period until the 21 October 2010 sale—the loss of cash flows portion of damages—Mr. Kaczmarek calculated the interest as accruing in tranches according to the date on which the loss in cash flow was realized: (i) as from 1 August 2009, on TECO's share of EEGSA's cash flows lost in the period from 1 August 2008 to 31 July 2009; (ii) as from 1 August 2010, on TECO's share of EEGSA's cash flows lost in the period from 1 August 2009 to 31 July 2010; and (iii) from 22 October 2010, on TECO's share of EEGSA's cash flows lost in the period from 1 August 2010 to 21 October 2010.[257] For the period following the 21 October 2010 sale—the loss of value portion of damages—Mr. Kaczmarek calculated interest on the difference between the actual and but-for value of TECO's share in EEGSA as of the date of the sale.[258]

82. Respondent did not dispute that, in the event TECO was awarded damages, it was entitled to interest.[259] In particular, Dr. Abdala acknowledged that, in the event TECO was

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[255] Memorial (Original Arbitration) ¶¶ 307-311; Reply (Original Arbitration) ¶¶ 315-320; TECO's Memorial on Partial Annulment ¶ 126.

[256] Memorial (Original Arbitration) ¶¶ 307-312 ("Thus, where, as here, the award for damages quantifies the loss suffered and compensation due at a time before the award, interest should be awarded from the time damages are quantified (i.e., pre-judgment interest) so that the claimant may recoup the time value of money."); TECO's Memorial on Partial Annulment ¶ 127; TECO's Reply on Partial Annulment ¶ 110.

[257] *See* Kaczmarek I ¶ 224, Table 20 (calculating damages for the period through 21 October 2010, as well as the related interest); Kaczmarek II ¶ 26, Table 5 (providing an updated damage amount, including interest); *id.* ¶ 141, Table 14 (providing an updated damages amount before interest, including the US$ 21.1 million in lost cash flows that the Original Tribunal awarded to TECO as damages relating to the period 1 Aug. 2008 – 21 Oct. 2010).

[258] Kaczmarek I ¶ 224, Table 20 (calculating interest on lost value damages as of 21 October 2010); Kaczmarek II ¶ 26, Table 5 (providing an updated damage amount, including interest).

[259] Counter-Memorial (Original Arbitration) ¶¶ 623-624; Abdala I ¶¶ 107-111;Rejoinder (Original Arbitration) ¶ 519; Abdala II ¶¶ 80-83; Guatemala's Post-Hearing Reply ¶¶ 173-175.

awarded pre-sale damages, there were no conceptual differences between the experts as regards interest,[260] and he also applied interest in his own calculations to loss of cash flow damages starting from 1 August 2009.[261]

83. With respect to the appropriate rate of interest, Mr. Kaczmarek presented calculations using three alternative interest rates, applied on a compound basis: (i) Guatemala's yield on US denominated sovereign bonds; (ii) the London Interbank Offer Rate (LIBOR) rate plus 4 percent; and (iii) the US Prime Rate plus 2 percent.[262] Thereafter, in response to Respondent's position that pre-sale interest ought to apply at a rate equivalent to EEGSA's WACC, which had been calculated using the same methodology applied by the CNEE to be 8.80 percent,[263] TECO accepted that the WACC provided the interest rate that should be applied.[264]

d. Costs

84. Both Parties sought an award of costs and fees from the Original Tribunal in accordance with the general principle that costs follow the event—otherwise known as the loser

[260] *See* Abdala I ¶ 109 (stating that "[c]onceptually, for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used," and that, with respect to "[t]his factor, estimated at 8.80% by the NCI [Navigant/Mr. Kaczmarek] . . . we do not have calculation discrepancies"); Abdala II ¶ 80 (stating that "we do not disagree with the view that, for the period prior to the sale in October 2010, an interest rate that includes a risk component based on the opportunity cost of EEGSA's money should be included"); *id*. ¶ 83 (stating that "we have no theoretical disagreements" with Mr. Kaczmarek with respect to interest relating to the period through 21 Oct. 2010); *see also* Guatemala's Counter-Memorial ¶¶ 623-626 (adopting Dr. Abdala's position); Guatemala's Rejoinder ¶ 520 (same); Respondent's Post-Hearing Reply ¶ 175 (same).

[261] *See* Abdala II, damages model (DAS-37) (electronic file), tab "3.A. Valuation Summary," rows 90-97 (calculating discount factors for historical damages using the 10-year U.S. debt rate of 3.29 percent running from Aug. 2009 and Aug. 2010 until 21 Oct. 2010); *id.* rows 23, 24 (applying these discount factors in formulas calculating EEGSA's lost cash flows as of 21 Oct. 2010); TECO's Reply on Partial Annulment ¶ 111.

[262] Kaczmarek I ¶ 221; Kaczmarek II ¶ 174; Memorial (Original Arbitration) ¶ 310 n.1153; Reply (Original Arbitration) ¶ 315; TECO's Memorial on Partial Annulment ¶ 126.

[263] Abdala I ¶ 109 (stating that, "for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used" and that as regards "[t]his factor, estimated at 8.80[percent] by the NCI [Mr. Kaczmarek] . . . we do not have calculation discrepancies"); Award ¶ 762 ("8.8 percent interest rate corresponds to EEGSA's WACC in October 2010.").

[264] Reply (Original Arbitration) ¶ 318, citing Abdala I ¶ 109.

pays rule.[265] In addition, Respondent agreed with Claimant that in awarding costs, the Original Tribunal "may take into consideration the particular circumstances of the case."[266]

85. In its submissions, TECO explained that an award of costs to it was justified by Guatemala's egregious breach of the Treaty, and further showed that its costs were reasonable.[267] In this regard, TECO demonstrated that its costs of US$ 10 million were reasonable in view of the length of the proceedings, the two merits hearings, the issues in dispute, and the numerous instances of Respondent's procedural misconduct.[268] Claimant further explained that, contrary to Respondent's suggestion, the fact that Respondent's costs of US$ 5,3 million were less than Claimant's costs did not demonstrate that Claimant's costs were unreasonable, but rather was a consequence of Respondent having used witness statements, expert reports, and arguments that it already had prepared for the *Iberdrola* arbitration.[269] TECO also explained that Respondent's misconduct in the underlying arbitration further supported an award of costs in its favor.[270]

86. *First*, as TECO demonstrated, Respondent included with its Rejoinder submission a Reply on Jurisdiction and Admissibility, even though that submission was expressly limited to addressing the merits of TECO's claims, and thus required TECO to bear the expense of preparing a Rejoinder on Jurisdiction and Admissibility in response.[271] As the Minutes of the First Session in the Original Arbitration reflect, the Original Tribunal had ordered, based upon the Parties' prior agreement, that the Parties each would exchange two submissions on the merits and that, if jurisdictional or admissibility objections were raised, those objections would be

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[265] *See* TECO's Submission on Costs dated 24 Jul. 2013 ("TECO's Submission on Costs"); Guatemala's Request for Costs dated 24 Jul. 2013 ("Guatemala's Request for Costs"); TECO's Reply on Costs dated 7 Aug. 2013 ("TECO's Reply on Costs"); Guatemala's Reply on Costs dated 7 Aug. 2013 ("Guatemala's Reply on Costs").

[266] Guatemala's Submission on Costs ¶ 4.

[267] *See* TECO's Submission on Costs; TECO's Reply on Costs.

[268] *See* TECO's Submission on Costs; TECO's Reply on Costs; Award ¶ 773 (citing TECO's Submission on Costs ¶ 22 as amended by TECO's Reply on Costs ¶ 9).

[269] TECO's Reply on Costs ¶¶ 7-8.

[270] TECO's Submission on Costs ¶¶ 5-21; TECO's Reply on Costs ¶ 5.

[271] *See* Letter from TECO to the Original Tribunal dated 27 Sept. 2012 (C-1269).

addressed in one exchange of submissions.[272] When Respondent indicated that it intended to raise jurisdictional and admissibility objections, but was not seeking bifurcation to have those objections addressed separately,[273] the schedule for submissions was revised accordingly, and the Parties confirmed their understanding that there would be only one exchange of written submissions addressing Respondent's objections. For the avoidance of any doubt, Claimant sent an email to the Original Tribunal dated 25 October 2011, stating that "Claimant confirms its agreement with Respondent's proposal [regarding the dates for submissions], with one clarification. In accordance with Item 13 of the Minutes of the First Session, there should be only one round of submissions on jurisdiction and admissibility. Accordingly, *Respondent's 24 September 2012 submission should be a Rejoinder on the Merits, but should not address its jurisdictional or admissibility objections.*"[274] Respondent replied on 27 October 2011, stating that "*Respondent agrees to a single round of submissions on questions of jurisdiction and admissibility*."[275] There thus was no ambiguity that the Parties had agreed to exchange only one round of submissions on jurisdiction and admissibility, and that Respondent's Rejoinder submission thus ought to have been limited to addressing only the merits of Claimant's claims.

87. In violation of the Parties' prior agreement and the Original Tribunal's order, Respondent, however, unilaterally granted itself the right to submit a Reply on Jurisdiction and Admissibility with its Rejoinder. It chose not to seek prior leave from the Original Tribunal or agreement from Claimant. In its Reply, Respondent, moreover, did not limit its jurisdictional and admissibility arguments to those relating to the Award in the *Iberdrola* arbitration, which had been issued after Respondent filed its Memorial on Jurisdiction and Admissibility; instead, Respondent addressed *all* of Claimant's arguments on jurisdiction and admissibility.[276] In response to Claimant's objection, Respondent notably did not deny that it had violated the

[272] Minutes of the First Session, Item 13 (C-1284).

[273] Letter from TECO to the Original Tribunal dated 27 Sept. 2012 (C-1269).

[274] Letter from TECO to the Original Tribunal dated 27 Sept. 2012 (emphasis added) (C-1269).

[275] Letter from TECO to the Original Tribunal dated 27 Sept. 2012 (emphasis added) (C-1269).

[276] *See* Rejoinder (Original Arbitration) ¶¶ 31-78.

Parties' prior agreement and the Original Tribunal's order, but rather simply responded that it had no objection to Claimant filing a Rejoinder on Jurisdiction and Admissibility.[277]

88. *Second*, Claimant showed that, throughout the arbitration, Respondent violated the Original Tribunal's orders by repeatedly using evidence and testimony from the *Iberdrola* arbitration, including the very same evidence in subsequent submissions that the Original Tribunal already had ruled inadmissible.[278]

89. With its Counter-Memorial, for instance, Respondent introduced, among other things, the testimony of experts from the *Iberdrola* arbitration, who were not presented as experts in the *TECO* arbitration, and the entire transcript of the *Iberdrola* hearing.[279] Claimant objected to the introduction of this evidence, particularly because it did not have access to the full record of the *Iberdrola* proceeding and would not be able to cross-examine the experts whose testimony had been submitted.[280] In its letter to the Parties dated 10 February 2012, the Original Tribunal recognized that "the present arbitration is distinct from the *Iberdrola* arbitration and that, as a general matter, the Arbitral Tribunal does not believe [it] necessary to refer to the evidence produced in a separate arbitration to decide this case."[281] While the Original Tribunal recognized that the Parties have the "right to properly cross-examine the witnesses presented by the other party, which right supposes that each party has the possibility to produce, in advance of the hearing, documents that may be necessary in order to assess the credibility of such witnesses,"[282] it held that "it would be unfair to the Claimant to admit in the record portions of the transcript of

[277] *See* Letter from TECO to the Original Tribunal dated 27 Sept. 2012 (C-1269); Letter from Guatemala to the Original Tribunal dated 1 Oct. 2012 (C-1270).

[278] *See* TECO's Submission on Costs ¶¶ 8-13.

[279] *See* Letter from TECO to the Original Tribunal dated 31 Jan. 2012 (C-1271); Letter from Guatemala to the Original Tribunal dated 3 Feb. 2012 (C-1272); Letter from TECO to the Original Tribunal dated 6 Feb. 2012 (C-1273); Letter from Guatemala to the Original Tribunal dated 7 Feb. 2012 (C-1274); Guatemala's Memorial on Objections and Jurisdiction and Admissibility and Counter-Memorial on the Merits dated 24 Jan. 2012.

[280] Letter from TECO to the Original Tribunal dated 31 Jan. 2012, at 2 (C-1271).

[281] Letter from the Original Tribunal to the Parties dated 10 Feb. 2012, at 2 (C-1275).

[282] *Id*.

the evidence of witnesses [or excerpts of reports of those experts] that it would not have a chance to examine or cross-examine at the hearing."[283]

90. In disregard of the Original Tribunal's rulings, Respondent submitted as factual exhibits with its Rejoinder the *Iberdrola* testimony of Iberdrola's expert witnesses, who were not experts in the *TECO* arbitration.[284] Respondent also submitted the damages sections of Iberdrola's written pleadings, and resubmitted the entire transcript of the *Iberdrola* hearing, in direct contravention of the Original Tribunal's earlier ruling.[285] In response to Claimant's objection, the Original Tribunal struck Respondent's exhibits, as well as all references thereto, from the record, reaffirming its prior ruling that "[i]t would be unfair to the Claimant to admit in the record as written evidence what is in fact the opinion of experts that the Claimant does not have an opportunity to cross-examine," and finding that the admission of Iberdrola's written pleadings "would be contrary to [the Original Tribunal's] decision that the present arbitration is distinct from the Iberdrola arbitration."[286]

91. Yet again, in violation of these rulings, Respondent referred to Iberdrola's damages claim, as well as to the way in which that claim allegedly had evolved during the course of the *Iberdrola* arbitration, in its Opening Statement at the Hearing, even though the Original Tribunal had stricken that information from Respondent's Rejoinder submission.[287] In response to Claimant's objection, Respondent falsely represented to the Original Tribunal that this information was contained in the *Iberdrola* Award.[288] Claimant later confirmed, in its Rebuttal, that the *Iberdrola* Award contained no "indication of what damages they [*i.e.*, Iberdrola] were seeking or whether they changed that number at all during the course of the arbitration," and that

[283] *Id.*

[284] *See* Letter from TECO to the Original Tribunal dated 12 Oct. 2012 (C-1276).

[285] *Id.*

[286] Letter from the Original Tribunal to the Parties dated 23 Oct. 2012, at 2 (1277).

[287] *See* Arbitration Tr. (21 Jan. 2013) 341:12-22 (Claimant's Rebuttal).

[288] *Id.*

Respondent, in its Opening Statement, thus, once again, referenced information that had been stricken from the record.[289]

92. Respondent nevertheless reintroduced in its Post-Hearing Brief *that very same information* regarding Iberdrola's damages claim.[290] In its Post-Hearing Brief, Respondent also expressly relied upon the *Iberdrola* testimony of Mr. Luis Maté (former General Manager of EEGSA), even though Respondent chose not to call Mr. Maté for cross-examination at the Hearing, and thus was not entitled to rely upon that testimony.[291] In response to Claimant's objection, the Original Tribunal ruled that, consistent with its prior decisions, it would disregard the sections of Respondent's Post-Hearing Brief referencing Iberdrola's damages claim and Mr. Maté's *Iberdrola* testimony.[292] The Original Tribunal reiterated that, "in order to avoid any further similar incidents when the second round of Post-Hearing Briefs will be submitted, [it] would like the [P]arties to be mindful that it will resolve this case on the basis of the direct oral and written evidence produced in this case, and that no consideration will be given to either the [P]arties pleadings or the transcripts in the *Iberdrola* arbitration, save of course to the limited extent identified in the Original Tribunal's letters of 10 February and 15 October 2012."[293] Despite these repeated directions, Respondent continued to contravene the Original Tribunal's orders, and made inadmissible statements in its Post-Hearing Reply concerning the content of arguments made by Iberdrola in its arbitration, which evidence was not in the record.[294] This continued into the annulment proceeding. Respondent, in its Counter-Memorial on Partial Annulment, invoked the same evidence stricken from the record by the Original Tribunal, and at

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[289] *Id.*

[290] Letter from the Original Tribunal to the Parties dated 27 June 2013 (C-1278).

[291] *Id.*

[292] *Id.* at 2.

[293] *Id.*

[294] *See* Guatemala's Post-Hearing Reply ¶ 90 & n.151 (claiming, without reference to any exhibit in the record, that "Iberdrola never mentioned [RLGE Article 83] in its arbitration proceeding").

Claimant's request, the *ad hoc* Committee likewise excluded it.[295] Respondent then referenced the same material at the annulment Hearing, again drawing Claimant's objection.[296]

93. It is precisely this pattern of misconduct by Respondent that compelled Claimant, in the present proceeding, to request that this Tribunal include in Procedural Order No. 1 the direction that "pleadings, expert reports, factual exhibits, and any other evidence of arguments concerning the *Iberdrola* arbitration that were stricken from the record in the Original Proceeding . . . and the references thereto stricken from Respondent's pleadings and argument in the Original Proceeding, cannot be introduced in this Proceeding."[297]

94. *Third*, Claimant demonstrated that Respondent engaged in procedural misconduct during the document production phase of the Original Arbitration. In response to Respondent's request, Claimant agreed to produce documents "relating to communications between EEGSA and Leonardo Giacchino and/or Carlos Bastos, or communications between these two individuals, as of their appointment as members of the Expert Commission," which Respondent asserted were "relevant to evaluate the Claimant's assertions relating to the independence of the members of the Expert Commission."[298] Yet, Respondent objected to the production of that very same category of documents with respect to the CNEE and its appointee to the Expert Commission, Jean Riubrugent, on the ground that Claimant's request for such documents was overbroad, and not sufficiently relevant or material to the outcome of the case.[299] The *ex parte* communications between the CNEE and Mr. Riubrugent—which Respondent agreed to produce only after Claimant demonstrated that Respondent had sought and received the very same category of documents from Claimant—were relevant and material to the issues in dispute. They evidenced the arbitrary and bad faith nature of the CNEE's actions during EEGSA's tariff review, and further undermined Respondent's arguments that the Expert Commission's decisions

[295] Letter from the *ad hoc* Committee to the Parties dated 18 Mar. 2015 (C-1279).

[296] *See* Annulment Tr. (13 Oct. 2015) 17:2-18 (Respondent's Opening Statement).

[297] Procedural Order No. 1 § 14.2.

[298] Claimant's Redfern Schedule, *attached to* Procedural Order No. 2 (Original Arbitration) dated 21 Mar. 2012, Request No. G.3, at 71 (C-1283).

[299] Claimant's Redfern Schedule, *attached to* Procedural Order No. 2 (Original Arbitration) dated 21 Mar. 2012, Request No. G.3, at 70 (C-1283).

could be ignored by the CNEE at its whim (a position the Original Tribunal ultimately rejected).[300]

95. In addition, Respondent withheld a series of responsive documents that the Original Tribunal expressly ordered Respondent to produce, or which Respondent itself agreed to produce to Claimant.[301] Although Respondent, for example, should have produced the CNEE's "minutes of meetings," Respondent produced *no* minutes of the meetings of the CNEE's directors.[302] As Mr. Moller (one of the CNEE's directors) confirmed on cross-examination, in accordance with the CNEE's Internal Regulations, the CNEE's directors are required to meet at least once a week, and that minutes of their meetings—both ordinary and extraordinary—must be recorded in writing, but that *Counsel for Respondent never requested a copy of the minute book in which these minutes are recorded*.[303] The same is true with respect to Claimant's request for "[a]ll promotional materials, presentations, or other documents prepared, used, or distributed by Guatemala during its promotion of the privatization of EEGSA,"[304] including a copy of the presentation given by the CNEE to the High-Level Committee on 13 March 1998 regarding the tariff methodology set out in the LGE,[305] and for "[d]ocuments showing the three lists of candidates proposed by the national universities, the MEM, and the wholesale market agents for CNEE's Board of Directors in 2007," which the Original Tribunal likewise ordered Respondent

[300] *See* Email chain between M. Peláez and J. Riubrugent dated 13 June 2008 (C-1024); Email from J. Riubrugent to M. Quijivix dated 7 July 2008 (C-1028); *see also* Award ¶¶ 661-690.

[301] TECO's Post-Hearing Brief ¶ 7.

[302] *Id.*

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

[304] Claimant's Redfern Schedule, *attached to* Procedural Order No. 2 (Original Arbitration) dated 21 Mar. 2012, Request No. B.1, at 12 (C-1283).

[305] *Id.* at 18; Arbitration Tr. (4 Mar. 2013) 1005:15-1006:15 (Moller).

to produce.[306] In its Post-Hearing Reply, Respondent notably failed to justify its incomplete document production.[307]

96. *Fourth*, Claimant showed that Respondent repeatedly misrepresented the record in an effort to mislead the Original Tribunal to Claimant's prejudice. Respondent, for example, asserted in its Post-Hearing Brief that, "[d]espite Guatemala's request for documentation of any due diligence in its request for documents . . . , [TECO] did not present even a single document."[308] Claimant, however, in fact, had already produced several documents and had listed several more on its privilege log in response to Respondent's request.[309] Respondent further misleadingly argued in its Post-Hearing Reply that Claimant "cannot seriously allege bad faith on the part of Guatemala in the submission of documents, when Guatemala submitted around 300 documents while [TECO] provided only 50."[310] As Claimant previously had explained, unlike Respondent, Claimant did not produce the same document more than once, nor did it reproduce documents that already were in the record;[311] the 50 documents that Claimant produced to Respondent thus did not include the many responsive documents that Claimant already had submitted as exhibits to its Memorial.[312] Similarly, Respondent erroneously asserted in its Post-Hearing Brief that Claimant never addressed the non-disputing party submissions at

[306] Claimant's Redfern Schedule, *attached to* Procedural Order No. 2 (Original Arbitration) dated 21 Mar. 2012, Request No. F.1, at 53 (C-1283).

[307] Guatemala's Post-Hearing Reply ¶¶ 9-10. Indeed, in its Post-Hearing Reply, rather than attempt to defend its compliance, Respondent simply asserted that it did not ask Mr. Moller for the CNEE's minutes of meetings, because "the contact at the CNEE for this matter was . . . the CNEE's Legal Department." *Id.* ¶ 9. Guatemala further asserted that the documents relating to EEGSA's privatization were kept by EEGSA, and not by Government agencies, even though one of the documents Claimant requested was a presentation prepared by the CNEE itself. *Id.* ¶ 10; TECO's Post-Hearing Brief ¶ 7. Respondent likewise failed to offer any explanation for its failure to produce documents reflecting the lists of candidates proposed for the CNEE Directors, which Mr. Moller confirmed on cross-examination are kept by the MEM. *See* TECO's Post-Hearing Brief ¶ 7.

[308] Guatemala's Post-Hearing Brief ¶ 314 n.425.

[309] TECO's Post-Hearing Reply ¶ 45.

[310] Guatemala's Post-Hearing Reply ¶ 10 n.12.

[311] Indeed, nearly 25 percent of the documents that Guatemala produced to TECO already were in the record as Claimant's own exhibits. *See* Letter from TECO to the Original Tribunal dated 9 Mar. 2012 (C-1280).

[312] Memorial (Original Arbitration).

the Hearing,[313] when Claimant not only addressed those submissions in its Opening Statement, but also had slides directly quoting them.[314]

97. Respondent also misrepresented in its Post-Hearing Briefs that the 28 July 2008 model submitted by Claimant (Bates White's final revised VAD and tariff study incorporating the Expert Commission's findings) as an exhibit had been altered.[315] Although that model was submitted by Claimant with its *Memorial*, Respondent waited to raise its objection to that model until after the cross-examination of Mr. Giacchino, the author of the model, thus depriving Mr. Giacchino of an opportunity to respond.[316] Respondent, moreover, continued to accuse Claimant of misconduct in this regard, despite the fact that it never disputed Claimant's explanation that the two exhibits at issue differed only with respect to a single file, which is dated contemporaneously with the VAD study and, thus, was submitted at that time, and, which, in any event, has no effect on the VNR or VAD amounts.[317]

98. *Fifth*, Claimant demonstrated that Respondent engaged in misconduct with respect to the submission of translations, increasing unnecessarily Claimant's costs. As the record reflects, Claimant initially proposed that international legal authorities need not be translated, because "Respondent has not shown that the [P]arties' purported need to review translations of international legal authorities, including ICSID cases, outweighs the burden and expense of having those legal authorities translated."[318] Claimant noted that "[b]oth [P]arties' counsel have worked on numerous ICSID cases and neither party's counsel will be prejudiced by having ICSID cases, or relevant excerpts thereof, submitted in the language(s) in which the case is published," and that, "[w]hile the [P]arties themselves may have a legitimate interest in

[313] Guatemala's Post-Hearing Brief ¶¶ 15-16.

[314] TECO's Post-Hearing Reply ¶ 33; Arbitration Tr. (21 Jan. 2013) 121:4-6, 123:11-124:1 (Claimant's Opening Statement); Claimant's Opening Slides 126, 130.

[315] Guatemala's Post-Hearing Brief ¶ 211.

[316] TECO's Post-Hearing Reply ¶ 110; TECO's Post-Hearing Brief ¶ 158.

[317] TECO's Post-Hearing Reply ¶ 110; TECO's Post-Hearing Brief ¶ 158; Guatemala's Post-Hearing Brief ¶¶ 211-213.

[318] Letter from TECO to the Original Tribunal dated 13 May 2011, at 2 (C-1281).

reviewing the factual evidence and domestic legislation and court decisions, the same has not been shown to be true with regard to international legal authorities."[319]

99. Respondent objected to Claimant's proposal, arguing that "there is no reason to distinguish ICSID decisions from other legal authorities or factual exhibits filed by the Parties with regard to the need for courtesy translations," and thus insisting that both Parties provide translations of "relevant excerpts of ICSID decisions not available in the other procedural language."[320] On the basis of Respondent's objection, the Original Tribunal ruled in Item No. 10 of the Minutes of the First Session in the Original Arbitration that, "[f]or factual exhibits and legal authorities, including ICSID decisions, presented with submissions, the [P]arties will translate into the other procedural language an appropriate excerpt that is relied upon by the party making the submission."[321]

100. In accordance with the Original Tribunal's direction, Claimant submitted with its Memorial relevant excerpts in Spanish for all 44 international cases (only 13 of which were publicly available in both English and Spanish). Despite its insistence on this ruling, however, Respondent failed to submit with its Counter-Memorial submission relevant excerpts in Spanish for *any* of the international cases which it relied upon that were not already publicly available in both English and Spanish.[322] Respondent's failure to do so not only violated the Original Tribunal's order, but demonstrated that its insistence on having Claimant provide such translations was for no reason other than to burden Claimant with unnecessary expenses. Indeed, rather than incur the cost of translating these cases once Claimant raised its objection,

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[319] *Id.*

[320] Letter from Guatemala to the Original Tribunal dated 13 May 2011, at 3 (emphasis removed) (C-1281).

[321] Minutes of the First Session, Item 10 (C-1284).

[322] *See Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999 ¶ 90 (RL-2); *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Final Award dated Dec. 16, 2002 (RL-5); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481 (UNCITRAL Rules) Award dated 3 Feb. 2006 (RL-9).

Respondent instead proposed to amend the Minutes of the First Session to accord with Claimant's earlier proposal to which it previously had strenuously objected.[323]

101. In addition, Respondent refused to translate other exhibits into English, including, for example, the report of Mercados Energéticos, one of the two consultants the CNEE engaged to assist it in the 2008-2013 tariff review process. The report was submitted as an exhibit to a witness statement that served only to confirm the contents of the attached report.[324] Nevertheless, and even though the Minutes of the First Session expressly required the translation of exhibits or relevant excerpts thereof, Respondent failed to provide a translation of this expert report, thus compelling Claimant to incur the cost of translating it itself.[325] Likewise, Respondent failed to translate other important documents, such as Respondent's Instruction Letter to its damages expert, Dr. Abdala.[326] Respondent also submitted only partial translations of documents, thus compelling Claimant to bear the cost of translating these documents in full.[327]

B. The Original Tribunal's Findings

1. Liability

102. In its Award, the Original Tribunal held that the actions taken by Guatemala during EEGSA's 2008-2013 tariff review, culminating in its decision to reject both the Expert Commission's decisions and EEGSA's revised VAD study, and to set EEGSA's tariffs on the basis of its own VAD study, reflected a willful disregard of the legal and regulatory framework, and constituted arbitrary treatment in violation of Article 10.5 of the DR-CAFTA.[328]

103. Specifically, the Original Tribunal found that the international law minimum standard of treatment under Article 10.5 of the DR-CAFTA is infringed by State conduct that is

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[323] Email from TECO to the Original Tribunal dated 8 Feb. 2012 (C-1282), notifying it of the Parties' agreement to modify Item 10 of the Minutes of the First Session; Email from Guatemala to the Original Tribunal dated 9 Feb. 2012, confirming agreement (C-1285).

[324] TECO's Submission on Costs ¶ 21.

[325] *Id.*

[326] Instruction Letter to Manuel A. Abdala and Marcelo A. Schoeters dated 1 November 2011 (C-1252).

[327] *See* TECO's Submission on Costs ¶ 21.

[328] Award ¶¶ 707-711.

"arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety,"[329] and that "a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard."[330] The Original Tribunal likewise found that "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."[331] As the Original Tribunal observed, the standard thus "prohibits State officials from exercising their authority in an abusive, arbitrary or discriminatory manner," and "obliges the State to observe due process in administrative proceedings."[332] The Original Tribunal also noted that "[a] lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was a lack of due process in administrative proceedings."[333]

104. Applying these principles, the Original Tribunal held that, "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 the fundamental principles of due process in regulatory matters."[334] In so doing, the Original Tribunal correctly found that the CNEE had "repudiated the two fundamental principles upon which the tariff review process regulatory framework is premised," namely, that, save in limited circumstances, "the tariff would be based on a VAD calculation made by a prequalified consultant appointed by the distributor," and that, "in case of disagreement between the regulator and the distributor, such disagreement would be resolved having regard to the conclusions of a neutral Expert Commission."[335]

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[329] *Id.* ¶ 454.

[330] *Id.* ¶ 457.

[331] *Id.* ¶ 458.

[332] *Id.* ¶ 587.

[333] *Id.*

[334] *Id.* ¶ 664.

[335] *Id.* ¶ 665.

105. With respect to the legal and regulatory framework, the Original Tribunal found that, "[b]y providing that the tariff would be established based on a VAD study realized by the distributor's consultant, the regulatory framework guarantees that the distributor would have an active role in determining the VAD and prevents the regulator from determining it alone and discretionally, save in limited circumstances."[336] Indeed, as the Original Tribunal rightly noted, the "entire regulatory framework is based on the premise" that the CNEE "did not enjoy unlimited discretion in fixing the tariff."[337] The Original Tribunal accepted that the amended RLGE Article 98 did not change this fundamental aspect of the regulatory regime, but rather, provided the CNEE with a means to set the distributor's tariffs on the basis of its own VAD study only in two limited circumstances, *i.e.*, where the distributor fails to submit a VAD study, or where the distributor fails to respond to the CNEE's observations by correcting its VAD study in accordance with the observations or indicating its disagreement with the CNEE's observations in writing.[338]

106. The Original Tribunal further found that, contrary to Guatemala's arguments, "the role of the Expert Commission was not . . . to verify that all the observations made by the regulator on the VAD study were implemented by the distributor's consultant;" rather, the role of the Expert Commission was "to pronounce itself on any disagreement regarding such observations, which implies that the Expert Commission could make findings either in favor or against the regulator."[339] As the Original Tribunal observed, "the language used in Article 75 of the LGE clearly suggests that, in case of a disagreement between the CNEE and the distributor on the distributor's VAD report, such disagreement would be resolved on the basis of a determination made by the Expert Commission."[340] Under LGE Article 75, the Expert

[336] *Id.* ¶ 506.

[337] *Id.* ¶ 563.

[338] *Id.* ¶¶ 580-667.

[339] *Id.* ¶ 669.

[340] *Id.* ¶ 567.

Commission's role thus "was to provide a solution to disagreements between the CNEE and the distributor, not to act as the guardian of the regulator's views."[341]

107. The Original Tribunal likewise found 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."[342] As the Original Tribunal remarked, it would be "entirely nonsensical" to submit points of disagreement to the Expert Commission, while simultaneously obliging the "distributor to immediately incorporate any such point of disagreement in its VAD Study."[343] The Original Tribunal further remarked that "[i]t would be even more nonsensical to allow the regulator to unilaterally impose its own VAD study because observations upon which there were disagreements and that were subject to a pending pronouncement of the Expert Commission had not been immediately incorporated in the VAD study."[344] As the Original Tribunal concluded, "because 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 (unless the regulator expresses valid reasons to depart from the experts' pronouncements)."[345]

108. Despite the language in the Sales Memorandum, the LGE, the CNEE's submissions to Guatemala's Constitutional Court, and in the CNEE's own internal documents,[346]

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[341] *Id.* ¶ 568.

[342] *Id.* ¶ 577.

[343] *Id.* ¶ 579.

[344] *Id.* ¶ 580.

[345] *Id.* ¶ 668.

[346] *See* Sales Memorandum, at 49 (C-1007); LGE Arts. 75-76 (C-1003); CNEE Answer to Constitutional Challenge 1782-2003 dated 10 Nov. 2003, at 6-7 (C-1092); Email from A. Campos to A. Garcia, J.F. Orozco, M. Santizo, M. Peláez, M. Estrada, D. Herrera, M. Ixmucane Cordova dated 16 May 2007, attaching Terms of Reference for VAD Studies and Replies to EEGSA Comments, at 2 (C-1093); Sigla Supporting Report for the Representative of the CNEE before the Expert Commission dated 27 May 2008, at 2 (C-1023); *see also* Memorial (Original Arbitration) ¶¶ 41-43; Reply (Original Arbitration) ¶¶ 37-50; TECO's Post-Hearing Brief ¶ 85; Alegría II ¶¶ 8-10, 38; Alegría I ¶¶ 31, 76-78; Dictionary of the Royal Spanish Academy (2001), second and fifth definitions of "*pronunciar*" (C-1094); Chilean General Electricity Law dated 2 May 2007, Art. 211 (C-1095); Regulations of the Chilean General Electricity Law dated 9 Oct. 1998, Art. 314 (C-1096).

the Original Tribunal rejected TECO's contention that the rulings of the Expert Commission were binding, finding that they "are not technically binding in the sense that the Expert Commission has no adjudicatory powers."[347] The Original Tribunal explained, however, that although not technically binding, "the regulator had the duty to give [the Expert Commission's rulings] serious consideration and to provide reasons in the case it decided to depart from them."[348] As the Original Tribunal noted, "the regulatory framework would make no sense" if the CNEE could disregard the Expert Commission's decisions at whim.[349] The Original Tribunal thus ruled that the regulator "could not decide to disregard the Expert Commission's pronouncements without providing any reason," which obligation "derives from both the regulatory framework and from the international obligations of the State under the minimum standard."[350]

109. With respect to EEGSA's 2008-2013 tariff review, the Original Tribunal found that the CNEE's Resolution No. 144-2008 was "inconsistent with the regulatory framework," and that, "[b]y rejecting the distributor's study because it had failed to incorporate the *totality* of the observations that the CNEE had made in April 2008 [before the parties' discrepancies were even submitted to the Expert Commission], 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."[351] As the Original Tribunal noted, "the CNEE did not consider the report of the Expert Commission as the pronouncement of a neutral panel of experts which it had to take into account in establishing the tariff," but rather "used the expert report to ascertain that some of the observations it had made in April 2008 had not been incorporated in the study, regardless of whether there was a disagreement, and irrespective of the views that had been

[347] Award ¶ 670.

[348] *Id.*

[349] Award ¶ 576.

[350] *Id.* ¶ 583.

[351] *Id.* ¶ 681 (emphasis in original).

expressed by the experts on such disagreements."[352] The CNEE accordingly "failed without any reasons to take the Expert Commission's pronouncements into account."[353]

110. The Original Tribunal further held that "the regulator's decision to apply its own consultant's study does not comport with Article 98 of the RLGE," and that, "in order for the regulator's decision to comport with Article 98, it should have [shown] 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."[354] The Original Tribunal thus held that, once the CNEE "had received the Expert Commission's report, [it] should have analyzed it and taken its conclusions onboard in establishing a tariff based on the Bates White VAD study, unless it had good reasons 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."[355]

111. The Original Tribunal also held that, "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission's pronouncements or that there is *any reason to depart from such pronouncements*;"[356] that Guatemala failed to establish that the CNEE "*would have had* any valid reasons to disregard the pronouncements of the Expert Commission regarding the asset base;"[357] and that "[t]he Expert Commission's pronouncement on the FRC is in fact consistent with the regulatory framework and the regulator *would have had no valid reason* to object to it."[358]

112. Finally, the Original Tribunal found that the CNEE's "preliminary review" of EEGSA's revised VAD study "performed in less than one day was clearly insufficient to

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[352] *Id.* ¶ 678.

[353] *Id.*

[354] Award ¶¶ 679-680.

[355] *Id.* ¶ 683.

[356] *Id.* ¶ 731 (emphasis added).

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

[358] *Id.* ¶ 726 (emphasis added).

discharge" its obligation to seriously consider the Expert Commission's findings, and was evidence of "[t]he arbitrariness of the regulator's behavior."[359] The Original Tribunal explained that, "both under the regulatory framework and under the minimum standard of treatment, the CNEE could and should have taken the time, after careful review of the Expert Commission's report, to implement its conclusions in the Bates White's study."[360] As the Original Tribunal noted, it could "find no justification, other than its desire to reject the Bates White study in favor of the more favorable Sigla's study, for [the CNEE's] behavior."[361]

113. Finding that Guatemala's "behavior therefore breaches Guatemala's obligation to grant fair and equitable treatment under article 10.5 of CAFTA-DR,"[362] the Original Tribunal further held that "such breach has caused damages to the Claimant, in respect of which the Claimant is entitled to compensation."[363]

2. Quantum

a. Loss of Cash Flow Portion Of Damages

114. In analyzing TECO's claim for the loss of cash flow portion of damages, the Original Tribunal agreed that EEGSA's historical results up through August 2010 and forecasts based upon the Sigla VAD study should serve as the basis for EEGSA's actual cash flow, and adopted Mr. Kaczmarek's calculation of EEGSA's actual cash flows.[364] The Original Tribunal also agreed that damages should be established on the basis of "what the tariffs should have been had the CNEE complied with the regulatory framework."[365] As the Original Tribunal concluded, TECO's loss of cash flow portion of damages therefore amounted to "(i) Claimant's share of the higher revenues that EEGSA would have received had the CNEE observed due process in the

[359] *Id.* ¶¶ 690-691 (emphasis omitted).

[360] *Id.* ¶ 690.

[361] *Id.*

[362] *Id.* ¶ 711.

[363] *Id.*

[364] *Id.* ¶¶ 224-226, 337, 716, 719-720, 742.

[365] *Id.* ¶¶ 728, 742.

tariff review, (ii) to run from the moment the high[er] revenues would have been first received until the moment when the Claimant sold its share[s] in EEGSA."[366]

115. In determining what VAD EEGSA would have charged and, thus, what cash flows it would have earned absent Guatemala's breach during this period, the Original Tribunal first considered, "[a]s an initial matter, . . . whether the proper base of valuation should be the Bates White 5 May, 2008 report as corrected by Mr. Damonte or the 28 July, 2008 report" prepared by Bates White.[367] As discussed above, Mr. Damonte's study admittedly incorporated only what he deemed to be the "possible and economically relevant" rulings of the Expert Commission.[368] The Original Tribunal found that, because Mr. Damonte's study did not incorporate all of the Expert Commission's rulings, including its "important" ruling on the FRC calculation,[369] it could not "usefully [be] refer[red] to . . . as a basis for assessing the but for scenario."[370]

116. The Original Tribunal thus properly decided that it would "work on the basis of the July 28, 2008 version of the [Bates White] study," as "*this approach will allow calculation of damages with a sufficient degree of certainty based on what the tariffs should have been had the CNEE complied with the regulatory framework*."[371] In so holding, the Original Tribunal "accepted the Claimant's views on the three issues that [were] in dispute in respect of that study (i.e. the VNR, the FRC, and the CAPEX)."[372] On the basis of Dr. Barrera's analysis that each of the Expert Commission's rulings had been incorporated into Bates White's revised model and other evidence, the Original Tribunal rejected Guatemala's objection that Bates White's 28 July 2008 study did not incorporate the Expert Commission's rulings, holding that "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study

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[366] *Id.* ¶ 742.

[367] *Id.* ¶ 723.

[368] *See supra* ¶ 52.

[369] *See* Award ¶¶ 726-727, 733.

[370] *Id.* ¶ 727.

[371] *Id.* ¶ 728 (emphasis added).

[372] *Id.* ¶ 742.

failed to incorporate the Expert Commission's pronouncements or that there is any reason to depart from such pronouncements."[373]

117. Because the Original Tribunal found that the CNEE breached that regulatory framework by refusing, without legitimate reason, to calculate the tariffs on the basis of Bates White's 28 July 2008 VAD study, which had incorporated the Expert Commission's rulings, the Original Tribunal agreed with TECO that it was entitled to its share of the cash flow that EEGSA would have received, if the CNEE had set EEGSA's 2008-2013 VAD and tariffs based upon Bates White's 28 July 2008 VAD study, rather than the VAD study prepared by the CNEE's own consultant, Sigla.[374] The Original Tribunal thus awarded TECO loss of cash flow damages in exactly the amount calculated by Mr. Kaczmarek and claimed by TECO, *i.e.*, US$ 21.1 million.[375]

b. Loss of Value Portion Of Damages

118. In analyzing TECO's loss of value damages claim, the Original Tribunal ruled that it had "no reasons to doubt that, as reflected in the [corporate board] minutes, the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework."[376] The Original Tribunal further observed that both Parties had agreed upon the methodology to be applied in calculating TECO's loss of value damages, *i.e.*, the difference between "EEGSA's sale value to EPM" and "the higher value to which EEGSA would have been sold to EPM in [the] absence of [the] breach."[377] The Original Tribunal also accepted that the Parties agreed on the value of TECO's shares in the actual scenario.[378] The Original Tribunal further accepted that the value of a distribution company, such as EEGSA, is determined on the

[373] *Id.* ¶ 731.

[374] *Id.* ¶¶ 728, 742.

[375] *Id.* ¶¶ 742, 780.

[376] *Id.* ¶ 748.

[377] *Id.* ¶ 719.

[378] *See id.* ¶ 750 (stating that, as regards the actual scenario, the parties are only in a "slight disagreement" regarding the portion of the sales price paid by EPM for the bundle of assets including EEGSA "that is attributed to EEGSA").

basis of its future expected cash flows, which would be determined by its future VAD.[379] Finally, the Original Tribunal acknowledged that "the existing tariffs were taken into account in fixing the price of the transaction" between TECO and EPM.[380]

119. Yet, having found that "Respondent's breach caused losses to the Claimant,"[381] and that "the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework,"[382] the Original Tribunal nonetheless denied TECO's claim for loss of value damages on the purported basis that there was "no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013,"[383] and thus "no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale."[384]

120. In so ruling, the Original Tribunal notably did not analyze the Parties' extensive expert reports (including the fact that even Respondent's expert assigned a positive value to the loss of value portion of TECO's damages), but rather focused solely on its own translation of a brief press interview given by Mr. Restrepo, the then Chief Executive Officer of EPM, the purchaser of EEGSA, to a Guatemalan newspaper the day after EPM purchased EEGSA.[385] In the interview, Mr. Restrepo was reported to have stated:

> Q. *The shareholders argued that there would be lower revenue and profitability due to the VAD*. Despite this issue, you decided to buy?
>
> A. *This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout* [*i.e.*, the Sigla VAD] *is the one that exists*. *Clearly*

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[379] *See id.* ¶ 728; *see also* Tr. (22 Jan. 2013) 553:14-17 (Tribunal President) (stating that a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that").

[380] *Id.* ¶ 752.

[381] *Id.* ¶ 742.

[382] *Id.* ¶ 748.

[383] *Id.* ¶ 754.

[384] *Id.* ¶ 749.

[385] *Id.* ¶¶ 753-754. In this proceeding, Claimant has submitted its own translation of this interview in its entirety. *See* Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097).

> *it has an impact on the final valuation and we had no expectation that it would be modified or changed*.
>
> Q. You must start preparing for the VAD of the next five year period [*i.e.*, the 2013-2018 tariff period]. Do you think it can improve with respect to the current one?
>
> A. Our valuation process of the company included various scenarios one of them being that the VAD – value received by distributors for the service – would not be modified. This is what we studied.
>
> Q. [W]hen you mention the valuation process, does it mean that the company would have costed more with another VAD?
>
> A. That is possible. *For the same cost you receive more revenue, you have more cash of course*.[386]

121. The Original Tribunal drew two conclusions from this interview. First, the Original Tribunal observed that the interview confirmed that the "existing tariff were considered as a relevant factor in determining the price of the transaction."[387] Second, focusing on the last question and answer, the Original Tribunal concluded that, on the other hand, the interview "only mentions as a '*possibility*,'" rather than a certainty, "that with a higher VAD for the rest of the tariff period, the transaction price would have been higher."[388] The Original Tribunal further noted, erroneously, that "there [was] no evidence in the record of how the transaction price has been determined," and remarked that it was unaware of "what other factors might have come into play," in determining the sales price.[389] The Original Tribunal then held that it could not "conclude with sufficient certainty that an increase in revenues in 2013 would have been reflected in the purchase price and to what extent,"[390] even though it earlier had acknowledged

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[386] Award ¶ 753 (citing and providing the Original Tribunal's own partial translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (emphasis added) (C-1268)). Claimant has submitted its own complete translation of this exhibit as (C-1097).

[387] *Id.* ¶ 754.

[388] *Id.* ¶ 754 (emphasis added).

[389] *Id.*

[390] *Id.*

the undisputed fact that the value of a distribution company is determined by its VAD;[391] had concluded that "the existing tariffs were taken into account in fixing the price of the transaction" between TECO and EPM;[392] and had determined that those existing tariffs gave rise to damages from 1 August 2008 until 21 October 2010, while TECO held its investment in EEGSA.[393]

122. The Original Tribunal further stated that there was "no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever,"[394] and that, while Mr. Restrepo had indicated in his interview that EPM had assumed that the tariffs were likely to remain the same for future tariff periods, he also said "that such a scenario was only one of those which were considered by the purchaser."[395] Agreeing with Guatemala that "'it is actually impossible to know what will happen with the tariffs in the future,'"[396] the Original Tribunal ruled that Claimant's claim for loss of value damages was "speculative."[397] According to the Original Tribunal, there was "nothing preventing the distributor from seeking an increase of the tariffs at the end of the 2008-2013 tariff period," and, "[i]n this respect, no information has been provided to the Arbitral Original Tribunal regarding the establishment of the 2013-2018 tariffs."[398] The Original

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[391] *See* Arbitration Tr. (22 Jan. 2013) 553:14-17 (President of Tribunal) (stating that a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that.").

[392] Award ¶ 752.

[393] *See supra* ¶ 117; Award ¶ 742.

[394] Award ¶ 755. TECO, however, had not argued that the price paid by EPM was based on an assumption that EEGSA's tariffs would remain forever unchanged post-2013. Rather, as described above, Mr. Kaczmarek projected EEGSA's cash flows until 2018, whereupon he assigned a terminal value to EEGSA. Mr. Kaczmarek did not assume that the tariffs would remain unchanged, but rather that the CNEE would continue to calculate the VAD based on a VNR depreciated by 50 percent. He also adjusted EEGSA's projected financial performance after 2013 for various factors, such as the inflation of costs and materials, the growth of the network, and the network's technical losses. All of this was explained in Mr. Kaczmarek's expert reports, as well as in TECO's submissions. *See* Kaczmarek I ¶¶ 161-181, 197; Kaczmarek II, at Appendix 3.A; Arbitration Tr. (5 Mar. 2013) 1496:4- (Kaczmarek Direct); Memorial (Original Arbitration) ¶¶ 288-292; TECO's Post-Hearing Brief ¶¶ 169-171; TECO's Post-Hearing Reply ¶ 126; TECO's Memorial on Partial Annulment ¶ 104.

[395] Award ¶ 756.

[396] *Id.* ¶ 757 (quoting and agreeing with Guatemala's Post-Hearing Brief ¶ 354).

[397] *Id.* ¶ 757.

[398] *Id.* ¶ 758. The Tribunal's statement is incorrect, including because the record contained the 2013-2018 ToR, whereby the CNEE established the procedures for setting the VAD and the tariffs for the 2013-2018

Tribunal also noted that there was "no indication that the distributor will be prevented from seeking a change in the tariffs in 2018,"[399] and that the regulatory framework may change, impacting future tariff reviews and VADs.[400]

c. Interest

123. In its Award, the Original Tribunal recognized that "Respondent [did] not object to the request for pre-award interest," and that "Respondent [did] not object to the claim for compounded interest."[401] The Original Tribunal granted TECO pre-award and post-award interest on its loss of cash flow damages at the U.S. Prime rate plus 2 percent, compounded annually, from the date of the sale to EPM on 21 October 2010.[402] The Original Tribunal, however, declined to grant pre-award interest for the period prior to the sale,[403] stating that "calculating interest on the entire amount of the historical damages as from the first day of the tariff period would result in an unjust enrichment of the Claimant."[404] The Original Tribunal thus held that "interest should only accrue from the date of the sale of EEGSA to EPM in October 2010."[405]

d. Costs

124. The Original Tribunal examined the costs submitted by each Party, and concluded that they were "justified and appropriate in view of the complexity of this case."[406] Recognizing that the Parties had agreed that the Original Tribunal should award costs in accordance with the

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tariff period and in which the CNEE set forth the very same FRC calculation as the one that it had imposed on EEGSA during its 2008-2013 tariff review, which had resulted in an unjustifiable 50 percent depreciation of EEGSA's regulatory asset base. *See* CNEE Resolution 161-2012 dated 23 July 2012, at 27 (C-1084); TECO's Post-Hearing Brief ¶ 170 (discussing same); TECO's Memorial on Partial Annulment ¶ 104 (same).

[399] Award ¶ 758.

[400] *Id.* ¶ 759.

[401] *Id.* ¶ 763.

[402] *Id.* ¶ 768.

[403] *See id.* ¶¶ 765, 767-768.

[404] *Id.*

[405] *Id.* ¶ 765.

[406] *Id.* ¶ 775.

principle that costs should follow the event,[407] the Original Tribunal ordered Respondent to support the entirety of its costs, and to reimburse 75 percent of TECO's costs, *i.e.*, US$ 7.5 million,[408] because it found that Claimant had prevailed on jurisdiction and the merits, but had been only partially successful on quantum.[409]

C. The *Ad Hoc* Committee's Findings In Its Decision On Annulment

125. Following dispatch of the Award to the Parties, Guatemala submitted an application for annulment of the entire Award, seeking to annul the Tribunal's decisions on jurisdiction, liability, damages, and costs,[410] while TECO submitted an application for partial annulment of the Award, seeking to annul the portion of the Award denying TECO loss of value damages, denying interest for the period preceding the sale, and establishing the applicable pre- and post-Award interest rate.[411]

126. In its Decision on Annulment dated 5 April 2016, the *ad hoc* Committee denied Guatemala's application in its entirety[412] and granted TECO's application (with the exception of its request with respect to the applicable interest rate), annulling the portions of the Award in which the Tribunal had denied TECO's claims for loss of value damages and interest for the period preceding the sale of EEGSA.[413] The *ad hoc* Committee also annulled the Tribunal's costs decision, holding that, because Guatemala's partial success on damages had been annulled, the basis for the Tribunal's allocation of costs in its Award (namely, that costs follow the event, as a result of which TECO was awarded a portion, but not all, of its costs) similarly had disappeared.[414]

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[407] *See id.* ¶¶ 776-777.

[408] *Id.* ¶ 779.

[409] *Id.* ¶¶ 778-779, 780(F).

[410] Decision on Annulment ¶¶ 31-32.

[411] *Id.* ¶¶ 29-30.

[412] *Id.* ¶¶ 215-238, 246-259, 274-300, 308-323, 327-331, 337-343, 348-351, 358-362, 382.

[413] *Id.* ¶¶ 123-139, 183-198, 382(1) and (2); *see also* Award ¶¶ 743-761, 765, 768.

[414] Decision on Annulment ¶¶ 358-362, 382(3); *see also* Award ¶¶ 769-779.

127. With respect to the Tribunal's decision on jurisdiction, the *ad hoc* Committee held that, "in upholding jurisdiction over TECO's claims, the Tribunal did not manifestly exceed its powers"[415] and that the Tribunal's reasoning was "logically capable of explaining the Tribunal's ultimate decision."[416] In so holding, the *ad hoc* Committee found that the Tribunal had addressed Guatemala's jurisdictional objection in full and had properly identified and applied the *prima facie* test in its jurisdictional analysis.[417] The *ad hoc* Committee further found that the Tribunal's decision on jurisdiction "was tenable as a matter of law,"[418] and that, contrary to Guatemala's assertions, "there is no inherent incompatibility between a regulatory dispute having arisen at the domestic law level and an arbitral tribunal being subsequently called to assess the conduct of the State under international law."[419]

128. The *ad hoc* Committee likewise found that the Tribunal had provided reasons for its decision on jurisdiction,[420] and that it had "no difficulty in holding that the Tribunal's reasoning was not frivolous, but logically capable of explaining the Tribunal's ultimate decision."[421] As the *ad hoc* Committee remarked, "the Tribunal set out the logical steps in its [jurisdictional] analysis, while the reasoning is clear and can be followed with ease from beginning to end."[422]

129. With respect to the Tribunal's decision on liability, the *ad hoc* Committee held that "the Tribunal did not fail to state reasons and did not manifestly exceed its powers when it considered the [Guatemalan] Constitutional Court decisions," as Guatemala had argued.[423] In so holding, the *ad hoc* Committee found "no contradiction between, on the one hand, the Tribunal's statement that it would not review the decisions of the Guatemalan judiciary on issues governed

[415] Decision on Annulment ¶ 238.

[416] *Id.* ¶ 258.

[417] *Id.* ¶¶ 224-231.

[418] *Id.* ¶¶ 233-234.

[419] *Id.* ¶ 236.

[420] *Id.* ¶ 253.

[421] *Id.* ¶ 258.

[422] *Id.* ¶ 257.

[423] *Id.* ¶ 274.

by Guatemalan law, and its subsequent finding that [CNEE] Resolution 144-2008 did not comply with the regulatory framework."[424] As the *ad hoc* Committee noted, "before making the latter finding, the Tribunal interpreted the decisions of the Constitutional Court and held that the Guatemalan judiciary had not made any ruling with respect to the legality of the 2008-2013 tariff or of the process leading to its establishment."[425] Accordingly, "to the Tribunal, the legality of the 2008-2013 tariff's establishment was very much an open question and one within its mandate to decide,"[426] and, "[b]y proceeding to answer this question within the award, the Tribunal did not contradict itself but followed its logical path of reasoning up to its natural conclusion."[427]

130. The *ad hoc* Committee likewise found that "the Tribunal did not revise or reverse the Constitutional Court decisions," as Guatemala had asserted, but rather "interpreted the Constitutional Court decisions in order to determine the scope of its findings and subsequently integrated the decisions within its analysis made under international law," and that "the Tribunal afforded the Constitutional Court decisions their due weight as proof of Guatemalan law."[428] The *ad hoc* Committee further noted that Guatemala's contention that "the Tribunal based its decision that Guatemala breached Article 10.5 of the CAFTA-DR solely upon its finding that Resolution 144-2008 did not comply with the regulatory framework" was incorrect.[429] As the *ad hoc* Committee remarked, "the Tribunal grounded its finding of liability under Article 10.5 of the CAFTA-DR on: (i) the regulator's disregard for the fundamental principles underpinning the regulatory framework, as evidenced by Resolution 144-2008; (ii) the regulator's arbitrary conduct when it accepted to receive the Expert Commission's report in the week of 24 July 2008 only to then disregard it along with the Bates White Study on the basis that this did not leave enough time to publish the tariff by 1 August 2008; and (iii) the regulator's arbitrary preliminary

[424] *Id.* ¶ 280 (internal citation omitted).

[425] *Id.*

[426] *Id.* ¶ 281.

[427] *Id.*

[428] *Id.* ¶ 286; *see also id.* ¶¶ 287-295.

[429] *Id.* ¶ 298.

review of the 28 July Bates White study, which underscored its desire to reject it for a more favorable study prepared by its own consultant, Sigla."[430]

131. With respect to the Tribunal's decision on liability, the *ad hoc* Committee also rejected Guatemala's contention that the Tribunal "manifestly exceed[ed] its powers by failing to apply international law and by equating a breach of domestic law with a breach of the CAFTA-DR."[431] In so holding, the *ad hoc* Committee found that "the Tribunal correctly identified the applicable law as being the CAFTA-DR and customary international law,"[432] and that, contrary to Guatemala's contentions, "the Tribunal did examine the relationship between the autonomous standard of fair and equitable treatment and that under customary international law" in its Award.[433] The *ad hoc* Committee further noted that the Tribunal "examined how the legal standard under customary international law would apply in the context of administrative proceedings," finding "that 'a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard', that 'a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard.'"[434] According to the *ad hoc* Committee, "in spite of referring to and applying domestic law in the instances above, the Tribunal ultimately found liability under international law on the basis of an international law analysis," and, "contrary to Guatemala's contentions, the Tribunal did not equate domestic law with international law, but carefully distinguished between the two."[435]

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[430] *Id.* (internal citations omitted).

[431] *Id.* ¶ 323.

[432] *Id.* ¶ 310.

[433] *Id.* ¶ 314.

[434] *Id.* ¶ 315 (internal citation omitted).

[435] *Id.* ¶ 319.

132. In addition, the *ad hoc* Committee found that "the Award clearly indicates what the Tribunal understood by arbitrariness and lack of due process,"[436] and that the Tribunal did not fail "to explain how the facts in this case could have been characterized as being arbitrary or lacking in due process."[437] As the *ad hoc* Committee remarked, "the Tribunal's reasoning is clear and can be followed without difficulty."[438]

133. With respect to the Tribunal's award of the loss of cash flow portion of damages, the *ad hoc* Committee held that "the Tribunal's decision on historical damages does not evidence either a lack of reasons or a manifest contradiction with the Tribunal's decision on liability,"[439] and that, in arguing to the contrary in its annulment pleadings, Guatemala had "misconstrue[d] the basis for the Tribunal's finding of liability."[440] As the *ad hoc* Committee noted, "[c]ontrary to what Guatemala is alleging, the Tribunal did not find liability solely on the basis of the regulator having failed to provide reasons for its decision to reject the Expert Commission's report. The Tribunal also found liability because Guatemala had displayed an arbitrary conduct during the tariff review process."[441]

134. Specifically, the *ad hoc* Committee found that "the Tribunal explained that the regulator's decision to accept to receive the Expert Commission's report in the week of 24 July 2008 but to then disregard it along with the Bates White study on the basis that it did not have enough time to publish the tariff by 1 August 2008 was 'contradictory' and 'aberrant.'"[442] In addition, the Tribunal "determined that the arbitrariness of the regulator's conduct was also evident from its preliminary review of the Expert Commission's report, conducted over the weekend of 26-27 July," and that, "because this review showed that the Expert Commission's report was unfavorable to the regulator and would have led to a higher VAD, the CNEE decided

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[436] *Id.* ¶ 328.

[437] *Id.* ¶ 330.

[438] *Id.*

[439] *Id.* ¶ 337.

[440] *Id.* ¶ 338.

[441] *Id.*

[442] *Id.* ¶ 339.

to use the more favorable Sigla study."[443] As the *ad hoc* Committee observed, "[t]hereafter, the Tribunal found that the Sigla study used by the regulator did not reflect the Expert Commission's pronouncements," and that "the reasons provided by Guatemala during the arbitration to explain the regulator's decision to disregard the Expert Commission's report were after the fact justifications that did not withstand scrutiny."[444] Accordingly, "[o]n these bases, the Tribunal concluded that the CNEE decided to disregard the Bates White study and to apply the Sigla study when none of the two circumstances permitting such a decision under RLGE Article 98 was present."[445] The *ad hoc* Committee remarked that, "[h]aving found that, at the time of the events, the regulator disregarded the Expert Commission's report in order to benefit from the more favorable Sigla study, that the reasons to deviate from the Expert Commission's report invoked by Guatemala in the arbitration were not convincing and that the Sigla report did not reflect the Expert Commission's pronouncements, the Tribunal logically proceeded to calculate the damages based on the report of the Expert Commission," and that "this was a natural and logical progression of the Tribunal's reasoning, which does not change the basis for liability, but to the contrary, builds upon it."[446]

135. The *ad hoc* Committee further held that the Tribunal did not commit a serious departure from a fundamental rule of procedure by allegedly ignoring evidence submitted by Guatemala concerning the loss of cash flow portion of damages.[447] Specifically, the *ad hoc* Committee found that "the Tribunal did not ignore the expert testimony of Mr. Damonte, but referred to it in several instances;"[448] that, "as TECO has rightly pointed out, it is evident from the body of the Award that the Tribunal found Mr. Damonte's evidence to be flawed in more

[443] *Id.*

[444] *Id.* ¶ 340.

[445] *Id.* ¶ 341.

[446] *Id.* ¶ 342.

[447] *Id.* ¶¶ 344-351.

[448] *Id.* ¶ 349.

than this respect;"[449] and that "the Tribunal expressly found that it could not [rely] upon Mr. Damonte's evidence with respect to the VNR."[450]

136. With respect to the Tribunal's rulings on the loss of value portion of damages, as well as interest for the period preceding the sale, the *ad hoc* Committee held that "the Award's decision on the loss of value claim does not meet the standards set out by Article 52(1)(e) of the ICSID Convention,"[451] and that "the Tribunal seriously departed from a fundamental rule of procedure when it denied TECO's claim for interest on historical damages for the period before EEGSA's sale on account of 'unjust enrichment.'"[452] The *ad hoc* Committee thus annulled these portions of the Tribunal's Award.[453]

137. Specifically, the *ad hoc* Committee found that "the Tribunal's reasoning on the loss of value claim is not clear at all, such that the Committee, despite having had the benefit of the Parties' submissions and of the entire record before it, has struggled to understand the Tribunal's line of reasoning."[454] As the *ad hoc* Committee noted, "despite the fact that it was deciding a claim for loss of value, the Tribunal did not discuss *at all* the Parties' respective expert reports either on the actual or the *but for* value of EEGSA," but rather "simply limited itself to mentioning the differing values which the Parties' experts calculated for the two scenarios and concluding that there was '*no sufficient evidence* that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013.'"[455] The *ad hoc* Committee further remarked that "[t]he Tribunal did not specify why it found the four expert reports submitted by the Parties, which amounted to about 1200 pages of

[449] *Id.* ¶ 350.

[450] *Id.*

[451] *Id.* ¶ 127.

[452] *Id.* ¶ 183.

[453] *Id.* ¶¶ 138, 198, 382(1) and (2).

[454] *Id.* ¶ 128.

[455] *Id.* ¶ 130 (emphasis in original).

analysis, and why the calculations put forward by the Parties, which were in dispute, were deemed unsatisfactory and amounted to 'no sufficient evidence.'"[456]

138. The *ad hoc* Committee emphasized that, although "[i]t was within the Tribunal's discretion to assess whether [the expert] testimony was relevant or not, material or not, and that view is not censorable on annulment," this "is not what is at stake here."[457] The *ad hoc* Committee took "issue with the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim,"[458] noting that it was not "persuaded by Guatemala's argument that it was sufficient that the Tribunal summarized the contents of the expert reports and purportedly analyzed them in 72 paragraphs of the Award."[459] Rather, "[w]hat matters for present purposes is that the Tribunal failed to address in any way the expert testimonies within its analysis on the loss of value claim, despite the fact that those testimonies directly pertained to this issue and that the Parties considered them to be highly relevant."[460]

139. The *ad hoc* Committee also found that "the Tribunal failed to explain why it considered that the record contained 'no evidence . . . of how the transaction price has been determined' when in actuality the record included both EPM's Non-Binding Offer Letter and Citibank's Fairness Opinion, which related to this issue even according to Guatemala."[461] As the *ad hoc* Committee noted, "while the Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make any such finding, but one of non-existence," and, "[t]aking the Tribunal's words at face value, the Committee can only conclude that the Tribunal ignored this evidence."[462] The *ad hoc* Committee similarly noted that "the Award found that 'no information has been provided to the Arbitral Tribunal regarding the

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[456] *Id.*

[457] *Id.* ¶ 131.

[458] *Id.*

[459] *Id.* ¶ 132.

[460] *Id.*

[461] *Id.* ¶ 133 (alteration in original, internal citation omitted).

[462] *Id.*

establishment of the 2013-2018 tariffs,'" although it was "undisputed that the record included information on this matter, namely the 2013-2018 Terms of Reference."[463]

140. The *ad hoc* Committee concluded that "the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case."[464] As the *ad hoc* Committee remarked, "[d]ue to the Award's lack of analysis of the above mentioned evidence and in spite of having had the benefit of the Parties' submissions and of the entire annulment record before it, the Committee could not understand the Tribunal's reasoning on the loss of value claim and whether the Tribunal dismissed it because it could not determine the actual value of EEGSA or its *but for* value,"[465] and "the Award did not endeavor to determine either."[466] Rather, as the *ad hoc* Committee explained, it was "inclined to think that the Tribunal dismissed the loss of value claim because EEGSA's *but for* value could not be determined with sufficient certainty," but, "in light of the fact that the Tribunal made no attempt to calculate the company's actual value and of its statement that it possessed no information on how the price had been determined, the Committee cannot be certain that this is the case," and it was "left guessing as to the Tribunal's actual line of reasoning, which cannot be ascertained from the rest of the Tribunal's analysis either."[467]

141. Accordingly, the *ad hoc* Committee concluded that "the Tribunal failed to address in any way the Parties' expert reports on the loss of value claim despite the Parties' strong emphasis on expert evidence, and ignored the existence in the record of evidence which at least appeared to be relevant to its analysis," and that "[t]his resulted in the Tribunal's reasoning on the loss of value claim being difficult to understand."[468] On the basis of "these cumulative grounds," the *ad hoc* Committee held "that the Tribunal's decision on the loss of value claim

[463] *Id.* ¶ 134.

[464] *Id.* ¶ 135.

[465] *Id.* ¶ 136 (emphasis in original).

[466] *Id.* ¶ 137.

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

[468] *Id.* ¶ 138.

does not satisfy the reasoning requirements of Article 52(1)(e) of the ICSID Convention and should therefore be annulled."[469]

142. In view of its determination that the Tribunal's decision on the loss of value claim did not meet the requirements of Article 52(1)(e), the *ad hoc* Committee found that there was no need to decide whether the Tribunal's decision on TECO's loss of value damages also seriously departed from a fundamental rule of procedure under Article 52(1)(d) or manifestly exceeded its powers under Article 52(1)(b) by imposing an unreasonable evidentiary burden upon TECO,[470] depriving TECO of its right to be heard,[471] or overstepping the Parties' dispute.[472]

143. With respect to the Tribunal's decision on interest, while the *ad hoc* Committee did not find that the Tribunal's decision on the pre-Award interest rate evidenced "a manifest excess of powers,"[473] it held "that the Tribunal seriously departed from a fundamental rule of procedure when it denied TECO's claim for interest on historical damages for the period before EEGSA's sale on account of 'unjust enrichment.'"[474]

144. Specifically, the *ad hoc* Committee found that it was "undisputed that neither the Parties nor the Arbitral Tribunal raised the concept of 'unjust enrichment' during the discussions on interest before the Award was rendered;" that "[t]he concept never came up in the Parties' submissions, at the hearing or in the Tribunal's letter of questions to the Parties which post-dated the hearing;" and that, "[i]n fact, during the hearing, the Tribunal's questions to the Parties with respect to interest focused on the appropriate interest rate."[475] As the *ad hoc* Committee noted, "the notion of 'unjust enrichment' did not form part of the legal framework established by the Parties and was never raised by the Tribunal," and, moreover, "was not something that the Parties could reasonably have anticipated, as there was nothing to suggest that the Tribunal was

[469] *Id.*

[470] *Id.* ¶ 150.

[471] *Id.* ¶ 159.

[472] *Id.* ¶ 167.

[473] *Id.* ¶ 182.

[474] *Id.* ¶ 183.

[475] *Id.* ¶ 189.

concerned with it. Indeed, the Tribunal never alluded to the issue or even to double counting either during the hearing or in its subsequent letter to the Parties."[476] The *ad hoc* Committee further found that "the departure from this fundamental rule of procedure was serious,"[477] and that, "if given the right to comment on this issue by the Tribunal, [the Parties] could have made arguments that at least had the potential to affect the ultimate financial outcome of the case," which the *ad hoc* Committee observed was "sufficient for the Committee to hold that the departure from the Parties' right to be heard was serious and warrants annulment."[478]

145. Finally, with respect to the Tribunal's decision on costs, the *ad hoc* Committee noted "that the Tribunal found the Parties' costs to be reasonable 'in view of the complexity of [the] case,'"[479] and that, "[b]y applying the *costs follow the event* principle, the Tribunal decided to order Guatemala to reimburse 75% of TECO's legal costs."[480] The *ad hoc* Committee further noted that the "Tribunal based this decision on its finding that '[t]he Claimant ha[d] been successful in its arguments regarding jurisdiction, as well as in establishing Respondent's responsibility' and that 'the Respondent ha[d] been partially successful on quantum.'"[481] The *ad hoc* Committee found that, "while the Tribunal did explain its decision on the issue of costs, it was based on Guatemala having been partially successful on quantum," and that, "[f]ollowing the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA . . . the basis for the Tribunal's finding that Guatemala was partially successful on quantum has also disappeared."[482]

146. Accordingly, in light of the fact that the annulment of the Tribunal's decision on the loss of value portion of damages and pre-sale interest took away Guatemala's partial success on quantum, the *ad hoc* Committee held that, "similarly to *MINE v. Guinea*, the Tribunal's decision on costs 'cannot survive the annulment of that portion of the Award with which it is

[476] *Id.* ¶ 190.

[477] *Id.* ¶ 192.

[478] *Id.* ¶ 195.

[479] *Id.* ¶ 360 (alteration in original).

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

[481] *Id.* (alterations in original).

[482] *Id.* ¶ 361.

inextricably linked,'"[483] and that "the Tribunal's decision on costs should be annulled as a result of the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA."[484]

147. In view of its decisions denying Guatemala's application in full and granting TECO's application (with the exception of the applicable interest rate), the *ad hoc* Committee ordered Guatemala to reimburse TECO half of the costs of the proceeding relating to TECO's partial annulment application as well as 60 percent of TECO's legal costs and expenses incurred in connection with Guatemala's annulment application.[485]

D. Guatemala Has Failed To Comply With The Award

148. The Award was rendered on 19 December 2013, and, with the *ad hoc* Committee's dismissal in its entirety of Respondent's request to annul the Award on 5 April 2016, the Original Tribunal's award of US$ 21.1 million in damages, as well as interest compounded annually on that amount at the U.S. Prime rate plus two percent, as from 21 October 2010 (the date of sale of EEGSA) to the date of full payment of the Award, became enforceable.[486]

149. Claimant, in letters to Respondent dated 29 April 2016 and 3 June 2016, urged Respondent to make payment of the amounts due.[487] Respondent, however, did not respond, nor did it make any payment. Claimant thus was left with little alternative but to seek assistance from the ICSID Secretariat, asking it to contact Respondent to request information on the steps that it had taken, or will take, to comply with its obligation to abide by the Award (to the extent

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[483] *Id.* ¶ 362 (citing *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Partial Annulment Application of Guinea of 14 Dec. 1989 ¶ 6.112 (CL-1021)).

[484] *Id.*

[485] *Id.* ¶¶ 379, 381.

[486] Award ¶¶ 742, 768; Decision on Annulment ¶¶ 381-382; *see* Letter from TECO to Guatemala dated 3 June 2016 (C-1250).

[487] Letter from TECO to Guatemala dated 29 Apr. 2016 (C-1251); Letter from TECO to Guatemala dated 3 June 2016 (C-1250).

not annulled) and the Decision.[488] The ICSID Secretariat wrote to Respondent by letter dated 26 October 2016, reminding it of its obligation under the ICSID Convention to comply with the Award and the Decision.[489] Respondent similarly did not respond. Accordingly, Claimant commenced court proceedings to enforce the Award. To date, Respondent remains in breach of its Treaty obligation to comply with the Award and with the *ad hoc* Committee's award of costs and fees.

III. TECO IS ENTITLED TO LOSS OF VALUE DAMAGES

A. TECO Is Entitled To Compensation In An Amount To Wipe Out All Of The Financial Consequences Of Guatemala's Breach Of The Treaty

150. Like many investment treaties, the DR-CAFTA does not address the measure of damages for breach of its fair and equitable treatment provision, and instead provides only a *lex specialis* rule regarding the measure of damages in the event of a lawful expropriation.[490] International law, which applies in such circumstances, is clear in this regard: a State has the obligation to make full reparation for the injuries caused by its wrongful acts.[491] This principle is

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[488] Letter from TECO to ICSID Secretary-General dated 19 Oct. 2016 (C-1253).

[489] Letter from ICSID Secretary-General to Guatemala (copied to TECO) dated 26 Oct. 2016 (C-1254).

[490] *See* DR-CAFTA, Art. 10.7.2-3 (CL-1005); *see also Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)12/5, Award of 22 Aug. 2016 ("*Rusoro v. Venezuela*, Award") ¶ 640 ("The compensation provided for in Article VII [of the Canada-Venezuela bilateral investment treaty] only covers cases of expropriation. In all other breaches, absent any specific Treaty language, damages must be calculated in accordance with the rules of international law.") (CL-1006); *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award of 19 Dec. 2014 ¶ 288 ("In contrast to Article 5 [Expropriation]" of the UK-Belize bilateral investment treaty, "Article 2 [FET] provides no standard for the compensation payable in the event of a violation of its provisions. In the absence of an applicable provision within the Treaty itself, establishing the standard of compensation as a matter of *lex specialis*, the applicable standard of compensation is that existing in customary international law[.]") (CL-1007); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award of 13 Nov. 2000 ¶ 310 ("There being no relevant [damages] provisions of the NAFTA other than those contained in Article 1110 [concerning expropriation] the Tribunal turns for guidance to international law.") (CL-1008).

[491] *See* DR-CAFTA, Art. 10.22.1 (providing that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law") (CL-1005); *see also Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 ¶¶ 259-260, 267 ("The question arises of the compensation standard to be applied in the case of breaches of CAFTA other than expropriation. CAFTA directs the Tribunal to interpret Article 10.5 on the minimum standard of treatment in accordance with Annex B on customary international law. Under customary international law as reflected in the ILC Articles, 'The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.'") (CL-1009); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 Oct. 2011 ("*El Paso v. Argentina*, Award") ¶¶ 700-701 ("In the absence of an

articulated in Article 31(1) of the International Law Commission's Articles on State Responsibility (the "ILC Articles"), which provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act,"[492] and extends to obligations set forth in treaties, as the Permanent Court of International Justice ("PCIJ") stated in the *Chorzów Factory* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.[493]

151. The PCIJ elaborated the content of the obligation to make full reparation in the following well-known passage:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, *wipe-out all the consequences* of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[494]

152. Where restitution, *i.e.*, the "establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed,"[495] is not available or alone is not sufficient to repair the harm, the responsible State is under an obligation to provide compensation for the damage caused. Article 36 of the ILC Articles provides in this regard:

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agreed criterion, the appropriate standard of reparation under international law is compensation for the losses suffered by the party affected, as established by the Permanent Court of International Justice ('PCIJ') in the *Factory of Chorzów* case[.]") (CL-1010).

[492] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2001) ("ILC ARTICLES ON STATE RESPONSIBILITY") Art. 31(1) (CL-1011).

[493] *Chorzów Factory (Ger. v. Pol.)*, Judgment No. 8 (Jurisdiction), 26 July 1927, P.C.I.J. Series A, No. 9 (1927) ("*Chorzów Factory Judgment No. 8*"), at 21 (CL-1012).

[494] *Chorzów Factory (Ger. v. Pol.)*, Judgment No. 13 (Merits), 13 Sept. 1928, P.C.I.J. Series A, No. 17 (1928) ("*Chorzów Factory Judgment No. 13*"), at 40 (emphasis added) (CL-1069).

[495] ILC ARTICLES ON STATE RESPONSIBILITY Art. 35, cmt. (2) (CL-1011).

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.[496]

153. Accordingly, where an award of restitution is not available or reasonably possible, the principle of full reparation requires an award of compensation in an amount corresponding to the value that (i) would re-establish the situation that existed prior to the occurrence of the wrongful act, and (ii) would compensate for any additional damage caused. These principles have been affirmed and applied by many investment treaty tribunals,[497] including in cases in respect of losses caused by a breach of the fair and equitable treatment obligation.[498]

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[496] *Id.* at Art. 36 (CL-1011); *see also Chorzów Factory Judgment No. 13*, at 40 ("Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.") (CL-1069).

[497] *See, e.g.*, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of 28 Mar. 2011 ("*Lemire v. Ukraine*, Award") ¶ 149 ("It is generally admitted that . . . the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT.") (CL-1013); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on the Application for Annulment of the Republic of Kazakhstan of 25 Mar. 2010 ("*Rumeli v. Kazakhstan*, Decision on Annulment") ¶ 141 ("The general test of 'full reparation,' found in Article 31 of the ILC Draft Articles, can be simply stated. It is that classically formulated by the Permanent Court of International Justice in the *Chorzów Factory Case* . . . .") (CL-1014); *El Paso v. Argentina*, Award ¶¶ 700-701 ("Many tribunals have applied this principle [of full reparation, referring to the above quote from *Chorzów Factory*] in deciding on damages due for breach of the standard of fair and equitable treatment.") (CL-1010); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 Oct. 2006 ("*ADC v. Hungary*, Award") ¶ 493 ("[T]here can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.") (CL-1015); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 Aug. 2007 ("*Vivendi v. Argentina*, Award") ¶ 8.2.5 ("There can be no doubt about the vitality of this [*Chorzów Factory*] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice.") (CL-1016).

[498] *See, e.g.*, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 Sept. 2014 ("*Gold Reserve v. Venezuela*, Award") ¶ 681 (finding that "[t]he relevant principles of international law applicable in this situation are derived from the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case that reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach" in calculating damages for an FET violation) (CL-1017); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award of 27 Nov. 2013 ("*Total v. Argentina*, Award") ¶ 24 (finding that the "full reparation principle is also applicable to cases

154. In circumstances where the investor sells or otherwise disposes of its investment as a consequence of a wrongful act of the host State, the principle of full reparation requires that the investor be compensated for any diminution in value of the investment resulting from the wrongful act. In *Murphy v. Ecuador*, for example, the tribunal found that Ecuador breached its obligation to accord fair and equitable treatment when it imposed a 99 percent windfall tax on the profits of an oil-producing consortium in which the claimant held a stake, and that Ecuador's breach had caused the claimant to sell its stake in the consortium.[499] With respect to quantum, the tribunal observed that, "[a]lthough the Tribunal has found that Ecuador breached the FET provision of the Treaty, the result for Claimant was the loss of ownership of its investment," and, "[i]n this way, the outcome was akin to an unlawful expropriation . . . ."[500]

155. The tribunal further observed that "[i]nvestor-state arbitral tribunals have frequently sought to establish the fair market value at the time of the investor's loss of its primary investment as a basis for the calculation of damages,"[501] and that "[t]he fair market value approach values an asset by considering its ability to generate future economic benefits."[502] The tribunal thus held that, in order to provide the claimant with full reparation, the claimant was entitled to compensation corresponding to the sum of (i) the profits lost as a result of Ecuador's imposition of the 99 percent tax rate, with respect to the period up until the sale of the claimant's stake in the consortium, and (ii) the loss in value of the investment as of the time of the sale, calculated as the difference between the price at which the claimant sold its stake in the

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involving breaches of the [FET] standard") (CL-1018); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 Apr. 2016 ("*Crystallex v. Venezuela*, Award") ¶¶ 846, 850 (CL-1019); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, ¶¶ 424-425, 442 (CL-1020); *Gemplus, S.A. and others v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award of 16 June 2010 ("*Gemplus v. Mexico*, Award") ¶ 12-52 (CL-1021); *Rumeli v. Kazakhstan*, Decision on Annulment ¶ 115 (CL-1014); *Occidental Petroleum Corp. and Occidental Expl. and Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 Oct. 2012 ¶¶ 704-707 (CL-1022).

[499] *Murphy Expl. and Prod. Co. - Int'l v. Republic of Ecuador*, UNCITRAL, Partial Award of 6 May 2016 ("*Murphy v. Ecuador*, Partial Award") ¶¶ 280-281, 292-293 (CL-1023). The tribunal found that there was "an undeniable nexus between Ecuador's conduct in passing and implementing Law 42 at 99% and Murphy's decision to sell" and that "but-for Ecuador's breach, Murphy would not have sold its interest[.]" *Id.* ¶¶ 466-467.

[500] *Id.* ¶ 482.

[501] *Id.* ¶ 482.

[502] *Id.* ¶ 486.

consortium and what the fair market value of the claimant's stake in the consortium would have been as of the date of the sale absent the wrongful acts, determined based on a projection of the free cash flows the investment would have generated absent the wrongful tax rate.[503]

156. Similarly, in *Total v. Argentina*, the tribunal held that Argentina breached its obligation to accord fair and equitable treatment to the claimant's investments in two Argentinean electricity generators "through the setting of prices that d[id] not remunerate the investment made nor allow reasonable profit to be gained contrary to the principles governing the activities of privately owned generators" under Argentina's Electricity Law.[504] Several years after the wrongful acts, the claimant sold its shareholding in the generators.[505] The tribunal awarded damages to the claimant in the amount of US$ 123.3 million, calculated as of the year-end following the sale of the claimant's shareholdings as the difference between (i) the fair market value of the shareholdings in an "actual" scenario taking into account the wrongful acts, and (ii) the fair market value of the shareholdings in a "but-for" scenario, assuming the absence of the wrongful acts.[506] In both scenarios, the fair market value of the investments was calculated based on the claimant's share of the net present value of the generators' projected future cash flows, determined using the DCF methodology.[507] The tribunal stated:

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[503] *Id.* ¶¶ 481-482, 486, 493, 501-504 (CL-1023). The claimant's claim for loss of value damages ultimately was dismissed based on the particular facts of the case. Specifically, the claimant based its damages claim on the assumption that the treaty breach encompassed not only the 99 percent tax, but also an earlier, 50 percent tax. *Id.* ¶¶ 503-504. As the tribunal noted, however, the "Claimant admit[ted] that, if it is assumed that only Law 42 at 99% is a breach of the Treaty," then, "taking into account the Claimant's ongoing obligation to make Law 42 at 50% payments," the but-for value was lower than the sale price to Repsol and, "according to the Claimant, its Entitlement is therefore zero." *Murphy Expl. and Prod. Co. - Int'l v. Republic of Ecuador*, UNCITRAL, Final Award of 10 Feb. 2017 ¶¶ 5, 67-68 (CL-1070). Because the tribunal found that the 50 percent tax was not a treaty violation, it accordingly dismissed the claim for loss of value damages. *Id.* ¶¶ 67-69, 84.

[504] *Total v. Argentina*, Award ¶¶ 105-107 (CL-1018).

[505] *Id.* ¶ 99 (CL-1018).

[506] *Id.* ¶¶ 105-118, 128-131, 138-140, 148-150 (CL-1018).

[507] *Id.* ¶¶ 111-116, 128-131, 148-150 (CL-1018). The claimant's quantum experts, Dr. Abdala and Dr. Spiller, presented to the tribunal an alternative "actual" scenario, which used the sales price at which the claimant sold its shareholdings. *Id.* ¶¶ 113-114, 135-137. The Tribunal, however, found that, in the circumstances of the case, the sales price was not representative of the "actual" fair market value of the investments. *Id.* ¶¶ 138-140.

> The Tribunal does not see why this method cannot be employed here simply due to the fact that Total sold its investment in the generators . . . . There are no elements in the record to indicate that Total somehow made a short term 'speculative' investment in Argentina in 2001, such as to render inappropriate the DCF method based on the long term expected stream of revenues from a utility. *Limiting the calculation of damages to the dividends lost while the equity was held by the investor . . . is not an acceptable way to measure damages caused to the capital value of equity*.[508]

157. Likewise, in *EDF v. Argentina*, the claimants sold their interest in an Argentinean electricity company as a consequence of Argentina's changes to the tariff regime and an unsuccessful tariff renegotiation, which the tribunal held was in breach of Argentina's obligation to accord fair and equitable treatment.[509] The tribunal awarded damages to the claimants in the amount of US$ 133.6 million, calculated as the difference between (i) the fair market value of the claimants' shareholding in the electricity company, determined as of the date of the first wrongful measure by using the sales price at which the shareholding was on-sold to a third party by another shareholder in the company who had acquired the shareholding from the claimants,[510] discounted to the date of the first wrongful measure, and (ii) the fair market value that the claimants' shareholding in the company would have had as of the date of the first wrongful measure absent the measures, calculated using the DCF valuation method.[511] With respect to the DCF method, the tribunal observed that this method is the "most suitable," when "[t]he

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[508] *Total v. Argentina*, Award ¶ 129 (CL-1018) (emphasis added). The tribunal held that the date of the sale was the relevant valuation date, because "as a result of the divesture, from that date Total ceased to sustain any risks and derive any benefit from the HPDA and Central Puerto businesses, so that any loss crystallized at that date." *Id*. ¶ 135.

[509] *EDF Int'l S.A. and others v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012 ("*EDF v. Argentina*, Award") ¶¶ 171-174, 227, 231, 388-390, 995-997 (CL-1024).

[510] The tribunal adopted this approach after finding that, in selling their shareholding to the other shareholder, the claimants unreasonably had failed to take into account an upcoming tariff increase that had been announced by the relevant authorities as part of a then-ongoing legally mandated tariff renegotiation process. Consequently, the tribunal found that the claimants had undersold their shareholding for US$ 2 million, as compared to the amount of US$ 52.8 million, for which the other shareholder subsequently on-sold the shareholding to a third party. The tribunal deemed the latter amount more representative of the fair market value of the shareholding in the actual scenario. *See id*. ¶¶ 1286-1317.

[511] *Id*. ¶¶ 603-610, 711-715, 1182-1184, 1209-1214, 1286-1317. Notably, this was the approach advanced in that case by the claimants' quantum experts, Dr. Abdala and Dr. Pablo T. Spiller of LECG. *See id*. ¶¶ 593-606.

enterprise under assessment is a regulated utilities company with a predictable revenue stream," and that the "DCF method is widely used in the context of tariff reviews for regulated utilities."[512]

158. The PCIJ in the *Chorzów Factory* case also made clear that reparation is designed to "re-establish the situation which would, *in all probability*, have existed if that act had not been committed."[513] It follows that the standard of proof for establishing the amount of damages must be treated like any other fact in the case, *i.e.*, it must be demonstrated as being more probable than not. Thus, for example, the tribunal in *Gold Reserve v. Venezuela* stated that it found "no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore [was] satisfied that the appropriate standard of proof is the balance of probabilities."[514] A number of investment treaty tribunals have ruled similarly.[515] These

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[512] *Id.* ¶ 1188.

[513] *Chorzów Factory Judgment No. 13*, at 40 (emphasis added) (CL-1069).

[514] *Gold Reserve v. Venezuela*, Award ¶ 685 (CL-1017).

[515] *See, e.g.*, *Crystallex v. Venezuela*, Award ¶¶ 867-868 ("[While] the *fact* (i.e., the existence) of the damage needs to be proven with certainty," "once the fact of damage has been established, a claimant should not be required to prove its exact *quantification* with the same degree of certainty. This is because any future damage is inherently difficult to prove.") (emphases in original) (CL-1019); *Lemire v. Ukraine*, Award ¶ 246 ("Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.") (CL-1013); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011 ¶ 371 (stating that, while it was incumbent upon the claimant to "prove that it suffered the damage for which it asks to be compensated," because "it cannot be established with certainty in what situation AGBA – and thus Impregilo – would have been, had the Argentine Republic's breach of the fair and equitable treatment standard not occurred," "it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo. Instead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation.") (CL-1025); *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award of 7 Dec. 2012 ("*Achmea v. Slovakia*, Award") ¶ 323 ("It is for Claimant to prove its case regarding the 'damage caused'. That said, the requirement of proof must not be impossible to discharge. Nor must the requirement for reasonable precision in the assessment of the quantum be carried so far that the search for exactness in the quantification of losses becomes disproportionately onerous when compared with the margin of error.") (CL-1026); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15), Award of 3 Mar. 2010 ("*Kardassopoulos v. Georgia*, Award") ¶ 229 (stating that, as regards damages, "the principle articulated by the vast majority of arbitral tribunals . . . does not impose on the Parties any burden of proof beyond a balance of probabilities.") (CL-1027); *Rumeli v. Kazakhstan*, Decision on Annulment ¶ 144 (stating that "[t]he fact that the [valuation] exercise is inherently uncertain is not a reason for the tribunal to decline to award damages") (CL-1014); *Gemplus v. Mexico*, Award ¶ 13-92 ("[A]s a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly

considerations are particularly pertinent when damages are assessed based on the difference between an actual scenario and a hypothetical, but-for scenario (also referred to as the counter-factual scenario), in which the wrongful act is assumed not to have come into existence. In such circumstances, the but-for scenario must be forecast, which is routinely done by way of expert evidence. As the tribunal in *Hrvatska Elektroprivreda v. Slovenia* observed, "naturally, some degree of estimation will be required when considering counterfactual scenarios and this, of itself, does not mean that the burden of proof is not satisfied."[516]

159. Taking into account the aforementioned principles, TECO is entitled to an award of damages that fully compensates it for the loss it suffered as a result of Guatemala's Treaty breach, including losses for the diminution in value of its investment as a result of that breach, as discussed further below.

B. Guatemala's Treaty Breach Caused Significant Harm To TECO

160. As discussed above, on 31 July 2008, the CNEE issued Resolutions Nos. CNEE-145-2008 and CNEE-146-2008, whereby it approved Sigla's VAD study as the basis for establishing the tariffs and periodic adjustment formulas for EEGSA's customers, effective from 1 August 2008 to 31 July 2013.[517] In so doing, the CNEE unilaterally reduced EEGSA's VAD by more than 45 percent and its revenue by approximately 40 percent,[518] causing significant damages to EEGSA's shareholders, including TECO.

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defeat the claimant's claim for compensation . . . confronted by evidential difficulties created by the respondent's own wrongs, the tribunal considers that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise.") (CL-1021); *see also* John Gotanda, *Damages in Private International Law*, 326 RECUEIL DES COURS 73, 102, 111, 117, 127, 131, 135 (2007) (explaining in his Hague Lectures that "[t]he certainty rule applies only to the fact of damages, not to the amount of damages," and that this is so in a range of jurisdictions) (CL-1028).

[516] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award of 17 Dec. 2015 ("*Hrvatska v. Slovenia*, Award") ¶ 175 (CL-1029); *see also Rusoro v. Venezuela*, Award ¶ 642 ("Any assessment of damages in a complex factual situation, involving revenue-generating enterprises, includes some degree of estimation – the same degree which is also applied by (private and government) actors in the real world when valuing enterprises.") (CL-1006).

[517] *See supra* ¶ 39; *see also* Resolution No. CNEE-145-2008 dated 30 July 2008, Art. I, at 3-4 (C-1069); Resolution No. CNEE-146-2008 dated 30 July 2008, Art. I, at 4 (C-1070); Award ¶ 224 (referencing same).

[518] *See* Award ¶¶ 212, 225-226; Moody's Investors Service, "Moody's Downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (C-1079); Gillette I ¶ 24 ("The impact of the VAD reduction on EEGSA

161. Indeed, on 26 August 2008, shortly after the CNEE's imposition of the Sigla VAD on EEGSA, Standard & Poor's downgraded EEGSA, stating that the rating downgrade reflected the CNEE's announcement of the "applicable tariffs for the 2008-2013 period, establishing a value-added distribution (a component of the tariff that reimburses the distribution company for its investment) that is about 55% lower than EEGSA's tariffs for the previous period," and that "*[t]his change will result in deteriorated profitability* and cash flow measures as well as limited liquidity *during the second half of 2008 and going forward*."[519]

162. Similarly, in December 2008, EEGSA was downgraded by Moody's, which stated that its "rating action is driven by the anticipated material deterioration in the near term of EEGSA's credit metrics, in the wake of the August 2008 tariff decision by the Comision Nacional de Electricidad y Energia ('CNEE') regarding the reduction of the Value Added of Distribution-charge ('VAD-charge') by 45% and the subsequent disputes among the CNEE and EEGSA,"[520] that EEGSA's "VAD-review raised concerns about the predictability and transparency of the process, and the overall supportiveness of the regulatory framework," and that, "[b]ased upon the results of the VAD-review process, *EEGSA's financial profile will deteriorate substantially* from historical results due to a *material weakening in its ability to recover operating costs and generate a sufficient rate of return*."[521]

163. As also discussed above, in view of the significant damage that the CNEE's unlawful conduct inflicted upon TECO's investment, TECO sold its interest in DECA II (and thereby its interest in EEGSA) to EPM on 21 October 2010,[522] [redacted]

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was significant, resulting in an estimated 40% reduction in revenues."); TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up dated Apr. 2009, at 2 (C-1098); TECO Guatemala, Inc., Operations Summary for Periods Ended Sept. 30, Board Book Write-up dated Oct. 2008, at 2 (C-1099); TECO Energy's Form 10-K dated 26 Feb. 2009, at 49 (C-1100).

[519] Standard & Poor's, "Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' From 'BB'/on CreditWatch Neg" dated 26 Aug. 2008 (C-1078) (emphasis added).

[520] Moody's Investors Service, "Moody's downgrades EEGSA to Ba3 from Ba2; negative outlook" dated 11 Dec. 2008 (1079).

[521] *Id.* (emphasis added); *see also* Callahan I ¶ 6 (discussing the impact of the reduced VAD on EEGSA's earnings).

[522] *See* Award ¶¶ 8, 236-237.

[redacted]"[523] All parties to that transaction—the DECA II shareholders and EPM—assumed that, following Guatemala's unlawful actions in setting EEGSA's VAD for the 2008-2013 tariff period, the VAD in future tariff periods would continue to be calculated off on an asset base (VNR) that would not increase in value by any significant extent from the VNR that had been calculated by Sigla, and that the CNEE would continue to apply the same FRC formula that it had used to set the 2008 VAD, which calculated EEGSA's return on an asset base that has been depreciated by half.[524] As such, EPM was "buying damaged goods."[525]

C. TECO's Damages

164. In both the Original Arbitration and in this resubmitted arbitration, the amount of damages caused to TECO by Guatemala's breach of the Treaty has been calculated by TECO's quantum expert, Mr. Kaczmarek.[526] Mr. Kaczmarek's damages analysis is based on the principles that the value of a distribution company, such as EEGSA, is determined on the basis of

[523] *Id.* ¶ 748; *see also, e.g.* [redacted]; Callahan I ¶ 8.

[524] *See supra* ¶¶ 44-45, 66-67; Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (C-1081) (proposing to purchase DECA II, whose main asset was EEGSA, for US$ 597 million, and stating that, among the "methodologies used" by EPM to calculate the proposed purchase price, EPM applied a "[d]iscounted free cash flow" analysis of EEGSA "appl[ying] different adjustments and assumptions," but "*not includ[ing] an increase in tariffs for the years 2013 and 2014*," in other words, not including a tariff increase in the transition from the 2008-2013 tariff period to the 2013-2018 tariff period) (emphasis added); ; Letter from EPM to Iberdrola, TPS and EDP dated 6 Oct. 2010 (C-1082) (submitting a binding offer to purchase DECA II for US$ 605 million); Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097) (EPM's Chief Executive Officer, Mr. Restrepo, reportedly stating in an interview that "[EPM] bought on the basis that the current tariff model and layout is the one that exists" and its "final valuation" of EEGSA "*had no expectation that [the tariff model] would be modified or changed*") (emphasis added); Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF p. 26 (C-1083) (assessing the fairness to TECO of EPM's price offer using a DCF analysis of EEGSA, among other methodologies, based on the assumption that the "*CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013*," and concluding on that basis that EPM's US$ 605 million price offer was fair to TECO) (emphasis added).

[525] Tr. (22 Jan. 2013) 589:2-17 (Callahan).

[526] *See generally* Kaczmarek III.

its future expected cash flows, which is in turn determined by its VAD,[527] and that the cost components of the VAD are established at the beginning of each tariff period for the duration of the entire five-year tariff period, which are undisputed.[528]

165. Applying these principles, Mr. Kaczmarek calculated TECO's damages as the difference between two scenarios: (i) an actual scenario reflecting Guatemala's breach of the Treaty, and (ii) a but-for scenario assuming that Guatemala had not violated its Treaty obligations.[529] This basic methodology has been accepted by a number of investment treaty tribunals,[530] including the Original Tribunal,[531] as well as by Guatemala's quantum expert in the Original Arbitration, Dr. Abdala.[532]

166. Because TECO sold its interest in DECA II to EPM on 21 October 2010, as Mr. Kaczmarek explains, that sale provides useful evidence of TECO's value in the actual scenario and a logical valuation date.[533] Mr. Kaczmarek thus calculated TECO's damages as the sum of

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[527] *Id.* ¶¶ 191-235; Kaczmarek I ¶¶ 71-77 (explaining that the VAD is the source of the distribution company's return of capital as well as return on capital, or profit); *see also supra* ¶ 46.

[528] Kaczmarek III ¶ 13; *see also* Award ¶ 112 (stating that "Article 77 of the LGE states that 'the methodology for determination of the rates shall be reviewed by [the CNEE] every five (5) years during the first half of January of the year in question'"); *id.* ¶ 758 ("[T]he VAD is recalculated every 5 years"); *id.* ¶¶ 222-226 (discussing the CNEE's rejection of Bates White's VAD study and its adoption of the Sigla VAD for the entire 2008-2013 tariff period); Arbitration Tr. (22 Jan. 2013) 553:14-17 (Tribunal President) (a "[l]ower VAD and high expenses means low cash flow and low cash flow means a lower value and -- okay. That's fine. I think we all understand that."); Kaczmarek I ¶ 83 (explaining that the "cost components of the VAD were to be calculated every five years through an independent study," and that, "[i]n between these study or 'rate periods,' the VAD was to be adjusted for inflation and energy prices on a quarterly basis."); Abdala I ¶ 39 ("In Guatemala, the regulator must set, every five years, the VAD to be applied by each distributor for the next five years.").

[529] Kaczmarek III ¶ 24; *see also* Kaczmarek I ¶¶ 128-129; Kaczmarek II ¶¶ 5-14.

[530] *See supra* ¶¶ 156-159.

[531] Award ¶ 719.

[532] *See, e.g.*, Abdala I ¶ 25 (stating that Mr. Kaczmarek "estimates the alleged damages to Claimant through the difference between a *but-for* scenario and an *actual* scenario," that the "difference between both (*i.e.*, *but for* less *actual*) represents the presumed economic damages suffered by TGH," and that the "methodology to calculate damages by difference between these two scenarios is standard and appropriate for this case[.]") (alteration in original).

[533] Kaczmarek III ¶ 144; *see also Murphy v. Ecuador*, Partial Award ¶¶ 481-482, 486, 493, 501-504 (CL-1023) (holding that, to compensate for a violation of FET, the claimant was entitled to the sum of (i) the profits the claimant lost as a result of the respondent's breach, with respect to the period up until the sale, and (ii) the loss in value of the investment as of the time of the sale, calculated as the difference between the price at which the

two parts: (i) the *loss of cash flow* portion of damages, based on EEGSA's lost cash flows from the date of imposition of the Sigla tariff on 1 August 2008 until the sale of EEGSA to EPM on 21 October 2010, and (ii) the *loss of value* portion of damages, reflecting the difference between the fair market value of EEGSA in the actual and but-for scenarios at the time of the 21 October 2010 sale.[534]

1. Loss Of Cash Flow Portion Of Damages

167. As set forth above, the Original Tribunal awarded TECO the loss of cash flow portion of damages in the exact amount claimed by TECO,[535] and Guatemala's application to annul that portion of the Award was denied.[536] TECO, therefore, is not seeking loss of cash flow damages in this resubmitted proceeding. Because Mr. Kaczmarek used the same integrated model to calculate the loss of cash flow portion of damages and the loss of value portion of damages, and because the assumptions underlying the former, which were endorsed by the Original Tribunal, are the same as those used to calculate the latter, the calculation of the loss of cash flow portion of damages informs the calculation of the loss of value portion of damages. Indeed, as explained below, the award of the former leaves no doubt that TECO is entitled to recovery for the latter.

168. As also explained above, Mr. Kaczmarek calculated the loss of cash flow portion of damages as TECO's share of the difference between EEGSA's actual cash flows until 21 October 2010 and the cash flows that EEGSA would have received if the VAD and the tariffs had been set based on Bates White's 28 July 2008 VAD study, which, as discussed above, calculated EEGSA's VAD and tariffs for the 2008-2013 tariff period in accordance with the Expert Commission's rulings.[537] Mr. Kaczmarek concluded that the actual cash flows to TECO until 21 October 2010 amounted to US$ 20,143,686 and the but-for cash flows to TECO until

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claimant sold its stake and the fair market value of the claimant's stake absent the wrongful acts, determined based on a projection of the free cash flows the investment would have generated absent the wrongful acts).

[534] Kaczmarek III ¶ 145; *see also* Award ¶ 719; Kaczmarek I ¶¶ 126-129; Kaczmarek II ¶ 6.

[535] *See supra* ¶ 117.

[536] *See supra* ¶¶ 133-135.

[537] *See supra* ¶¶ 49, 51, 115-116.

that date amounted to US$ 41,244,238, resulting in loss of cash flow damages to TECO of US$ 21,100,552 (before interest).[538]

169. As also explained above, Guatemala's expert in the Original Arbitration, Dr. Abdala, calculated EEGSA's actual cash flows as US$ 24.4 million.[539] There thus was no material difference between the Parties as to TECO's share of EEGSA's actual cash flows during the pre-sale period.[540] As regards the but-for scenario, rather than rely on Bates White's 28 July 2008 VAD study, Dr. Abdala, however, based his but-for calculation on the VAD study prepared for purposes of the arbitration by Mr. Damonte, Guatemala's industry expert, which departed from the Expert Commission's rulings in a number of respects.[541] Having used Mr. Damonte's flawed study as the basis of his but-for analysis, Dr. Abdala concluded that the but-for cash flows to TECO until 21 October 2010 amounted to only US$ 13.8 million, implying, absurdly, that TECO obtained a significant benefit from Guatemala's Treaty breach.[542]

170. As also set forth above, the Original Tribunal ruled that Bates White's 28 July 2008 VAD study was the proper basis for EEGSA's but-for valuation, because it properly implemented the Expert Commission's rulings (whereas Mr. Damonte's study did not) and because, if the CNEE had complied with the regulatory framework, it would have set EEGSA's VAD and tariffs for the 2008-2013 tariff period based upon Bates White's 28 July 2008 VAD study.[543] On that basis, the Original Tribunal awarded TECO the loss of cash flow portion of damages in exactly the same amount calculated by Mr. Kaczmarek and claimed by TECO, *i.e.*, US$ 21,100,552.[544] The Original Tribunal thereby fully compensated TECO for the loss it suffered in connection with the time period leading up to the sale of EEGSA on 21 October 2010.

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[538] *See supra* ¶ 51.

[539] *See supra* ¶ 50.

[540] *See supra* ¶ 70.

[541] *See supra* ¶¶ 52-54.

[542] *See supra* ¶ 56.

[543] *See supra* ¶¶ 115-116.

[544] *See supra* ¶ 117.

171. Because TECO was selling "damaged goods" when it sold its interest in EEGSA to EPM, however, the combination of the award of the loss of cash flow portion of damages in the Original Arbitration and the proceeds from the sale of EEGSA to EPM does not provide full reparation to TECO for Guatemala's breach. Rather, full reparation requires that TECO be compensated also for the diminishment in the fair market value of its investment as a result of Guatemala's breach, *i.e.*, the difference between the fair market value of its investment at the time of the sale of EEGSA on 21 October 2010 and what the fair market value of TECO's stake in EEGSA would have been as of the date of the sale absent the wrongful acts. Indeed, as the *Total v. Argentina* tribunal recognized, "[l]imiting the calculation of damages to the dividends lost while the equity was held by the investor . . . is not an acceptable way to measure damages caused to the capital value of equity," precisely because such approach would result in less than full reparation.[545] Rather, "likely future profits, properly derived from expected cash flows, must be taken into account to determine the but-for value of an investment at the relevant date," and "[t]his value can then be compared to the actual value to determine the difference and the measure of damages."[546]

172. That the sum of the loss of cash flow portion of damages and TECO's share of the proceeds of the sale of EEGSA falls far short of providing full reparation to TECO is further confirmed by Mr. Kaczmarek, who explains that, when TECO's share of the proceeds of the sale of EEGSA and the loss of cash flow portion of damages awarded to TECO by the Original Tribunal are considered together,[547] the resulting internal rate of return ("IRR") on TECO's investment is significantly below TECO's cost of capital, and that, absent an award to TECO of the loss of value portion of damages, TECO will not have received full reparation.[548]

2. Loss Of Value Portion Of Damages

173. In order to calculate the loss of value portion of TECO's damages both in the Original Arbitration and in this resubmitted arbitration, Mr. Kaczmarek used the same integrated

[545] *Total v. Argentina*, Award ¶ 129 (CL-1018).

[546] *Id.* ¶ 129.

[547] To date, Guatemala has not paid the Award.

[548] Kaczmarek III ¶¶ 299-300.

model described above that he used to calculate TECO's loss of cash flow damages,[549] and compared TECO's share of EEGSA's actual fair market value as of the date of sale of EEGSA on 21 October 2010 with the fair market value that TECO's share of EEGSA would have had but for Guatemala's wrongful acts.[550] As Mr. Kaczmarek explains, fair market value is an "objective standard of value based upon a hypothetical transaction between two hypothetical and informed parties,"[551] which is frequently applied by investment treaty tribunals.[552] He further explains the calculation of the fair market value as follows:

> [T]he exercise is a hypothetical one which assumes that neither the buyer nor the seller is under any compulsion, the transaction is at arm's length, there are no market restrictions, and both parties are informed of the relevant facts. Notably, both the buyer and the seller are presumed to be hypothetical as well. As such, in implementing the fair market value standard, the object of the analysis is not to determine the price that the actual owner of the investment could obtain for the investment. Rather, the objective of the analysis is to determine the price at which two hypothetical parties would agree to sell and purchase the investment. As a result, the subjective opinions or particular circumstances of an actual seller or buyer as to an enterprise are not relevant factors in assessing fair market value.[553]

174. The fair market value analysis thus essentially compares (i) the purchase price at which two hypothetical, informed parties would agree to sell and purchase TECO's interest in EEGSA on 21 October 2010 in a scenario reflecting Guatemala's Treaty breach, and (ii) the purchase price at which two hypothetical, informed parties would agree to sell and purchase TECO's interest in EEGSA on 21 October 2010 in a scenario assuming that Guatemala had not violated its Treaty obligation.[554]

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[549] *See supra* ¶¶ 59-61, 72; Kaczmarek III ¶¶ 175-176.

[550] Kaczmarek III ¶¶ 175-176. Guatemala's quantum expert in the Original Arbitration, Dr. Abdala, applied the same approach. *See* Abdala I ¶¶ 25, 91-96; Abdala II ¶¶ 74-78.

[551] Kaczmarek III ¶ 153; *see also* Kaczmarek I ¶ 132.

[552] *See, e.g.*, *Murphy v. Ecuador*, Partial Award ¶¶ 482, 486 (CL-1023); *El Paso v. Argentina*, Award ¶¶ 702-704 (CL-1010); *Total v. Argentina*, Award ¶¶ 28, 32, 108 (CL-1018).

[553] Kaczmarek III ¶ 154.

[554] *Id.* ¶¶ 154-156.

175. To calculate the fair market values, Mr. Kaczmarek employed three generally-accepted valuation methodologies, namely, the DCF method, the comparable publicly-traded company approach, and the comparable transaction approach.[555]

176. As Mr. Kaczmarek explains, the "DCF Approach is widely utilized and stems directly from the fundamental financial principle that the value of a company is equal to the future cash flows produced by the company, discounted to present value at a rate that reflects the risks of generating the future cash flow."[556] The DCF method of valuing a company also is commonly used by arbitral tribunals, including in cases such as this one. In *Total v. Argentina*, for example, the tribunal observed that the DCF method "has been approved and followed by economic and accounting experts and by regulatory authorities, and has been routinely applied by arbitral tribunals in investment disputes."[557] As set forth above, the *Total* tribunal used the DCF method proposed by the claimant's experts (Drs. Abdala and Spiller) to measure the loss in fair market value of the claimant's shareholding interest in two electricity companies at the time the claimant divested its interest in those companies.[558] As the tribunal observed, "comparing the relevant but-for cash flows with the actual future cash flows using the DCF method and applying an appropriate WACC in order to discount those flows to the relevant date" reveals the "decrease in market value of the equity affected that must be indemnified."[559]

177. Furthermore, in *EDF v. Argentina*, the tribunal remarked that the "DCF method is most suitable" where the "enterprise under assessment is a regulated utilities company with a predictable revenue stream," noting that it "is widely used in the context of tariff reviews for regulated utilities."[560] The *EDF* tribunal thus endorsed the approach of the claimant's quantum experts (Drs. Abdala and Spiller), and, as set forth above, used the DCF method to calculate the

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[555] *Id.* ¶¶ 162-169; *see also* Kaczmarek I ¶¶ 157-219; Kaczmarek II ¶¶ 7-9, 104-135, 140; Award ¶ 338.

[556] Kaczmarek III ¶ 162; *see also* Kaczmarek I ¶¶ 142-145.

[557] *Total v. Argentina*, Award ¶ 128 (CL-1018); *see also* SERGEI RIPINSKY AND KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) ("RIPINSKY"), at 289 ("[W]here the fair market value is established by using the DCF method, it directly represents the net present value of future (in relation to the date of valuation) cash flows that the investment is expected to generate.") (CL-1030).

[558] *Total v. Argentina*, Award ¶¶ 105-118; 128-129, 150 (CL-1018).

[559] *Id.* ¶ 128.

[560] *EDF v. Argentina*, Award ¶ 1188 (CL-1024).

but-for value of the company by "calculating the present value of future cash flows, and then adding the residual value of the company at the last year of the concession, discounted at its cost of capital."[561]

178. As Mr. Kaczmarek further explains, while the "DCF Approach is widely utilized" and "is perhaps the most common and widely accepted valuation approach," the "valuation practitioner should attempt to implement all three valuation approaches when it is feasible to do so."[562] Accordingly, in addition to the DCF approach, Mr. Kaczmarek used the comparable publicly-traded company method, which calculates the value of a firm by reference to the value of other similar, publicly-traded companies.[563] As the tribunal in *Crystallex v. Venezuela* observed, this valuation method "estimates the value of an asset or company by examining the market valuation of companies holding properties of similar characteristics," and "is widely used as a valuation method of business, and can thus be safely resorted to[.]"[564] Mr. Kaczmarek likewise explains that the "basic concept employed" in this method "is that the value of the subject company can be estimated by analyzing the value of other similar, publicly-traded companies," and that, "[b]ecause the share capital of publicly-traded companies can be readily observed by multiplying the trading price per share by the number of shares outstanding . . . , and the debt value either can be observed or usually can be accurately estimated based on public information, this method requires fewer assumptions than the DCF approach."[565]

179. The final method used by Mr. Kaczmarek is the comparable transaction method, which analyzes the purchase prices of comparable, recently-acquired companies purchased pursuant to bilateral negotiations between a buyer and a seller.[566] Mr. Kaczmarek explains that the "basic concept employed . . . is that when a company comparable to the subject company has recently been purchased, either partially or in total, the purchase price of the comparable

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[561] *Id.* ¶ 599.

[562] Kaczmarek III ¶¶ 162-163; *see also* Kaczmarek I ¶¶ 141-142.

[563] Kaczmarek III ¶¶ 167-168; *see also* Kaczmarek I ¶¶ 146-147.

[564] *Crystallex v. Venezuela*, Award ¶ 901 (CL-1019).

[565] Kaczmarek III ¶ 167.

[566] *Id.* ¶ 169; *see also* Kaczmarek I ¶ 148.

company may be useful in determining the fair market value of the subject company."[567] Other tribunals, such as the tribunal in *Kardassopoulos v. Georgia*, have relied on comparable transactions to arrive at the fair market value of an investment.[568]

180. As Mr. Kaczmarek explains, "[a]fter completing each of the applicable valuation approaches . . . the valuation practitioner should review any deviation among the valuation conclusions that have been reached" and "assign weights to each approach based upon the quality of the data utilized and should not take a simple arithmetic average of the various results."[569] Mr. Kaczmarek accordingly assigned a 60 percent weight to his DCF valuation, a 30 percent weight to the valuation obtained using the comparable publicly-traded company approach, and 10 percent to the value derived from using the comparable transaction method to arrive at a final valuation for EEGSA in the actual and but-for scenarios as of the date of the sale.[570]

a. EEGSA's "Actual" Value As Of The Date Of Sale Is Driven By The Expectation That The CNEE Would Continue To Apply Sigla's Approach To The VAD And Was Not Disputed In The Original Arbitration

181. Although the Parties' experts in the Original Arbitration relied on different methods to calculate EEGSA's value in the actual scenario to calculate loss of value damages, there was no material difference between their conclusions.

182. As set forth above, although Mr. Kaczmarek did not question that the purchase price that EPM paid for DECA II reflected EEGSA's fair market value, he noted that, because "DECA II contained a portfolio of companies, the price paid by EPM for DECA II does not yield

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[567] Kaczmarek III ¶ 169; *see also* Kaczmarek I ¶ 148.

[568] *Kardassopoulos v. Georgia*, Award ¶¶ 595, 603, 645 (CL-1027).

[569] Kaczmarek III ¶¶ 171-173; *see also* Kaczmarek I ¶¶ 150-152.

[570] Kaczmarek III ¶ 256; *see also* Kaczmarek I ¶¶ 152, 217-219; SHANNON P. PRATT, ROBERT F. REILLY & ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS & APPRAISAL OF CLOSELY HELD COMPANIES (2010), at 443, 445 ("[T]here are no scientific formulas or specific rules to use with regard to the weighting of the results of two or more valuation methods. . . . [The] method of concluding the value estimate is for the analyst: (1) to use subjective but informed judgment and decide on a percentage weight to assign to the indications of each meaningful valuation approach or method and (2) to base the final value estimate on a weighted average of the indications of the various methods.") (C-1149).

a directly observable price for EEGSA."[571] For that reason, Mr. Kaczmarek calculated EEGSA's actual fair market value as of the date of the sale using three accepted valuation approaches, *i.e.*, (i) the DCF method, (ii) the comparable publicly-traded company method, and (iii) the comparable transaction method.[572]

183. In applying the DCF method, Mr. Kaczmarek projected EEGSA's cash flows from the 21 October 2010 sale date until the end of the 2013-2018 tariff period, whereupon he assigned a terminal value to EEGSA.[573] Mr. Kaczmarek based his projections upon the same basic assumption that he applied in projecting EEGSA's actual cash flows from 1 August to 21 October 2010 as part of his calculation of the loss of cash flows portion of TECO's damages, namely, that the Sigla VAD imposed by the CNEE on 1 August 2008 would remain in place for the remainder of the 2008-2013 tariff period.[574] There was and can be no dispute about this fact, as the regulatory framework makes clear that the cost components of the VAD are established at the beginning of each tariff period for the duration of the entire five-year period.[575]

184. For the subsequent 2013-2018 tariff period, with respect to the VNR, Mr. Kaczmarek projected EEGSA's cash flow on the basis of the Sigla VNR, subject to reasonable adjustments.[576] As Mr. Kaczmarek explains, he, for example, "increased network maintenance costs at the same rate as [his] projection for energy consumption," "increased administration costs at the same rate as [his] projection for consumers served," and "assumed that working capital . . . would grow at the same rate as energy distributed."[577] He also used Sigla's projection of the capital expenditures necessary to expand the network.[578] Mr. Kaczmarek also projected, consistent with the Sigla study, that energy losses "would be held constant" and that medium

[571] Kaczmarek II ¶ 134; Award ¶ 347.

[572] Kaczmarek III ¶ 257; *see also* Kaczmarek I ¶¶ 157-219; Kaczmarek II ¶¶ 132-134.

[573] Kaczmarek III ¶ 235; *see also* Kaczmarek I ¶ 197.

[574] Kaczmarek III ¶ 193; *see also* Kaczmarek I ¶¶ 21, 126, 161-169.

[575] *See supra* ¶ 47; *see also* Kaczmarek III ¶ 96; Kaczmarek I ¶¶ 153, 161-169.

[576] Kaczmarek III ¶ 194; *see also* Kaczmarek I ¶¶ 171-183.

[577] Kaczmarek III ¶¶ 203, 219; *see also* Kaczmarek I ¶ 172.

[578] Kaczmarek III ¶ 218; *see also* Kaczmarek I ¶ 180.

voltage consumers would "remain flat" between 2013 and 2018.[579] Mr. Kaczmarek also held depreciation expenses and income tax expenses constant during this period.[580]

185. As Mr. Kaczmarek further explains, although "[t]he VAD is calculated by quantifying and aggregating the costs a Model Company would incur in distributing electricity to EEGSA's customer base," which are then paid to the distributor through tariffs, "[t]he costs incurred by a Model Company [may] not reflect the costs actually incurred by EEGSA."[581] Accordingly, Mr. Kaczmarek also projected the costs EEGSA could have expected to incur in reality in the actual scenario.[582]

186. With respect to the FRC, Mr. Kaczmarek assumed that, following the 2008-2013 tariff period, the CNEE would continue to use the Sigla FRC formula and, thus, continue to calculate EEGSA's VAD off of a VNR that was depreciated by 50 percent.[583] This assumption is consistent with Guatemala's insistence throughout EEGSA's 2008-2013 tariff review, before the Expert Commission, and in the domestic administrative and court proceedings that calculating the VAD off of a regulatory asset base that was depreciated by 50 percent was consistent with the regulatory framework, and the CNEE would have had no incentive to increase the VAD by adopting the Expert Commission's FRC ruling after TECO and its partners had sold EEGSA.[584] This assumption also was confirmed during the course of the arbitration by the fact that Guatemala continued to argue in the Original Arbitration in favor of the Sigla VAD and that the CNEE's ToR for EEGSA's subsequent 2013-2018 tariff review contained the same FRC formula used to calculate the Sigla VAD, which the CNEE had arbitrarily imposed upon EEGSA during the 2008-2013 tariff review.[585]

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[579] Kaczmarek III ¶¶ 196-199; *see also* Kaczmarek I ¶¶ 165, 168.

[580] Kaczmarek III ¶¶ 209-210; *see also* Kaczmarek II ¶¶ 178-179.

[581] Kaczmarek III ¶ 202; *see also* Kaczmarek I ¶ 171.

[582] Kaczmarek III ¶ 202; *see also* Kaczmarek I ¶¶ 171-181.

[583] Kaczmarek III ¶ 195; *see also* Kaczmarek I ¶¶ 161-170; Kaczmarek II ¶¶ 80-89; Memorial (Original Arbitration) ¶¶ 288-293; TECO's Post-Hearing Brief ¶¶ 169-170.

[584] *See supra* ¶ 21.

[585] *See* TECO's Post-Hearing Brief ¶ 170; CNEE Resolution 161-2012 dated 23 July 2012, at 27 (containing the ToR for EEGSA's 2013 tariff review) (C-1084).

187. Mr. Kaczmarek's DCF analysis in the actual scenario also is consistent with the parties' contemporaneous expectations concerning EEGSA's future financial performance underlying the sales price at which EPM purchased the portfolio of companies including EEGSA on 21 October 2010. Specifically, as noted above, in Citibank's Fairness Opinion, which confirmed the fairness of EPM's price offer to TECO, Citibank projected EEGSA's financial performance from 2010 until 2018 using a DCF analysis, assuming, like Mr. Kaczmarek, that the VAD methodology imposed by the CNEE during EEGSA's 2008-2013 tariff review would not change, and made adjustments for similar factors as in Mr. Kaczmarek's analysis.[586]

188. Mr. Kaczmarek's DCF analysis in the actual scenario also is consistent with EPM's non-binding offer letter to Iberdrola, which states that, among the "methodologies used" by EPM to calculate the purchase price that EPM had offered for DECA II, EPM applied a "[d]iscounted free cash flow" analysis of EEGSA "appl[ying] different adjustments and assumptions," but "not includ[ing] an increase in tariffs for the years 2013 and 2014."[587]

189. Moreover, Mr. Kaczmarek's DCF analysis comports with the reported statement to the press by EPM's Chief Executive Officer, Mr. Restrepo, according to which "[EPM] bought on the basis that the current tariff model and layout is the one that exists" and its "final valuation" of EEGSA "had no expectation that [the tariff model] would be modified or changed."[588]

190. As of the end of the 2013-2018 tariff period, Mr. Kaczmarek assigned a terminal value to EEGSA,[589] consistent with Citibank's analysis, which in its Fairness Opinion also assigned a terminal value to EEGSA as of the end of the 2013-2018 tariff period.[590]

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[586] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF p. 26 (summarizing the assumptions underlying Citibank's DCF analysis of EEGSA, including, among other things, a projection period of 2010-2018, that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013," and assigning a terminal value to EEGSA in 2018) (C-1083).

[587] Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (C-1081).

[588] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097).

[589] Kaczmarek III ¶¶ 35, 235; *see also* Kaczmarek I ¶ 197.

191. To discount EEGSA's projected future cash flows to present value, Mr. Kaczmarek used a discount rate of 8.8 percent in nominal terms, which was calculated using the same methodology applied by the CNEE to calculate EEGSA's WACC.[591]

192. As also set forth above, in applying the publicly-traded company method, Mr. Kaczmarek identified seventy publicly-traded companies potentially comparable to EEGSA, twelve of which were found to be sufficiently comparable so as to provide a reasonable basis upon which to value EEGSA.[592] Mr. Kaczmarek weighted the companies based upon their similarities with EEGSA, including their size, customer mix, customer density of each distributor, and the type of regulatory scheme under which each distributor operated, and computed the EV/EBITDA multiple for each of the comparable companies.[593] Mr. Kaczmarek then calculated a single weighted-average EV/EBITDA multiple for these companies and multiplied that result by EEGSA's EBITDA to obtain EEGSA's value in the actual scenario.[594] The publicly-traded company method also was applied both in the Citibank Fairness Opinion[595] and by EPM as one of the bases for its price offer.[596]

193. Similarly, in applying the comparable transaction method, Mr. Kaczmarek identified sixty-seven transactions involving the sale of companies potentially comparable to EEGSA, nine of which were sufficiently comparable so as to provide a reasonable basis upon which to value EEGSA.[597] As with the comparable publicly-traded company approach, Mr. Kaczmarek calculated the EV/EBITDA multiple for each of the electricity companies that were

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[590] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF pp. 15, 26 (C-1083).

[591] Kaczmarek III ¶ 233; *see also* Kaczmarek I ¶¶ 184, 195-196.

[592] Kaczmarek III ¶ 238; *see also* Kaczmarek I ¶¶ 199-200.

[593] Kaczmarek III ¶¶ 239-247; *see also* Kaczmarek I ¶¶ 201-210; Kaczmarek II ¶¶ 105-131.

[594] Kaczmarek III ¶¶ 247-248; *see also* Kaczmarek I ¶¶ 146-147, 198-210; Kaczmarek II ¶¶ 105-131.

[595] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF p. 15 (explaining that Citibank's financial analysis utilized the "Selected Companies Analysis," *i.e.*, the comparable publicly-traded company method) (C-1083).

[596] *See* Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (stating that, among other methods, EPM used EBITDA multiples based on comparable publicly-traded companies to calculate its price offer) (C-1081).

[597] Kaczmarek III ¶¶ 250-251; *see also* Kaczmarek I ¶¶ 211-213.

found to have had comparable transactions, and then calculated a single weighted EV/EBITDA multiple by weighing the transactions based on the similarities between the companies and EEGSA, giving the highest weightings to transactions of distribution companies in Chile, Peru, and El Salvador, where the regulatory regime is closer to that in Guatemala, and lower weightings to companies located in Brazil and Argentina.[598] The comparable transaction method also was used both by Citibank in its Fairness Opinion[599] and by EPM as one of the bases for its price offer.[600]

194. Mr. Kaczmarek then weighted the results of the three methods based upon his assessment of the quality of the information available to implement each method,[601] which, as noted above, is standard valuation practice.[602] As Mr. Kaczmarek explains, robust data was available for the DCF approach and comparable company approach, while the quality of the information available for use in the comparable transaction approach was somewhat less reliable due to the timing of the transactions as compared to the valuation date.[603] Mr. Kaczmarek thus assigned a weight of 60 percent to the DCF approach, 30 percent to the comparable company approach, and 10 percent to the comparable transaction approach.[604] These weightings resulted in an actual enterprise value for EEGSA of 562.4 million.[605] To obtain the value of TECO's interest in EEGSA, Mr. Kaczmarek subtracted EEGSA's net debt and multiplied the remaining equity value by 24.26 percent, the percentage of TECO's shareholding in EEGSA.[606] Mr.

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[598] Kaczmarek III ¶¶ 252-253; *see also* Kaczmarek I ¶¶ 148, 211-216; Kaczmarek II ¶¶ 105-131.

[599] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF pp. 15, 19, 45-47 (explaining that Citibank's financial analysis utilized the "Selected Precedent Transactions Analysis," *i.e.*, the comparable transaction method) (C-1083).

[600] *See* Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra dated 26 July 2010 ¶ 1 (C-1081) (stating that, among other methods, EPM used EBITDA multiples based on transactions involving comparable companies to calculate its price offer).

[601] Kaczmarek III ¶¶ 255-256; *see also* Kaczmarek I ¶¶ 17, 217-218; Kaczmarek II ¶¶ 114-118140; Award ¶ 338.

[602] *See supra* ¶ 64.

[603] Kaczmarek III ¶ 256; *see also* Kaczmarek I ¶¶ 213-214, 217-218.

[604] Kaczmarek III ¶ 256; *see also* Kaczmarek I ¶¶ 217-218.

[605] Kaczmarek III ¶ 256; *see also* Kaczmarek I ¶¶ 217-218.

[606] Kaczmarek III ¶ 262; *see also* Kaczmarek I ¶ 219.

Kaczmarek thus concluded that the fair market value of TECO's interest in EEGSA in the actual scenario as of 21 October 2010 was US$ 115.2 million.[607]

195. As a reasonableness check, Mr. Kaczmarek compared this result against the implied value of EEGSA that he derived from the sale of DECA II.[608] Specifically, Mr. Kaczmarek allocated DECA II's purchase price to its various assets based upon the relative EBITDA, gross margin, and net income that these assets contributed to DECA II, and estimated on that basis that EEGSA constituted approximately 62.2 percent of DECA II's value.[609] He thus assigned an actual value for EEGSA based upon the DECA II sales price of US$ 498 million.[610] This is within a close range of Mr. Kaczmarek's valuation conclusion using the three valuation methods discussed above, confirming that Mr. Kaczmarek's calculation of EEGSA's value in the actual scenario was accurate.[611]

196. Mr. Kaczmarek's conclusion that the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 amounts to US$ 115.2 million also is within the range of the results of Citibank's DCF analysis, according to which the implied value of TECO's stake in EEGSA was between US$ 112 million and US$ 134.4 million.[612] This provides additional confidence in the accuracy of Mr. Kaczmarek's result.

197. Similar to Mr. Kaczmarek, in the Original Arbitration, Dr. Abdala, Guatemala's quantum expert, accepted that the sales price paid by EPM on 21 October 2010 for the portfolio of companies including EEGSA reflected EEGSA's actual fair market value as of that date;[613] in

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[607] Kaczmarek III ¶ 262; *see also* Kaczmarek II ¶ 141, Table 14; Award ¶ 340.

[608] Kaczmarek III ¶¶ 258-260; *see also* Kaczmarek I ¶¶ 239-241; Kaczmarek II ¶ 132.

[609] Kaczmarek III ¶ 259; *see also* Kaczmarek I ¶¶ 239-241.

[610] Kaczmarek III ¶ 259; *see also* Kaczmarek I ¶¶ 239-241; Award ¶ 351.

[611] Kaczmarek III ¶ 261; *see also* Kaczmarek I ¶¶ 239-241; Kaczmarek II ¶ 132.

[612] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF p. 17 (summarizing Citibank's DCF analysis and showing the "TECO Stake Implied Value" of EEGSA as ranging from US$ 112.0 million to US$ 134.4 million) (C-1083).

[613] *See* Abdala I ¶ 80 (stating that the sale to EPM "is the best available reference of EEGSA's value under the *actual* scenario, since it has been agreed between two independent parties under free market conditions (*i.e.*, under the arm's length transactions principle") (emphasis in original); Award ¶ 422 (noting Guatemala's

other words, Dr. Abdala concluded that EPM neither underpaid nor overpaid for EEGSA. Despite not having direct evidence of the percentage of the portion of the sales price attributable to EEGSA, Dr. Abdala derived his value of EEGSA in the actual scenario solely from the EPM sales price.[614] Based on this approach, Dr. Abdala calculated an enterprise value for EEGSA as a range of US$ 518 million to US$ 582 million,[615] and TECO's share of the purchase price attributable to EEGSA as a range of US$ 104.5 million to US$ 120 million.[616]

198. As further noted above, Mr. Kaczmarek's conclusion that the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 amounted to US$ 115.2 million therefore was within and towards the higher end of the range of values calculated by Dr. Abdala, where a higher actual value means lower damages. Accordingly, the Parties in the Original Arbitration agreed that their "conclusions as to EEGSA's actual value are not significantly different and, thus, have no material impact on the calculation of damages,"[617] and that they "are essentially in agreement regarding EEGSA's value in the actual scenario."[618] The Original Tribunal did not question the Parties' agreed position in this regard.[619]

199. In summary, contemporaneous evidence demonstrates that the parties to the 21 October 2010 sale of EEGSA assumed not only that the VAD established by the CNEE at the beginning of the 2008-2013 tariff period based on the Sigla VAD study would continue to apply through the remainder of that tariff period, but also that the VNR in future tariff periods would

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position that "the best reference for establishing EEGSA's value in the actual scenario is the price paid by EPM to acquire the DECA II block of shares").

[614] *See* Abdala I ¶ 80; Award ¶¶ 422, 750.

[615] Abdala II ¶ 32; Abdala I ¶ 83.

[616] Abdala II ¶ 78, Table VI.

[617] TECO's Post-Hearing Brief ¶ 165; *see also* TECO's Post-Hearing Reply ¶ 153; Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 13.

[618] Guatemala's Post-Hearing Brief ¶ 334; *see also* Guatemala's Post-Hearing Reply ¶ 161 (stating that the "truth is that there are no significant differences between the parties regarding EEGSA's value in the actual scenario, which has basically been determined by the value of the sale of EEGSA to EPM"); Abdala II ¶ 2 (stating that "[t]here [were] no major differences with [Mr. Kaczmarek] in the valuation of EEGSA in the *actual* scenario") (emphasis in original).

[619] *See* Award ¶ 750 (stating that, as regards the actual scenario, the Parties are only in "slight disagreement" regarding the portion of the sales price paid by EPM for DECA II "that is attributed to EEGSA").

not increase by any significant extent from the Sigla VNR and that the CNEE would continue to apply the same FRC formula that it had used to set the 2008 VAD, which calculated EEGSA's return on a VNR that has been depreciated by half. Applying the same assumptions, Mr. Kaczmarek calculated the actual fair market value of TECO's interest in EEGSA as of 21 October 2010 in an amount that was not materially different from that calculated by Guatemala's quantum expert, Dr. Abdala. The Parties thus agreed that there were no material differences between them as regards EEGSA's fair market value in the actual scenario.

b. EEGSA's "But-For" Value Is Derived From Bates White's Revised VAD Study, And Significantly Exceeds EEGSA's "Actual" Value

200. Although the Parties in the Original Arbitration agreed on EEGSA's actual fair market value as of the date of sale, they disagreed greatly regarding EEGSA's fair market value in the but-for scenario.[620] That disagreement was primarily the product of the use of Mr. Damonte's VAD study by Guatemala's quantum expert as the basis for his valuation of EEGSA in the but-for scenario, rather than Bates White's 28 July 2008 VAD study.[621]

201. As discussed above, Mr. Kaczmarek calculated EEGSA's fair market value in the but-for scenario by applying the three accepted valuation approaches he used to calculate EEGSA's fair market value in the actual scenario, *i.e.*, the DCF method, the comparable publicly-traded company method, and the comparable transaction method, and calculated a weighted average of the results of the three methods.[622] Mr. Kaczmarek's implementation of these methods in the but-for scenario was essentially identical to that in the actual scenario, described above, with the difference being that, in the but-for scenario, he based his calculations on Bates White's 28 July 2008 VAD study, rather than on Sigla's VAD study.[623]

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[620] *See supra* ¶ 71; *see also* Award ¶ 751 (stating that the "Parties nevertheless differ substantially as to EEGSA's *but for* value").

[621] *See supra* ¶¶ 78-79; *see generally* Damonte I as referred to in Abdala I; Damonte II as referred to in Abdala II.

[622] *See supra* ¶ 71; *see also* Award ¶ 338; Kaczmarek III ¶ 256; Kaczmarek I ¶¶ 157-219; Kaczmarek II ¶ 9.

[623] *See supra* ¶ 71; *see also* Kaczmarek III ¶¶ 192-194; Kaczmarek I ¶ 126.

202. By contrast, Dr. Abdala relied solely upon the DCF method to calculate EEGSA's but-for value,[624] and calculated that value using Mr. Damonte's VAD study, which did not incorporate critical Expert Commission rulings, as set forth above.[625] If Dr. Abdala had used in his calculation the VNR presented in Bates White's 28 July 2008 VAD study, and if he had used the FRC formula per the Expert Commission's ruling, keeping all other factors constant, his calculation would have produced slightly *higher* damages than Mr. Kaczmarek's calculation.[626] This underscores that the key question relating to EEGSA's fair market value in the but-for scenario is whether such value should be calculated based on Bates White's 28 July 2008 VAD study, or whether it should be calculated based on Mr. Damonte's VAD study. As noted above and discussed in greater detail below, this question already was decided by the Original Tribunal, which found that Bates White's 28 July 2008 VAD is the proper basis for the but-for scenario.[627]

i. Damages Relating To The Remainder Of The 2008-2013 Tariff Period Flow Directly From The Original Tribunal's Finding That Bates White's 28 July 2008 VAD Study Should Have Been Used To Set EEGSA's 2008-2013 VAD And Tariffs

203. As set forth above, the Original Tribunal held that Guatemala had violated its obligation to accord EEGSA fair and equitable treatment by setting EEGSA's VAD and tariffs for the 2008-2013 tariff period on the basis of the Sigla VAD study, rather than Bates White's 28 July 2008 VAD study.[628] As also set forth above, in analyzing TECO's loss of cash flow portion of damages, the Original Tribunal held that it would "work on the basis of the July 28, 2008 version of the [Bates White] study," as "this approach will allow calculation of damages with a sufficient degree of certainty based on what the tariffs should have been had the CNEE complied with the regulatory framework."[629] The Original Tribunal thus accepted in its entirety Mr. Kaczmarek's calculation of TECO's loss of cash flow damages, which was based on Bates

[624] Award ¶ 421; Abdala I ¶ 92; Abdala II ¶¶ 2-6.

[625] *See* Award ¶¶ 417, 724, 730; Abdala I ¶¶ 72-78; Abdala II ¶ 75; Guatemala's Post-Hearing Brief ¶ 192.

[626] *See* Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 19; Kaczmarek III ¶ 277.

[627] *See supra* ¶¶ 115-116; *see also* Award ¶ 728.

[628] *See supra* ¶¶ 105-113; *see also* Award ¶¶ 683, 726, 731.

[629] Award ¶ 728.

White's 28 July 2008 VAD study, and awarded TECO the full amount of loss of cash flow damages claimed.[630]

204. In light of the principle that the cost components of the VAD are established at the beginning of each tariff period for the duration of the *entire* five-year tariff period,[631] which is undisputed between the Parties, the Original Tribunal's decision means that, in the but-for scenario, the higher VAD and tariffs resulting from the application of Bates White's 28 July 2008 VAD study would have remained in place for the *entire* 2008-2013 tariff period, and not only until the 21 October 2010 sale date. Because the value of a distribution company, such as EEGSA, is based on its future expected cash flows, which is, in turn, determined by its VAD,[632] it further follows that, in the but-for scenario, parties in a hypothetical transaction on 21 October 2010 would have set the sales price based on the VAD and tariffs that EEGSA stood to receive for the 2008-2013 tariff period, *i.e.*, the Bates White VAD and tariffs, in much the same way that EPM evidently based its offer on EEGSA's *actual* value by calculating EEGSA's cash flows through the end of the 2008-2013 tariff period on the basis of the Sigla VAD and tariffs.[633] As Mr. Kaczmarek explains:

> Since the key economic drivers of EEGSA's financial performance were established at the beginning of the Third Rate Period and held constant throughout the remainder of that five-year tariff period, EEGSA's cash flows through July 2013 were effectively locked in. A buyer assessing the value of EEGSA in 2010 would have been willing to pay more for the company, had EEGSA's 2010-2013 cash flows been higher using inputs consistent with the Bates White July 2008 tariff study.[634]

205. Indeed, in light of the fact that the Original Tribunal correctly found that TECO sold its interest in EEGSA as a consequence of Guatemala's Treaty breach, to deny TECO the loss of value portion of damages relating to the remainder of the 2008-2013 tariff period not only would contravene the central findings of the Original Tribunal and economic reason, but also

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[630] *Id.* ¶¶ 742, 780.

[631] *See supra* ¶ 67.

[632] *See* Kaczmarek III ¶ 36; *see also supra* ¶¶ 47-167.

[633] *See supra* ¶¶ 44-45, 66-67.

[634] Kaczmarek III ¶ 278.

would amount to unjust enrichment, by allowing Guatemala to benefit from its own wrongdoing by way of a lower damages award.[635]

206. As shown below, Mr. Kaczmarek's calculation of TECO's damages associated with the 2008-2013 tariff period, including both the loss of cash flow and loss of value portions of damages, amounts to US$ 47,893,554 (before interest), out of which US$ 26,793,001 relates to the remainder of the 2008-2013 tariff period post-sale.[636]

Tariff Period	[A] TECO's Share of Sigla Tariffs (US$)	[B] TECO's Share of Bates White Tariffs (US$)	[B]-[A] TECO's Damages (US$)	
1 Aug. 2008 to 31 July 2009	6,563,344	11,948,487	5,385,144	**Awarded by Original Tribunal: US$ 21,100,552**
1 Aug. 2009 to 31 July 2010	11,553,760	24,786,306	13,232,546	
1 Aug. 2010 to 21 Oct. 2010	2,026,582	4,509,444	2,482,863	
22 Oct. 2010 to 31 July 2011	6,551,588	14,578,254	8,026,666	**TECO's Damages (DCF Approach, Discounted): US$ 26,793,001**
1 Aug. 2011 to 31 July 2012	8,248,221	18,071,395	9,823,174	
1 Aug. 2012 to 31 July 2013	7,829,873	16,773,034	8,943,161	
Total:	42,773,368	90,666,920	47,893,553	

[635] *See* TECO's Memorial on Partial Annulment § IV.A.3.

[636] *See* Kaczmarek III, Appendix 3.A. Amounts are based on the DCF approach and are undiscounted and before interest. After discounting, the amount of US$ 31,284,343 relating to the period from 22 Oct. 2010 to 31 July 2013 equals US$ 26,793,001. When the amounts from the comparative publicly-traded company and comparative transaction approach are considered and weighted, along with the DCF approach, the amount relating to the foregoing time period equals US$ 29,582,454. *See id.*, Appendix 3.J.

ii. Damages For The Period After The 2008-2013 Tariff Period Are A Direct Consequence Of Guatemala's Breach

207. It is undisputed that DECA II held a 50-year authorization for EEGSA,[637] and, as of 21 October 2010, EEGSA still had 38 years remaining on the contract.[638] Accordingly, when EPM purchased EEGSA on 21 October 2010, it did not pay only for EEGSA's cash flow through the end of the 2008-2013 tariff period; instead, as discussed above, EPM based its price offer on its forecast of EEGSA's cash flows through the end of the 2013-2018 tariff period—thus forecasting EEGSA's cash flows for 10 years, as is usual practice—and assigned a terminal value to EEGSA.[639] Likewise, in the but-for scenario, well-informed parties to a hypothetical sales transaction on 21 October 2010 would have considered that EEGSA would continue operating in Guatemala through the 2013-2018 tariff period and into the distant future, and would have taken EEGSA's projected future financial performance into account in valuing EEGSA and in setting the price of the transaction.[640]

208. In light of the principle that the value of a distribution company, such as EEGSA, is based on its future expected cash flows, which is in turn determined by its VAD,[641] and in light of the fact that, in the but-for scenario, the 2008-2013 VAD and tariffs would have been set based on the 28 July 2008 Bates White VAD study (as the Original Tribunal ruled),[642] the question thus is what assumptions would parties to such a hypothetical transaction make concerning EEGSA's future VADs and financial performance following the 2008-2013 tariff period. As discussed below, the evidence demonstrates that the parties would have based such projections on Bates White's 28 July 2008 VAD study.

209. In the but-for scenario, the hypothetical sale on 21 October 2010 would have been preceded by approximately two years in which EEGSA's VAD and tariffs for the 2008-2013

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[637] Authorization Contract between MEM and EEGSA dated 15 May 1998 (C-1103).

[638] *See id.* at Art. 19.

[639] *See supra* ¶ 66.

[640] *See* Kaczmarek III ¶¶ 189-195.

[641] *See supra* ¶ 47.

[642] *See supra* ¶¶ 115-116.

tariff period would have been set by the CNEE on the basis of Bates White's 28 July 2008 VAD study, in compliance with the regulatory framework.[643] The Original Tribunal ruled in this connection that, regarding the Bates White VNR, "[a]fter careful review of the evidence, the Arbitral Tribunal is not convinced that the Bates White 28 July study failed to incorporate the Expert Commission's pronouncements or that there is *any reason to depart from such pronouncements*."[644] Furthermore, it held that Guatemala had failed to establish that the CNEE "*would have had* any valid reasons to disregard the pronouncements of the Expert Commission" regarding the VNR.[645] Likewise, with respect to the FRC, the Original Tribunal ruled that "the Expert Commission's pronouncement on the FRC is in fact consistent with the regulatory framework and the regulator *would have had no valid reason* to object to it."[646]

210. Accordingly, in the but-for scenario, the parties to a hypothetical sale of EEGSA would have assumed that, following the 2008-2013 tariff period, the CNEE would continue to act in accordance with the regulatory framework and would set EEGSA's VAD on the basis of the methodology employed in the Bates White VAD study with respect to the VNR and FRC, which were found by the Expert Commission and the Original Tribunal to be compliant with the regulatory framework. Parties to a hypothetical transaction for EEGSA in the but-for scenario, moreover, would have had no reason to assume that the CNEE would have materially altered EEGSA's VNR or FRC calculation to impose a significantly lower VAD on EEGSA, when the Expert Commission ruled that imposing such a VNR and using the Sigla FRC would not accord with the regulatory framework.

211. Indeed, as Mr. Kaczmarek explains, "SIGLA's VNR and [FRC] determinations were neither rational nor economically justified,"[647] including, among other reasons, because they resulted in a decrease of the VNR from the prior tariff period notwithstanding that the costs

[643] *See supra* ¶¶ 115-116.

[644] Award ¶ 731 (emphasis added).

[645] *Id.* ¶ 731 (emphasis added).

[646] *Id.* ¶ 726 (emphasis added).

[647] Kaczmarek III ¶ 17; *see also* Kaczmarek I § V.E.

of constructing a distribution network and the size of EEGSA's network had increased,[648] and, in combination with the reduced FRC, produced an irrationally low VAD and tariffs.[649] By contrast, in the but-for scenario, the CNEE would have adopted the economically rational and justified VAD resulting from Bates White's 28 July 2008 VAD study. Combined with the fact that the VAD established by the CNEE for the preceding 2003-2008 tariff period also was economically justified,[650] parties in the but-for scenario would have had no reason to assume that, following the 2008-2013 tariff period, the CNEE would adopt anything but a rational and economically justified VAD.

212. This is further confirmed by the way in which EEGSA's sales price was established in the actual sales transaction. As set forth above, the parties to the actual transaction, namely, the DECA II shareholders and EPM, assumed that, following Guatemala's unlawful actions in setting EEGSA's VAD for the 2008-2013 tariff period, the VAD in future tariff periods would continue to be calculated off of a VNR that would not increase in value by any significant extent from the VNR that had been calculated by Sigla, and that the CNEE would continue to apply the same Sigla FRC formula that it had used to set the 2008 VAD, which calculated EEGSA's return on a VNR that had been depreciated by half.[651] Similarly, in the but-for scenario, hypothetical parties to such a sales transaction would assume that, following the 2008-2013 tariff period, in which the VNR and FRC and the resulting VAD would have been established on the basis of Bates White's 28 July 2008 VAD study, the CNEE would not change the VNR by any significant extent from the VNR that had been calculated by Bates White, and that the CNEE would continue to apply the FRC formula, as set forth in that VAD study.

213. As also set forth above, in the actual sale of EEGSA, EEGSA's projected financial performance was analyzed by Citibank for purposes of evaluating the fairness to TECO of EPM's proposed purchase price for DECA II.[652] As part of its analysis, Citibank prepared a

[648] Kaczmarek III ¶ 137; *see also* Kaczmarek I ¶ 114.

[649] Kaczmarek III ¶ 137; *see also* Kaczmarek I ¶¶ 123-124.

[650] *See supra* ¶ 16.

[651] *See supra* ¶¶ 44-45, 66-67.

[652] *See supra* ¶¶ 44-45, 66-67; *see also generally* Citibank Fairness Opinion dated 14 Oct. 2010 (C-1083).

DCF analysis of EEGSA's future financial performance from 2010 until 2018 and assigned a terminal value to EEGSA in 2018.[653] In conducting its DCF, Citibank assumed that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013."[654] In other words, Citibank assumed that the basic VAD methodology applied by the CNEE during EEGSA's 2008-2013 tariff review would not change. For the 2013-2018 tariff period, Citibank adjusted EEGSA's projected cash flows to account for various factors, such as cost and material inflation, the growth of the network, and the network's technical losses.[655] The fact that the results of Citibank's analysis aligned with the price offer presented by EPM demonstrates that EPM applied similar assumptions in formulating its price offer.[656]

214. Citibank's DCF analysis thus is indicative of how hypothetical parties to a 21 October 2010 sale of EEGSA would approach determining the value and, thus, the purchase price for EEGSA in the but-for scenario. Specifically, the parties to a sale in the but-for scenario would have taken EEGSA's existing VNR and VAD and adjusted them to account for inflation, growth in the network, and technical losses. Rather than adjusting the Sigla VNR and VAD to forecast EEGSA's future cash flows beyond 2013—as was done in the actual scenario—in the but-for scenario, the parties would have adjusted the Bates White VNR and VAD to forecast EEGSA's cash flows beyond the 2008-2013 tariff period.

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[653] *See* Citibank Fairness Opinion dated 14 Oct. 2010, Presentation to the Board of Directors of TECO Energy, Inc., at PDF p. 15 (explaining that Citibank's financial analysis utilized the "Discounted Free Cash Flow Analysis" and that, to conduct its DCF, Citibank projected EEGSA's VAD through 2018 relying upon DECA II's financial documentation, and then calculated a terminal value for EEGSA based upon EBITDA multiples of comparable companies, discounted back to the date of the analysis at the WACC rate) (C-1083); *id.*, at PDF p. 26 (summarizing the assumptions underlying Citibank's DCF analysis of EEGSA, including, among other things, a projection period of 2010-2018, that the "CNEE does not institute any change in EEGSA's VAD tariff upon the next reset in 2013," and assigning a terminal value to EEGSA in 2018); *id.*, at PDF p. 28 (listing macroeconomic assumptions underlying Citibank's analysis, such as the projected inflation rates in Guatemala); *id.*, at PDF p. 32 (showing a projected business plan for EEGSA, taking into account factors such as projected changes in electricity demand); *id.*, at PDF p. 36 (providing a DCF analysis).

[654] *Id.* at PDF p. 26.

[655] *See id.* at PDF p. 32; *see also* Kaczmarek III ¶ 34 (discussing same).

[656] *See supra* ¶¶ 44-45, 66-67. This also demonstrates the error in the Original Tribunal's finding (which was annulled) that "[t]here [is] no evidence in the record of how the transaction price has been determined," as the Citibank Fairness Opinion contains detailed analysis, and thus constitutes evidence of how the purchase price was determined by EPM. *See* Award ¶ 754.

215. Accordingly, in order to calculate TECO's loss of value portion of damages for the period after 2013, Mr. Kaczmarek projected EEGSA's future financial performance from 2010 until 2018 using a DCF analysis based on the assumption that the VAD methodology set forth by Bates White in its 28 July 2008 VAD study would continue to apply, and assigned a terminal value to EEGSA in 2018.[657] For the 2013-2018 tariff period, Mr. Kaczmarek adjusted EEGSA's projected cash flows for factors similar to those used by Citibank, such as cost and material inflation, the growth of the network, and the network's technical losses, consistent with the methodology he applied in the actual scenario.[658]

216. Guatemala's quantum expert in the Original Arbitration, Dr. Abdala, used the same DCF methodology as Mr. Kaczmarek, projecting EEGSA's but-for future financial performance from 2010 until 2018, making similar adjustments for the 2013-2018 tariff period as Mr. Kaczmarek, and assigning a terminal value to EEGSA in 2018, much in the same way as Mr. Kaczmarek.[659] The primary difference between Mr. Kaczmarek's and Dr. Abdala's but-for value of EEGSA is that Dr. Abdala used Mr. Damonte's VAD study to forecast EEGSA's future cash flows, rather than using Bates White's 28 July 2008 VAD study for that purpose.[660] In a but-for scenario, however, there would have been no basis for hypothetical parties to presume that the CNEE would set EEGSA's future VAD on the basis of Mr. Damonte's VAD study—which did not even exist at the time—and which did not comport with the Expert Commission's rulings. As noted above, if Dr. Abdala had input into his calculation the VNR and FRC formula presented in Bates White's 28 July 2008 VAD study, per the Expert Commission's rulings, Dr. Abdala's calculation would have produced slightly *higher* damages than Mr. Kaczmarek's calculation.[661]

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[657] *See* Kaczmarek III ¶ 235; *see also* Kaczmarek I ¶¶ 158-197.

[658] *See* Kaczmarek III ¶¶ 194-200; *see also* Kaczmarek I ¶¶ 160-181.

[659] As Mr. Kaczmarek notes, "Respondent's expert acknowledged that the terminal value is 'a commonly used tool in financial valuations that captures the value of cash flows coming after the end of projections,' and adopted this same approach when valuing EEGSA using the DCF method." Kaczmarek III ¶ 235 n.269 (quoting Abdala I ¶ 32 n.11).

[660] *See supra* ¶ 205.

[661] *See supra* ¶ 205; *see also* Kaczmarek III ¶ 277; Direct Examination Presentation of Brent C. Kaczmarek, 5 Mar. 2013, Slide 19.

217. The fact that there were no major differences between the Parties' experts as regards the configuration or application of the DCF analysis in the but-for scenario—other than the fact that Mr. Kaczmarek based his forecast of EEGSA's future cash flows off of Bates White's study, whereas Dr. Abdala based his forecast off of Mr. Damonte's study—reinforces the conclusion that Mr. Kaczmarek's calculation of EEGSA's value in the but-for scenario using the DCF analysis is sound.

218. As in the actual scenario, in addition to using the DCF method, Mr. Kaczmarek valued EEGSA in the but-for scenario using the comparable publicly-traded company approach and the comparable transaction approach. In doing so, he applied these methods in the same manner as he applied them in the actual scenario, and weighted the results of the three methods based upon his assessment of the quality of the information available to implement each method, using the same weights as in the actual scenario.[662] These weightings resulted in a but-for enterprise value for EEGSA of US$ 1,479.3 million.[663] To obtain the but-for value of TECO's interest in EEGSA, as in the actual scenario, Mr. Kaczmarek subtracted EEGSA's net debt and multiplied the remaining equity value by 24.26 percent, the percentage of TECO's shareholding in EEGSA.[664] Mr. Kaczmarek thus concluded that the fair market value of TECO's interest in EEGSA in the but-for scenario as of 21 October 2010 was US$ 337.7 million.[665]

c. TECO's Loss Of Value Portion Of Damages Amounts To US$ 222,484,783 (Before Interest)

219. Deducting the actual fair market value of TECO's interest in EEGSA of US$ 115.2 million from the but-for fair market value of TECO's interest in EEGSA of US$ 337.7 million Mr. Kaczmarek concluded that TECO's loss of value portion of damages

[662] *See* Kaczmarek III §§ IX.B - IX.C; *see also see also* Kaczmarek I ¶¶ 17, 198-216; Kaczmarek II ¶¶ 105-131, 140; Award ¶ 338.

[663] Kaczmarek III ¶ 256; *see also* Kaczmarek I ¶¶ 217-218.

[664] Kaczmarek III ¶ 262; *see also* Kaczmarek I ¶ 219.

[665] Kaczmarek III ¶ 262; *see also* Kaczmarek II ¶ 141, Table 14; Award ¶ 340.

amounts to US$ 222.5 million (before interest).[666] A summary of Mr. Kaczmarek's results is shown in the following table.[667]

Summary of Claimant's Lost Value Damages

US$s	Weighting	But For Scenario	Actual Scenario	Lost Value
Discounted Cash Flow	60%	1,406,686,303	576,214,141	830,472,162
Comparable Public Company	30%	1,528,328,687	521,179,082	1,007,149,605
Comparable Transactions	10%	1,767,946,540	602,891,748	1,165,054,791
EEGSA Enterprise Value		**1,479,305,042**	**562,371,384**	**916,933,658**
EEGSA Net Debt		87,600,000	87,600,000	-
EEGSA Equity Value		**1,391,705,042**	**474,771,384**	**916,933,658**
Claimant's Shareholding		24.26%	24.26%	
Claimant's Equity Value		**337,683,311**	**115,198,529**	**222,484,783**

220. As noted above, that awarding loss of value damages to TECO in the full amount requested is necessary to compensate TECO for Guatemala's breach of the Treaty is confirmed by Mr. Kaczmarek's analysis of TECO's IRR relative to TECO's cost of capital, both with and without an award of the loss of cash flow portion of damages and an award of the loss of value portion of damages.[668] As Mr. Kaczmarek explains, the "IRR measures the compound average annual return for a series of cash investments and cash returns over time."[669] In order to determine the historical IRR of an investment, "cash flows are carried forward to the present day at a rate of return such that the future value of cash investments (negative cash flows) and cash returns (positive cash flows) equal zero."[670] Mr. Kaczmarek further explains that "[b]efore investing in a project, an investor may compare the expected IRR to the cost of capital to judge

[666] Kaczmarek III ¶ 263; *see also* Kaczmarek II ¶ 141, Table 14; Award ¶ 340. The appearance of the two amounts not adding up to the dollar in the final result arises from rounding.

[667] Reproduced from Kaczmarek III, ¶ 271, Table 27.

[668] Kaczmarek III § XI.A; *see also* Kaczmarek I § XI.A, Kaczmarek II § V.A.

[669] Kaczmarek III ¶ 293.

[670] *Id.* ¶ 294.

the suitability of the project" and "if the expected IRR of the project does not exceed the cost of equity for the project, an investment in the project would be uneconomic."[671]

221. Mr. Kaczmarek calculated TECO's IRR by analyzing its investments in EEGSA, the dividends and capital distributions made by EEGSA over the life of TECO's investment, and the proceeds TECO received from the sale of its interest in EEGSA to EPM in three scenarios: (i) without any award of damages, (ii) including the loss of cash flow portion of damages awarded to TECO by the Original Tribunal, and (ii) including both the loss of cash flow portion of damages awarded by the Original Tribunal and the loss of value portion of damages that TECO is seeking in this resubmitted arbitration.[672] He then compared the results against the "measures of the cost of equity for investing in the shares of EEGSA," including the "real WACC target range for Guatemalan electricity distributors of 7 to 13 percent" set forth at Article 79 of the LGE and "the cost of equity for EEGSA, as calculated by DresdnerKleinwort (financial advisor to DECA) in 1998," which amounted to "15.1 percent on a nominal basis (i.e., with inflation) or 11.66 percent on a real basis (i.e., without inflation) and by the CNEE in the Third Rate Period in 2008 [of] 13.97 percent (nominal basis) or 11.01 percent (real basis)."[673]

222. TECO should have been able to recover its cost of equity in connection with its investment in EEGSA, because EEGSA performed very well and efficiently during the time when DECA II controlled it. In particular, after EEGSA was purchased by TECO and its partners, they replaced EEGSA's dilapidated network with new assets that stopped the extensive

[671] *Id.* ¶ 295; *see also* Gillette I ¶ 12 ("We [] were aware that . . . the law guaranteed a real rate of return on the new replacement value of the assets between 7% and 13%. All of this was taken into account by us, along with our partners, in structuring our bid."); *id.* ¶ 14 ("TECO made its investment to acquire 24% of EEGSA via DECA based on a nominal rate of return of approximately 13% on its invested capital of US$ 100 million."); *id.* ¶ 19 ("Although still below the expected level that the company required to invest in DECA II, the cumulative returns did start approaching the 8% range of utility returns in the U.S. during the second VAD period. This cumulative return on invested capital, however, was still far below the original 13% threshold. Assuming that future adequate VAD rates were approved, it was my hope at the time that the cumulative returns on invested capital would eventually meet the expected level of the 13% minimum that the company relied upon at the time of making the investment despite the poor returns in the first five years.").

[672] Kaczmarek III ¶ 296.

[673] *Id.* ¶ 298.

blackouts that Guatemala experienced pre-privatization, vastly expanded the network's coverage, and reduced energy losses to among the lowest in Latin America.[674]

223. Mr. Kaczmarek's analysis revealed, however, that, without any award of damages, TECO's IRR amounts to 3.2 percent on a nominal basis (not reflecting inflation) and 0.6 percent on a real basis (reflecting inflation), significantly below the foregoing measures of the cost of equity.[675] As Mr. Kaczmarek thus concludes, in the scenario without any award of damages to TECO, "[t]his reconfirms that Claimant has incurred economic losses from its investment in EEGSA."[676]

224. In the scenario including the loss of cash flow portion of damages awarded to TECO by the Original Tribunal, TECO's IRR amounts to 4.2 percent on a nominal basis and 1.6 percent on a real basis, still significantly below the foregoing measures of the cost of equity.[677] This underscores that the award of the loss of cash flow portion of damages to TECO by the Original Tribunal fell significantly short of providing full reparation to TECO.

225. In the scenario including an award to TECO of both the loss of cash flow portion of damages and the loss of value portion of damages, TECO's IRR amounts to 10.8 percent on a nominal basis and 8.1 percent on a real basis, "still lower than some of the cost of equity measurements for EEGSA,"[678] within the 7 to 13 percent range anticipated by the LGE, and lower than the expected returns calculated by DresdnerKleinwort at the outset of the investment

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[674] *See, e.g.*, Reply (Original Arbitration) ¶ 305 (noting that "there are no allegations of gross mismanagement, inefficiencies, or poor service that should have prevented Claimant from obtaining, at a minimum, the floor of the targeted rate of return set forth in the LGE," and explaining that "the evidence shows that electricity losses were significantly reduced post-privatization and that EEGSA made substantial improvements in the quality and efficiency of its electricity service by, among other things, increasing bill payment locations, reducing the percentage of unread meters, reducing billing errors, increasing the number of customer calls handled, significantly decreasing the average complaint response time, substantially decreasing the average waiting period for obtaining new electricity service, and appreciably decreasing the frequency and length of power interruptions"); *see also* Kaczmarek III ¶ 106.

[675] Kaczmarek III ¶¶ 298, 300, 302.

[676] *Id.* ¶ 298.

[677] *Id.* ¶ 300.

[678] *Id.* ¶ 302.

in 1998.[679] This underscores that the amount of damages claimed by TECO in this resubmitted proceeding is reasonable and indeed conservative, and awarding TECO damages in less than the full amount sought would have the effect of depriving TECO of a reasonable return on its investment notwithstanding its beneficial and efficient performance.

d. The Original Tribunal Erred In Denying TECO The Loss Of Value Portion Of Damages

i. The Original Tribunal's Reliance On And Interpretation Of A Press Article To Deny Damages Was Mistaken

226. As demonstrated above, all of the evidence—including *Respondent's* own damages reports from the Original Arbitration—confirms that EEGSA's value declined as a result of the unlawful VAD and tariffs and, consequently, TECO received less from the sale of its share of EEGSA than it otherwise would have received absent the breach. In arriving at a contrary conclusion, the Original Tribunal relied on a brief press interview given by the then-Chief Executive Officer of EPM, the purchaser, to a local Guatemalan newspaper immediately after the sale.[680] As shown above, however, the statements purportedly made by Mr. Restrepo to the press support TECO's damages analysis, as Mr. Restrepo confirmed that "[EPM] bought on the basis that the current tariff model and layout is the one that exists," with "no expectation that it would be modified or changed."[681] On the basis of an untranslated portion of this interview that neither of the Parties had discussed in their written or oral pleadings and about which the Original Tribunal had not raised any questions,[682] however, the Original Tribunal erroneously concluded that, although the 2008-2013 tariff had been taken into account in fixing EEGSA's sales price, it could not with certainty determine that a higher tariff would have resulted in a

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[679] *See* Kaczmarek III ¶¶ 298, 302; DresdnerKleinwort EEGSA Base Case Scenario dated June 1998, at 1 (C-1085); CNEE Resolution 04-2008 dated 17 February 2008 (C-1086)*; see also* Kaczmarek II ¶ 146.

[680] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097); Award ¶¶ 752-761; *see also* Decision on Annulment ¶¶ 127-136.

[681] *See supra* ¶ 120.

[682] *See* Arbitration Tr. (22 Jan. 2013) 402:20-403:20 (Tribunal's Questions); TECO's Memorial on Partial Annulment ¶¶ 69-71; Annulment Tr. (14 Oct. 2015) 338:11-346:15.

higher purchase price.[683] The press interview at issue, however, does not warrant any such conclusion.

227. As an initial matter, on a standalone basis, the edited press interview is tantamount to hearsay and, thus, of limited probative value. In *Bureau Veritas v. Paraguay*, for instance, the claimant invoked statements by government officials, as reported in a series of newspaper reports, to support its claim that the Government was using the machinery of the State to repudiate the claimant's right to payment under a contract with the Ministry of Finance for customs inspection services.[684] The tribunal observed that it was "wary about placing too much reliance on newspaper reports, which may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced."[685] It thus concluded that such reports were of "limited, *if any*, probative weight."[686] For much the same reason, international arbitration tribunals have concluded that hearsay is of no, or very limited, probative value.[687]

228. As noted by Jeffrey Waincymer in his study of procedure and evidence in international arbitration, "[o]ne particular form of hearsay evidence is press reports."[688] The ICJ, in *Military and Paramilitary Activities in and Against Nicaragua*, accordingly remarked "that

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[683] Award ¶¶ 752-761 (citing and providing at ¶ 753 the Tribunal's own translation of Prensa Libre, *We carry no flag, we respect roots* dated 23 Oct. 2010 (C-1268)); TECO's Memorial on Partial Annulment ¶ 4.

[684] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction of 9 Oct. 2012 ("*BIVAC v. Paraguay*, Further Decision on Objections to Jurisdiction") ¶¶ 214-235 (CL-1031).

[685] *Id*. ¶ 234.

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

[687] *See, e.g., Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of 3 July 2008 ("*Helnan v. Egypt*, Award") ¶¶ 157-160 (finding that a witness statement quoting a conversation between the witness and a non-witness was hearsay and must be corroborated to be accorded probative weight) (annulled on other grounds) (CL-1032); *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of 3 Aug. 2005, Part III, Chapter B ("*Methanex v USA*, Final Award") ¶¶ 47-49 (finding that a witness statement reporting on a conversation between third parties was of limited, if any, evidential value because it is "double hearsay") (CL-1033); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award of 8 Oct. 2009 ("*EDF v. Romania*, Award") ¶ 224 (finding that witness statement in which the witness discussed a request for a bribe as conveyed by a non-witness was hearsay that requires "confirmatory evidence") (CL-1034).

[688] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (2012), at 795 (CL-1035).

press information should not be treated in itself as evidence for judicial purposes," although it may be a source of information to establish "public knowledge of a fact."[689] In that case, Nicaragua relied on, among other things, press reports which alluded to admissions by U.S. government officials that they were supplying weapons to the Contras.[690] The Court considered that it should treat such press reports "with great caution," "regard[ing] them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, *i.e.*, as illustrative material in addition to other sources of evidence."[691]

229. Indeed, when international tribunals assess the reasonableness of assumptions used in a valuation—which was the purpose for which this edited press interview was relied upon by the Original Tribunal—they appropriately rely upon direct and contemporaneous documentary evidence, including expert testimony, and not press reports or other hearsay.[692] Especially in cases such as this one, where the Parties, in essence, have agreed on the actual value of the investment and it is the but-for value which is at issue, tribunals properly have made determinations regarding the but-for valuation on the basis of expert evidence.[693] This is because, by definition, the but-for value is hypothetical in nature and, thus, direct evidence

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[689] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ REPORTS 1986 (Judgment of 27 June 1986) ¶¶ 63-68 (CL-1036).

[690] *Id.*

[691] *Id.* ¶ 62.

[692] *EDF v. Argentina*, Award ¶¶ 1226-1228, 1298-1299 (relying on a contemporaneous document prepared by the board of directors in determining whether the claimants had properly accounted for a future tariff increase in calculating its sale price) (CL-1024); *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.À.R.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of 4 May 2017 ("*Eiser v. Spain*, Award") ¶¶ 444-452 (relying on financial and planning documents, documents prepared by financial assessors and accounts, a report prepared by consulting engineers, and expert evidence to determine the operational life of the project) (CL-1038); *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Ltd.*, ICSID Case No. ARB/10/20, Award of 12 Sept. 2016 ("*Standard Chartered v. Tanzania*, Award") ¶¶ 66, 372-386 (relying on a letter sent by the claimant to the government soon after entering into the power purchase agreement, which recorded the parties' agreement on the financial assumptions of the project, to determine assumptions underlying the IRR calculation) (CL-1039); *Guaracachi America, Inc. & Rurelec Plc v. The Plurinational State of Bolivia*, UNCITRAL, Award of 31 Jan. 2014 ("*Guaracachi v. Bolivia*, Award") ¶¶ 455, 460, 469-477, 481-482 (relying on contemporaneous studies performed by the government agency and the claimant in assessing cash flow projections) (CL-1040).

[693] *See* RIPINSKY, at 174 ("Quantification of damages can be a very complex exercise requiring special knowledge, particularly when there is a need to value business interests, which makes the involvement of valuation experts in arbitral proceedings practically inevitable.") (CL-1030).

generally would not exist as to what *would have been* the value of the investment had events unfolded differently than they did.[694]

230. Accordingly, direct evidence of EEGSA's value in the but-for scenario does not and would not be expected to exist. By denying TECO's claim for loss of value damages on account of Mr. Restrepo's interview, from which the Original Tribunal determined it could not conclude with certainty that EPM would have paid more for EEGSA absent the breach,[695] the Original Tribunal dismissed TECO's claim for failure to meet an impossibly high burden of providing evidence that does not exist. As the *Achmea* tribunal observed, although the claimant has the burden of proving its damages, "the requirement of proof must not be impossible to discharge."[696]

231. The newspaper interview's probative value is diminished even further in this case, because the interview subject, the then-CEO of the purchaser, would have been disinclined to make any statements that might have antagonized Guatemala.[697] In fact, the interview suggests that Mr. Restrepo went out of his way to ingratiate EPM with Guatemala, by, among other things, emphasizing the close ties between Colombia (EPM's home country) and Guatemala, and remarking that EPM was not "arriv[ing] with any flag," and is "different from the previous owner."[698]

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[694] *See* RIPINSKY, at 120 ("Frequently, the amount of damages cannot be established with precision. This is particularly true when the assessment of damages involves projections of future profitability of a business and, consequently there is a need to consider *future, hypothetical* factors.") (emphasis in original) (CL-1030); JOHN A. TRENOR, THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION 148 (2016) ("The but-for scenario needs to be realistic, and one needs to remember that the calculation can only ever be an estimate – because nobody can ever actually know with complete certainty what would have happened in an alternative universe in which the breach of contract, or treaty, never occurred.") (CL-1041); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed., 2017), at 256 ("MARBOE") ("If the unlawful act of a state destroys or impairs long-term investments, it appears appropriate to measure the damage incurred by a projection of the future income after the breach and compare it with the *hypothetical* future income without the breach") (emphasis added) (CL-1042).

[695] *See* Award ¶¶ 753-754.

[696] *Achmea v. Slovakia*, Award ¶ 323 (CL-1026); *see also Gemplus v. Mexico*, Award ¶ 13-92 (CL-1021); *Hrvatska v. Slovenia*, Award ¶ 175 (CL-1029).

[697] TECO's Memorial on Partial Annulment ¶ 69.

[698] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097); TECO's Memorial on Partial Annulment ¶ 69.

232. Furthermore, the Original Tribunal selectively quoted the press report and took Mr. Restrepo's purported comments out-of-context; what account there is of Mr. Restrepo's responses in this interview, in fact, *confirms* that Guatemala's breach depressed the purchase price of EEGSA and, correspondingly, that, absent the breach, EEGSA's value would have been higher. *First*, Mr. Restrepo was asked why EPM chose to acquire EEGSA when there "would be lower revenue and profitability due to the VAD."[699] This question, alone, acknowledges the basic fact that a Guatemalan electricity distributor's profitability is tied to its revenue which, in turn, is dependent upon its VAD.[700] Thus, by decreasing the VAD, the distributor's profitability and, hence, value is likewise diminished. Mr. Restrepo acknowledged this in his response, in which he stated that the lower VAD was "reflected in the value of the transaction."[701] Thus, Mr. Restrepo *confirmed* that EPM paid less than it otherwise would have paid for EEGSA, had EEGSA's VAD been higher. This corresponds to Mr. Kaczmarek's—and, indeed, Dr. Abdala's—conclusion, and directly contradicts the Original Tribunal's statement that Mr. Restrepo indicated that it was only a possibility that EPM would have paid more for EEGSA had its VAD been higher.[702]

233. *Second*, Mr. Restrepo elaborated on his statement that the lower VAD was "reflected in the value of the transaction," explaining that EPM "bought on the basis that the current tariff model and layout is the one that exists," and with "no expectation that it would be modified or changed."[703] He clarified that "*of course*, [this] has an impact on the final valuation."[704] At the time, the "current tariff model and layout" was reflected in the Sigla tariff, by which EEGSA's VNR was sharply reduced and the FRC formula calculated the distributor's VAD off of a VNR that had been depreciated by 50 percent.[705] As such, EPM's CEO acknowledged that, in calculating EEGSA's purchase price, EPM assumed that the CNEE would

[699] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097).

[700] *See supra* ¶ 47.

[701] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097).

[702] Abdala I, Table 1; Kaczmarek II ¶ 12; Award ¶ 754.

[703] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097).

[704] *Id.*

[705] TECO's Post-Hearing Brief ¶¶ 169-171; TECO's Memorial on Partial Annulment ¶¶ 70-72.

continue to calculate EEGSA's VAD using the same FRC formula, and that the VNR would remain essentially unchanged. These same assumptions were made by Mr. Kaczmarek in his model forecasting EEGSA's future revenue in the actual scenario.[706] This likewise corresponds with Citibank's model, which also forecasted EEGSA's future revenue and concluded that the price offered by EPM was fair.[707]

234. *Third*, when Mr. Restrepo was asked whether EPM anticipated that EEGSA's VAD would "improve" in the 2013-2018 tariff period, he responded that EPM's "valuation process – of [EEGSA] – included various scenarios one of them being that the VAD . . . would not be modified," and that "*[t]his was part of what [EPM] studied*."[708] This should be read consistently with Mr. Restrepo's response to the earlier question, namely, that EPM had "no expectation that it [*i.e.*, the "current tariff model and layout"] would be modified or changed."[709] Indeed, Guatemala shared this interpretation, stating in its Post-Hearing Brief that "EPM's press release . . . suggests that EPM expected a minimal change in the level of VAD in the future."[710]

235. *Fourth*, Mr. Restrepo's response to the next question confirms that EPM recognized that EEGSA's value would have been higher if its VAD had been higher. Specifically, Mr. Restrepo was asked whether it "mean[t] that the company would have costed more with another VAD?,"[711] to which he responded that it was "possible," because "for the same costs higher revenues generated," and, as such, "more cash, *of course*."[712] Mr. Restrepo already had acknowledged that, because EEGSA's VAD was significantly decreased in 2008, this meant lower cash flows (*i.e.*, "lower revenue and profitability"), which was reflected in the

[706] Kaczmarek III ¶¶ 193-194; Kaczmarek I ¶ 21, 126, 153, 161-181; Kaczmarek II ¶¶ 80, 85-87.

[707] Citibank Fairness Opinion dated 14 Oct. 2010, at PDF pg. 3 (C-1083).

[708] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097) (emphasis added).

[709] *Id.*

[710] Guatemala's Post-Hearing Brief ¶ 362.

[711] Prensa Libre, *We do not carry a flag, we respect the roots* dated 23 Oct. 2010 (C-1097).

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

transaction price.[713] Conversely, he confirmed with this answer that, if the VAD had not decreased, "more cash [flow]" would have been assumed in valuing EEGSA.

236. As noted previously, the Original Tribunal relied on this portion of the interview, which had not been formally translated by the Parties and without the benefit of the Parties' comments, in deciding that it could not conclude "with sufficient certainty" that "had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company until 2013."[714] Partially quoting one of Mr. Restrepo's reported answers, the Original Tribunal stated that Mr. Restrepo "only mentions as a '*possibility*' that with a higher VAD for the rest of the tariff period, the transaction price would have been higher," and, therefore, concluded that "there [was] no evidence in the record of how the transaction price has been determined."[715] However, as demonstrated above, the Original Tribunal erred in focusing exclusively on the press interview reporting Mr. Restrepo as having used the word "possible" in his response to the question whether EEGSA would have cost more with a higher VAD. In so doing, the Original Tribunal interpreted Mr. Restrepo's reported remark out-of-context, ignoring that he previously had made clear that the Sigla VAD resulted in lower profitability for EEGSA, which was reflected in the purchase price, and the fact that he immediately followed his remark by stating that a higher VAD means more revenue and, *of course*, more cash. It is nonsensical to conclude from these remarks that a hypothetical, well-informed purchaser would *not* have paid more for EEGSA on 21 October 2010 had EEGSA's VAD and tariffs been set on the basis of the higher Bates White VNR and VAD, rather than the Sigla VNR and VAD, when it made its purchase.

ii. The Tribunal's Statements Regarding EEGSA's Future Tariffs Were Mistaken

237. The Original Tribunal accepted Guatemala's argument, raised at a late stage in the Original Arbitration, that "it is actually impossible to know what will happen with the tariffs in

[713] *Id.*

[714] Award ¶¶ 753-754.

[715] *Id.* ¶ 753 (emphasis added).

the future."[716] In denying the claim for the loss of value portion of damages, the Tribunal further stated that there was "no evidence that, as submitted by the Claimant, the valuation of the company reflected the assumption that the tariffs would remain unchanged beyond 2013 and forever;"[717] that "no information has been provided to the Arbitral Tribunal regarding the establishment of the 2013-2018 tariffs;"[718] and that the Tribunal "cannot accept that the sale price to EPM was based on the assumption that tariffs would remain forever unchanged post-2013."[719]

238. Requiring knowledge of "what will happen with the tariffs in the future," however, would place an insurmountable evidentiary burden on TECO and cannot be the basis for depriving TECO of damages for Guatemala's internationally unlawful behavior.[720] Every DCF valuation—which Guatemala's own expert advocated was the proper method to value EEGSA and which the *EDF* tribunal endorsed as "widely used in the context of tariff reviews for regulated utilities"[721]—requires forecasting future cash flows which, by their very nature, cannot be known with absolute certainty.[722] As explained above, "[t]he fact that the [valuation] exercise is inherently uncertain is not a reason for the tribunal to decline to award damages."[723]

239. Moreover, TECO did not argue, and its damages claim was not and is not premised on a showing (which in any event would be impossible to make), that EEGSA's tariffs "would remain unchanged beyond 2013 and forever." Rather, as discussed above, TECO's claim is based on the lost fair market value of its investment as of 21 October 2010, calculated in part based on likely assumptions that well-informed, hypothetical parties to a hypothetical sales transaction on 21 October 2010 would make at that time concerning EEGSA's future financial

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[716] *Id.* ¶ 757 (quoting Guatemala's Post-Hearing Brief ¶ 354) (emphasis removed)).

[717] *Id.* ¶ 755.

[718] *Id.* ¶ 758.

[719] *Id.* ¶ 760.

[720] *See supra* ¶ 161 & n.519; *see also* TECO's Memorial on Partial Annulment ¶¶ 110-115; TECO's Reply on Partial Annulment ¶¶ 6-7, 88-97.

[721] *EDF v. Argentina*, Award ¶ 1188 (CL-1024).

[722] *See supra* ¶ 151.

[723] *Rumeli v. Kazakhstan*, Decision on Annulment ¶ 144 (CL-1014); *see also supra* ¶ 161 n.519.

performance, which is standard valuation methodology. In fact, Mr. Kaczmarek did not assume that in such a transaction the parties would proceed on the basis that EEGSA's tariffs would remain "unchanged forever." Rather, as explained above, Mr. Kaczmarek adjusted EEGSA's tariffs for the 2013-2018 tariff period to take into account likely inflation, changes in the cost of materials used to build a distribution network, growth in the network, and changes in energy losses, among other things.[724]

240. Finally, the Tribunal's statement that "no information has been provided to the Arbitral Tribunal regarding the establishment of the 2013-2018 tariffs"[725] is incorrect. As the *ad hoc* Committee acknowledged, the record included the CNEE's ToR for EEGSA's subsequent 2013-2018 tariff review, which contained the very same FRC formula used to calculate the Sigla VAD.[726] In any event, the 2013-2018 ToR would not have been available to hypothetical parties to a hypothetical sales transaction on 21 October 2010, and therefore, information regarding the establishment of the 2013-2018 tariffs—or the complete lack of any such information—cannot affect TECO's right to damages reflecting the loss of fair market value of its investment.

IV. TECO IS ENTITLED TO AN AWARD OF INTEREST ON ITS LOSS OF CASH FLOW DAMAGES ACCRUING FROM 1 AUGUST 2009

A. Full Reparation Requires That Interest Be Awarded From The Date That The Unlawful Measure Deprives The Claimant Of Revenue

241. Article 10.26.1(a) of the DR-CAFTA provides that a tribunal may award "monetary damages and any applicable interest."[727] This provision is consistent with the international legal principle requiring full reparation for the injury caused.[728] As Article 38(1) of ILC Articles provides, interest—which is "a form of compensation for the loss of use of money"[729]—"shall be payable when necessary in order to ensure full reparation," and "[t]he

[724] *See supra* ¶¶ 216-218.

[725] Award ¶ 758.

[726] *See* Decision on Annulment ¶ 134.

[727] DR–CAFTA, Art. 10.26.1 (CL-1005).

[728] *See supra* ¶¶ 150-151.

[729] RIPINSKY, at 362-363 (quoting J Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40, 41 (1996) (CL-1068)) (CL-1030); MARBOE, at 330 ("[I]nterest should address the claimant's financial

interest rate and mode of calculation shall be set so as to achieve that result."[730] Article 38(2) further provides that "[i]nterest runs from the date when the principal sum *should have been paid* until the date the obligation to pay is fulfilled."[731]

242. As the tribunal in *Vivendi v. Argentina* explained, "[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive."[732] In *Crystallex v. Venezuela*, the tribunal likewise stated that "an award of interest is an integral component of the full reparation principle under international law, because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds or pay debts using the money to which that investor was rightfully entitled."[733] Interest, as such, is awarded to address "loss of opportunity."[734] The *LG&E v. Argentina* tribunal similarly

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disadvantage of not being able to dispose of the amount of money.") (CL-1042); *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award of 1 Mar. 2012 ¶ 429 ("[A]n award of interest is appropriate to ensure that Claimants are made whole because interest reflects the time value of money.") (CL-1043); *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award of 10 Feb. 2012 ¶ 183 (stating that interest is awarded to "compensate for the time value of money lost" and is an "essential component of full reparation") (CL-1044).

[730] ILC ARTICLES ON STATE RESPONSIBILITY, Art. 38(1) (CL-1011).

[731] ILC ARTICLES ON STATE RESPONSIBILITY, Art. 38(2) (emphasis added) (CL-1011); *id*. at 235 ("As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation. Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.").

[732] *Vivendi v. Argentina*, Award ¶ 9.2.3 (CL-1016); RIPINSKY, at 362-263 (CL-1030); MARBOE, at 330-331 (CL-1042).

[733] *Crystallex v. Venezuela*, Award ¶ 932 (CL-1019); *see also Vivendi v. Argentina*, Award ¶ 8.3.20 (to give effect to "the *Chorzów* principle [. . .] it is necessary for any award of damages in this case to bear interest"); *id*. ¶ 9.2.1 ("the liability to pay interest is now an accepted legal principle") (CL-1016); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990 ("*AAPL v. Sri Lanka*, Award") ¶ 114 ("[T]he case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself.") (CL-1045).

[734] *Crystallex v. Venezuela*, Award ¶ 932 ("In this case, due to Venezuela's unlawful conduct, Crystallex lost the opportunity to use the amount corresponding to the fair market value of its expropriated investment to productive ends. The reparation should address this loss of opportunity by virtue of awarding interest.") (CL-1019).

noted that "interest is part of the 'full reparation' to which the Claimants are entitled to ensure that they are made whole."[735]

243. Investment treaty tribunals consistently award interest from the date of breach, including where, as here, the damages include loss of cash flows.[736] For example, in awarding damages for a breach of the fair and equitable treatment obligation in connection with certain changes to the tax regime, the tribunal in *Oxus Gold v. Uzbekistan* reasoned that breach of the treaty "effectively occurred when Claimant paid the taxes from which it expected to be exempted," and that, "[g]iven that the taxes owed by Claimant are calculated at the end of each year, the interest will start running as of 31 December of each relevant year."[737] Likewise, the tribunal in *Abengoa v. Mexico* awarded interest on the amount of Value-Added-Tax ("VAT") that was held to have been wrongfully collected, as of the date on which the claimants should have received VAT reimbursement for the previous year.[738] Observing that "[i]nterest must be calculated from the date on which the loss was suffered," and that "[w]ith respect to past cash flows, the loss was suffered whenever those cash flows were due and not received,"[739] the tribunal in *Quiborax v. Bolivia* similarly awarded interest on damages for an expropriation "from the date on which each cash flow was due on a yearly basis,"[740] explaining that "[s]uch interest

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[735] *LG&E Energy Corp. and others v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of 25 July 2007 ("*LG&E v. Argentina*, Award") ¶ 55 (CL-1046).

[736] *See, e.g.*, *Hrvatska v. Slovenia*, Award ¶ 544 ("[I]nterest should be calculated from 1 July 2002 [the date of breach] which is when '[claimant's] damages first started to accrue.'") (CL-1029); *AAPL v. Sri Lanka*, Award ¶ 114 ("[T]he case-law elaborated by international tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged.") (CL-1045); *see also* MARBOE, at 375-378 (CL-1042); *id*. at 375-376 ("[T]he decisive date should rather be the date when the payment should have been effectuated in the first place. . . . The beginning of the interest period should above all be oriented towards achieving full reparation[.]"); RIPINSKY, at 374 ("The 'date when the principal sum should have been paid' is indicated as the *dies a quo*. This a logical solution given that interest compensates for the *delay* in payment: it must start running simultaneously with the beginning of the delay, ie from the moment the obligation to pay arises.") (emphasis in original) (CL-1030).

[737] *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL, Final Award of 17 Dec. 2015 ¶ 986 (CL-1047).

[738] *Abengoa S.A. and Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award of 18 Apr. 2013 ¶¶ 782-784 (CL-1048).

[739] *Quiborax S.A. and Non Metallic Minerals v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 Sept. 2015 ¶ 515 (CL-1049).

[740] *Id*. ¶¶ 511-516.

compensates the fact that the Claimants were not in possession of the funds to which they were entitled and thus had either to borrow funds at a cost or were deprived of the opportunity of investing these funds at a profit."[741]

B. TECO Was Wrongfully Denied Pre-Sale Interest

244. In accordance with the principles set forth above, making TECO whole in this case requires an award of interest on its loss of cash flow damages as from 1 August 2009. Such award is necessary in order to compensate TECO "for the impossibility to invest the amounts due,"[742] thereby ensuring that it receives full reparation and is made whole.[743]

245. Because the Sigla VAD and tariffs were imposed on EEGSA on 1 August 2008, Mr. Kaczmarek calculated TECO's loss of cash flows portion of damages in the Original Arbitration as the sum of three amounts, *i.e.*, TECO's share of EEGSA's lost cash flows from 1 August 2008 to 31 July 2009, from 1 August 2009 to 31 July 2010, and from 1 August 2010 to 21 October 2010, and then applied interest to each of these three amounts, accruing as from 1 August 2009, 1 August 2010, and 22 October 2010, respectively.[744] Mr. Kaczmarek has not changed his approach in his third report, submitted with this Memorial.[745]

246. Guatemala did not dispute this approach in the Original Arbitration, accepting that, in the event TECO were awarded the loss of cash flow portion of damages through the date of EEGSA's sale, TECO would be entitled to interest accruing in the manner set forth by Mr.

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[741] *Id.* ¶ 513; *see also* MARBOE, at 377 ("Interest should, therefore, start to accrue when financially assessable damage occurs.") (CL-1042).

[742] *LG&E v. Argentina*, Award ¶ 104 (CL-1046).

[743] *See* Kaczmarek III ¶¶ 32, 283.

[744] *See* Kaczmarek I ¶ 224, Table 20 (calculating damages for the period through 21 October 2010, as well as the related interest); Kaczmarek II ¶ 26, Table 5 (providing an updated damage amount, including interest); *id.* ¶ 141, Table 14 (providing an updated damages amount before interest, including the US$ 21.1 million in lost cash flows that the Tribunal awarded to TECO as damages relating to the period 1 August 2008 – 21 October 2010); Memorial (Original Arbitration) ¶ 312 (stating that the amounts claimed by TECO include "[i]nterest . . . running from the *end of each year* for lost cash flow and 21 October 2010 for lost share value, compounded annually[.]") (emphasis added).

[745] Kaczmarek III ¶ 282.

Kaczmarek.[746] Specifically, Guatemala's quantum expert, Dr. Abdala, remarked that there were no conceptual differences between the Parties' experts as regards interest.[747] Accordingly, in his own damages calculation, Dr. Abdala applied interest to the loss of cash flow portion of damages in annual tranches, beginning from 1 August 2009.[748]

247. Although the Original Tribunal acknowledged that the loss of cash flow portion of damages awarded to TECO "correspond to revenues that would have *progressively flowed* into EEGSA from August 2008 until October 2010,"[749] it held that "calculating interest on the entire amount of the historical damages as from the first day of the tariff period [on 1 August 2008] would result in an unjust enrichment of the Claimant."[750] This conclusion is erroneous and misstates TECO's claim for interest.

248. *First*, as explained above, TECO's claim for interest was not and is not calculated as accruing from the first day of the tariff period on 1 August *2008*. Rather, it is calculated, and

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[746] *See* Counter-Memorial (Original Arbitration) ¶¶ 623-624; Rejoinder (Original Arbitration) (not disputing the start date for interest on the loss of cash flow portion of damages); Guatemala's Post-Hearing Brief (not disputing the start date for interest on the loss of cash flow portion of damages); Guatemala's Post-Hearing Reply (not disputing the start date for interest on the loss of cash flow portion of damages).

[747] *See* Abdala I ¶ 109 (stating that "[c]onceptually, for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used," and that with respect to "[t]his factor, estimated at 8.80% by the NCI [Mr. Kaczmarek] . . . we do not have calculation discrepancies"); Abdala II ¶ 80 (stating that "we do not disagree with the view that, for the period prior to the sale in October 2010, an interest rate that includes a risk component based on the opportunity cost of EEGSA's money should be included"); *id*. ¶ 83 (stating that "we have no theoretical disagreements" with Mr. Kaczmarek with respect to interest relating to the period through 21 October 2010); *see also* Counter-Memorial (Original Arbitration) ¶¶ 623-626 (adopting Dr. Abdala's position); Rejoinder (Original Arbitration) ¶ 520 (same); Guatemala's Post-Hearing Reply ¶ 175 (same).

[748] *See* Abdala II, damages model (DAS-37) (electronic file), tab "3.A. Valuation Summary," rows 90-97 (calculating discount factors for the loss of cash flow portion of damages using the 10-year U.S. debt rate of 3.29 percent running from August 2009 and August 2010 until 21 October 2010); *id*., rows 23, 24 (applying these discount factors in formulas calculating EEGSA's lost cash flows as of 21 October 2010); TECO's Reply on Partial Annulment ¶ 111.

[749] Award ¶ 765 (emphasis added).

[750] *Id*. In support of its finding that the amount of the loss of cash flow portion of damage had not been discounted to 1 August 2008, the Original Tribunal referred to Mr. Kaczmarek's First Expert Report, Appendix 3.A, which reflects Mr. Kaczmarek's "Valuation Summary" and sets out EEGSA's lost cash flows for each tariff year, from 1 August 2008 to 31 July 2009, and notes that the lost cash flow figures it presents are "*without interest factor*." *See* Kaczmarek I ¶¶ 195-196, Appendix 3.A (emphasis added).

always has been calculated, as accruing on an annual basis as from *1* August *2009*.[751] This is because the additional cash flow EEGSA would have generated during the first year of the 2008-2013 tariff period would have become available to TECO as from the end of that year, *i.e.*, as from August 2009.[752] There thus would be no unjust enrichment by awarding TECO interest as of the time when it first suffered loss of cash flow as a result of Guatemala's breach.

249. *Second*, TECO's calculation of pre-sale interest ensures that it captures only the interest accruing on each amount as it fell due. This accords with the principle that damages should fully compensate the claimant, and interest should compensate for the time-value of the money unlawfully withheld from the claimant. As confirmed by the authorities cited above, this is accomplished by having interest accrue as of the date the claimant is unlawfully deprived of the cash flow.[753]

250. *Third*, the concept of unjust enrichment tends to be discussed in awards as a basis for "measur[ing] compensation . . . by reference to the respondent's financial gain, rather than the claimant's financial loss."[754] Denying TECO pre-sale interest would result in under-compensating TECO—and the "unjustly enriched" party would be Guatemala, rather than TECO, by way of withholding compensation to which TECO is entitled. Indeed, "the non-payment of an amount of money owed typically results in unjust enrichment *of the debtor*. The

[751] *See, e.g.*, Request for Resubmission ¶ 24 (referencing "interest on the historical damages suffered by TECO (compounded through payment) accruing in the period *from 1 August 2009* until the date of TECO's sale of its interest in EEGSA on 21 October 2010.") (emphasis added).

[752] *See* Memorial (Original Arbitration) ¶ 312 (referencing "[i]nterest . . . running from the *end of each year* for lost cash flow") (emphasis added); Kaczmarek I ¶ 23 (explaining that damages "occurred at various points in time. Thus, each amount must be bought to present value to account for the time value and opportunity cost of money before the amounts are summed."); *id*. Table 20; Kaczmarek II ¶¶ 174-175 (referring to and adopting the approach to calculating interest in his first report); TECO's Memorial on Partial Annulment ¶¶ 133-135; TECO's Reply on Partial Annulment ¶¶ 110, 114; Rejoinder (Original Arbitration) (not disputing the start date for interest on the loss of cash flow portion of damages).

[753] *See supra* ¶¶ 242-243.

[754] RIPINSKY, at 129 (CL-1030); *see also, e.g.*, *Azurix v. Argentina*, Award ¶¶ 435-438 (unjust enrichment can only apply where the measure of damages is restitution, rather than damages) (CL-1020).

prevention of the *debtor's enrichment* can thus also be seen as a function of the interest claim."[755]

C. Pre-Sale Interest On TECO's Loss Of Cash Flow Portion Of Damages Should Be Awarded At The Rate Of EEGSA's WACC, Compounded Annually

251. In the Original Arbitration, Mr. Kaczmarek presented three alternative interest rates for TECO's loss of cash flow portion of damages: (i) Guatemala's yield on US denominated sovereign bonds; (ii) LIBOR plus four percent; and (iii) the US Prime Rate of interest plus two percent.[756] After Guatemala indicated that, *in principle*, an interest rate equivalent to EEGSA's WACC ought to apply,[757] TECO agreed with Guatemala's suggestion that this interest rate should apply.[758] EEGSA's WACC as of 21 October 2010 was 8.80 percent, calculated using a methodology identical to that used by the CNEE in 2008.[759]

252. In the Original Arbitration, Guatemala's expert, Dr. Abdala, testified in his first report that, "for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used," because it "reflects the economic opportunity cost of EEGSA's cash flows, and is in line with the level of commercial risk to which the Claimant was exposed during the period prior to the transaction with EPM."[760] Similarly, in his second expert

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[755] MARBOE, at 330 (emphasis added) (CL-1042).

[756] Kaczmarek I ¶ 221; Kaczmarek II ¶ 174; Memorial (Original Arbitration) ¶ 310 n.1153; Reply (Original Arbitration) ¶ 315; TECO's Memorial on Partial Annulment ¶ 126.

[757] Abdala I ¶ 109 ("[F]or the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used. This factor, estimated at 8.80 [percent] by the NCI [Mr. Kaczmarek], for which we do not have calculation discrepancies, reflects the economic opportunity cost of EEGSA's cash flows, and is in line with the level of commercial risk to which the Claimant was exposed during the period prior to the transaction with EPM.").

[758] Reply (Original Arbitration) ¶ 318, citing Abdala I ¶ 109; TECO's Post-Hearing Brief ¶ 202; *see also* Kaczmarek II ¶¶ 178-179 ("Claimant's expert Dr. Abdala has . . . regularly used investments' cost of capital to calculate an appropriate interest rate . . . . Dr. Abdala maintains that view in his role as a party-appointed expert in international arbitration.").

[759] Kaczmarek III ¶¶ 31, 233; *see also* Kaczmarek I ¶¶ 184-196; Kaczmarek II ¶ 180 n.122, Appendix 3.A.

[760] Abdala I ¶¶ 107-11; Counter-Memorial (Original Arbitration) ¶¶ 623-624 ("To update the losses to their currency value as of October 21, 2010, it is necessary to actualize the presumed damages calculated by the DCF method from the date the damages occurred until the aforementioned date [the date of the award]. As Messrs. Abdala and Schoeters explain, in order to do so, *it is necessary to apply an actualization factor based*

report, Dr. Abdala testified that, "theoretically, the alleged historical damages (from August 2008 to the sale in October 2010) ha[ve] to be updated on the basis of EEGSA's cost of capital ('WACC')."[761] This position comports with Dr. Abdala's testimony in numerous other investment treaty arbitrations and with the views reflected in his writings.[762] Indeed, after TECO indicated that it accepted Guatemala's proposed pre-award interest rate,[763] Dr. Abdala confirmed on cross-examination that, if the Tribunal found that TECO suffered damages during the pre-sale

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on EEGSA's cost of capital (best represented by the 'WACC'), which correctly reflects the risks that EEGSA faced when the company was still operating within the market.") (emphasis added).

[761] Abdala II ¶ 80. Dr. Abdala nevertheless applied a risk-free rate to TECO's loss of cash flow portion of damages in his reports, arguing that because he had calculated "negative" loss of cash flow damages, he was providing a benefit to TECO by using a lower interest rate, because "the higher the discount rate used, the lower the damages becomes." Abdala I ¶ 109; *see also id.* (stating that "[c]onceptually, for the historical damages (until October 2010) an update factor based on EEGSA's cost of capital ('WACC') should be used," but because his damage calculation "impl[ies] a historical damage with negative sign . . . we have used a risk-free interest rate"); Counter-Memorial (Original Arbitration) ¶¶ 623-626; Abdala II ¶ 80 (stating that "theoretically, the alleged historical damages (from August 2008 to the sale in October 2010) had to be updated on the basis of EEGSA's cost of capital ('WACC') but given the peculiarity of having a negative historical damage, we considered [it] conservative to use the risk-free rate in this case as well"). As Claimant explained, Dr. Abdala's position was non-sensical, as there was no scenario under which TECO could have been ordered to pay damages to Respondent (given that there was no counterclaim). Reply (Original Arbitration) ¶ 319; Kaczmarek II ¶ 183; TECO's Post-Hearing Brief ¶ 202. In any event, once the Original Tribunal awarded "positive" loss of cash flow damages to TECO, Dr. Abdala's purported rationale for applying an artificially low interest rate to damages fell away.

[762] *See, e.g.*, *EDF v. Argentina*, Award ¶ 720 (reproducing Dr. Abdala's position that, with respect to pre-sale damages, "the applicable interest rate should be the WACC because this rate is equivalent to Claimants' opportunity cost for their invested amount during their operation of the concession") (CL-1024); MARBOE, at 352 ("Abdala, López Zadicoff, and Spiller . . . argue that the cost of capital is the most appropriate pre-award interest rate.") (C-1042); Manuel A. Abdala, Pablo D. López Zadicoff, and Pablo T. Spiller, *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, 5 WORLD ARB. AND MED. REVIEW 1, 4-6 (2011) (stating that, in the case of historical damages defined as "damages related to cash-flows foregone before the date of the award," the appropriate pre-judgment interest rate should "be commensurate to the risk of doing business in the affected activity, and thus, to its cost of capital[.]") (CL-1067); *id.* at 10 ("This Article shows . . . that, under most circumstances, the cost of capital of the affected business is not only the rate which avoids [invalid-round trip (*i.e.*, discounting cash flows at a rate higher than the interest rate thereafter applied to its value)] but which also satisfies the [full compensation] principle."); *Guaracachi America, Inc. & Rurelec PLC v. Plurinational State of Bolivia*, Statement of Claim of 1 Mar. 2012 ¶ 240 (referring to Dr. Abdala's evidence that "[u]sing the WACC is appropriate as it compensates GAI and Rurelec for the lost opportunity to re-invest the funds of which they have been deprived as a consequence of the breaches of the Treaties, that is, the deprivation of the opportunity cost of capital.") (C-1105); *Alpha Projekholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award of 8 Nov. 2010 ¶ 514 (referring to Dr. Abdala's evidence that "[t]he risk-free rate plus the market risk premium, which . . . is 9.11% in total. . . . better reflects the opportunity cost associated with Claimant's losses, adjusted for the risks of investing in Ukraine.") (internal citation omitted) (CL-1050).

[763] Reply (Original Arbitration) ¶¶ 315-320 (¶ 318 citing Abdala I ¶ 109); Kaczmarek II ¶¶ 175-180.

period, the WACC 8.80 percent interest rate should apply.[764] At the Hearing, Dr. Abdala confirmed that, when the "investor is deprived of the investment by reason of the host country's breach," "compensation [ ] should put the damaged Party into the position that it would be today," and "a WACC reflecting the opportunity cost of funds would be an appropriate measure to use because in the absence of the breach, the company would still be operating today and therefore that's the opportunity cost it would have suffered."[765] As noted above, TECO demonstrated—and the Original Tribunal found—that TECO sold its indirect interest in EEGSA as a direct result of Guatemala's breach of the DR-CAFTA.[766]

253. In any event, if the 8.8 percent WACC rate were found to be inapplicable, one of the rates identified by Mr. Kaczmarek should apply, such as the annually compounded US Prime Rate of interest plus two percent.

254. Finally, interest awarded on the loss of cash flow portion of damages prior to the sale of EEGSA should be compounded annually, until the date of payment. Compound interest is routinely applied in order to ensure full reparation of the claimant's damage.[767] Guatemala did

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[764] Arbitration Tr. (5 Mar. 2013) 1587:7-13 (Abdala) ("Q. [. . .] Now, let us assume that the Tribunal disagrees [with the calculation of negative losses during the pre-sale period] and finds that TECO suffered actual damages during this two-year period. So, in that event, you would agree that it would be appropriate to apply an interest rate of 8.8 percent to those damages; is that correct? A. That is correct.").

[765] Arbitration Tr. (5 Mar. 2013) 1596: 13-20 (Abdala Tribunal Question); 1597:4-17 (Abdala Tribunal Question); *id.* 1598:5-17 (Abdala Tribunal Question) ("[T]he WACC may be a good approximation for a full compensation criteria"); *see also* Manuel A. Abdala, Pablo D. López Zadicoff, and Pablo T. Spiller, *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, 5 WORLD ARB. AND MED. REVIEW 1, 10 (2011) ("It is an accepted principle of international law that awards should grant *full compensation*, that is, that they should restore the claimant to the position that it would be had the contested actions not been taken. This Article shows next that, under most circumstances, the cost of capital of the affected business is not only the rate which avoids [invalid-round trip] (as shown above), but which also satisfies this principle.") (emphasis in original) (CL-1067).

[766] Award ¶ 748 ("[T]he decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework."); *see also* TECO's Memorial on Partial Annulment ¶¶ 32-34.

[767] *EDF v. Argentina*, Award ¶¶ 721-723 (CL-1024); *see also El Paso v. Argentina*, Award ¶ 746 ("Compound interest is generally recognised by arbitral tribunals in the field of investment protection[.]") (CL-1010); *LG&E v. Argentina*, Award ¶¶ 56, 103 ("[T]he Tribunal is of the opinion that compound interest would better compensate the Claimants for the actual damages suffered since it better reflects contemporary financial practice.") (CL-1046); *Gemplus v. Mexico*, Award ¶ 16-26 ("[I]t is clear from the legal materials cited by the Claimants (summarised above, to which several more could be added) that the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of 'jurisprudence *constante*' where the presumption has shifted from the position a decade or so

not dispute that interest on any damages in this case ought to be compounded. Accordingly, and unsurprisingly, the Original Tribunal noted that "Respondent [did] not object to the claim for compounded interest" and awarded compounded post-sale interest.[768]

255. For the reasons stated above, the Tribunal should award TECO interest on the loss of cash flow portion of its damages at a rate of 8.8 percent, corresponding to EEGSA's WACC at the time, compounded annually, until the date of payment. As Mr. Kaczmarek indicates, such interest amounts to US$ 1,200,509, as of 1 September 2017.[769]

V. RESPONDENT SHOULD BEAR ALL OF THE COSTS OF THE ORIGINAL ARBITRATION PROCEEDING

256. As set forth above, in the Original Arbitration, Claimant was awarded 75 percent of its costs on the basis that it had prevailed on jurisdiction and liability, but was only partially successful on quantum.[770] As also set forth above, the *ad hoc* Committee annulled the Tribunal's cost award *on the sole basis* that, because it had annulled the portion of the Tribunal's Award *denying* Claimant's loss of value damages, the Original Tribunal's finding that Respondent was partially successful on quantum no longer was valid.[771] As elaborated below, if Claimant prevails in this arbitration and is awarded loss of value damages as a result of Respondent's breach of the DR-CAFTA, it should be awarded 100 percent of the costs it incurred in the Original Arbitration. Furthermore, *at a minimum*, even if Claimant's claims in this arbitration

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ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.") (CL-1021); MARBOE, at 390 ("[C]ompound interest as opposed to simple interest is predominately accepted in recent international investment arbitration. It is regarded as better reflecting actual economic realities both for the purpose of remedying the loss actually incurred by the injured party and for the prevention of unjustified enrichment of the respondent state.") (CL-1042); RIPINSKY, at 387 ("As far as international investment law is concerned, . . . compound interest has come to be treated as the default solution.") (CL-1030); F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U. C. DAVIS L. J. 577, 586 (1988) ("[O]n the basis of compelling evidence compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals.") (CL-1051); Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 618-620 (James Crawford and others, eds., 2010) (CL-1052).

[768] Award ¶¶ 763, 768.

[769] Kaczmarek III ¶ 291 n.316 & Appendix 7.C.

[770] Award ¶¶ 769-779.

[771] Decision on Annulment ¶¶ 358-362, 382(3).

are denied, Claimant should be awarded 75 percent of the costs it incurred in the Original Arbitration.

257. As detailed above, in the Original Arbitration, both Parties sought an award of costs and fees from the Tribunal in accordance with the general principle that costs follow the event—that is, the loser pays rule.[772] In addition, Claimant argued that Respondent's procedural misconduct throughout the arbitration further warranted an award of costs in Claimant's favor.[773] Claimant also demonstrated that its costs of US$ 10,027,593.86 were reasonable in view of the length of the proceedings, the two merits hearings, the issues in dispute, and the numerous instances of Respondent's procedural misconduct.[774]

258. As also detailed above, the Original Tribunal, in its Award, "agree[d] with the Parties that the costs should be apportioned based on the principle the costs follow the event."[775] The Original Tribunal thus held that, because "Claimant ha[d] been successful in its arguments regarding jurisdiction, as well as in establishing the Respondent's responsibility," whereas Respondent had been "partially successful on quantum," Respondent would carry the entirety of its costs and reimburse Claimant 75 percent of its costs, *i.e.*, US$ 7,520,695.39.[776]

259. In its Decision on Annulment, the *ad hoc* Committee rejected Respondent's arguments in favor of annulling the Original Tribunal's decision on costs, but nevertheless annulled the decision in light of its other rulings.[777] Specifically, as set forth above, the *ad hoc* Committee found that, "[f]ollowing the annulment of the Tribunal's decision on the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA . . . , the basis for the Tribunal's finding that Guatemala was partially successful on quantum has also

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[772] *See* TECO's Submission on Costs; Guatemala's Request for Costs; TECO's Reply on Costs; Guatemala's Reply on Costs.

[773] TECO's Submission on Costs ¶¶ 5-21; TECO's Reply on Costs ¶ 5.

[774] *See* TECO's Submission on Costs; TECO's Reply on Costs; Award ¶ 773 (citing TECO's Submission on Costs ¶ 22 as amended by TECO's Reply on Costs ¶ 9).

[775] *Id.* ¶ 777.

[776] *Id.* ¶¶ 778-779, 780(F).

[777] Decision on Annulment ¶¶ 358-362.

disappeared."[778] As such, the *ad hoc* Committee annulled the costs portion of the Award, as Respondent could no longer be deemed to have been partially successful on quantum, and the basis for awarding Claimant only 75 percent of its costs pursuant to the principle that costs follow the event had ceased to exist.[779]

260. In view of the annulment of the Tribunal's cost decision in the Original Arbitration, the Tribunal in the present case should order Respondent to bear all of Claimant's costs from the Original Arbitration based upon the general principle that costs follow the event, as well as Respondent's misconduct during the course of the Original Arbitration proceedings.[780] Moreover, even if Claimant's claims in this arbitration are denied, Claimant nonetheless should be awarded at least 75 percent of its costs from the Original Arbitration.

261. There is no dispute between the Parties that the general principle that costs follow the event governs how costs should be awarded in this case.[781] Indeed, the Original Tribunal's decision on costs in the Award was premised on the *agreement of the Parties* that the principle should be applied in this case.[782] Moreover, the *ad hoc* Committee's Decision affirmed the application of the "costs follow the event" approach in this case, annulling the Original Tribunal's costs decision only on the ground that there no longer was any basis to find that Respondent had been partially successful on quantum, thereby causing the basis for withholding from Claimant 25 percent of its costs to disappear.[783]

262. The general principle that costs follow the event, otherwise known as "loser pays," operates such that where, as here, a respondent State has violated its treaty obligation, the successful party is awarded all or a significant portion of its costs.[784] In *Pezold v. Zimbabwe*, for

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[778] *Id.* ¶ 361.

[779] *Id.* ¶¶ 361-362, 382(3).

[780] *See supra* ¶ 124.

[781] TECO's Submission on Costs ¶ 4; Guatemala's Request for Costs ¶ 4.

[782] Award ¶ 776 (citing TECO's Submission on Costs ¶ 4 and Guatemala's Request for Costs ¶ 4).

[783] Decision on Annulment ¶¶ 360-362.

[784] *See, e.g.*, *Bernhard Friedrich Arnd Rüdiger von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award of 28 July 2015 ("*Pezold v. Zimbabwe*, Award") ¶¶ 1002-1010 (CL-1053); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 Oct. 2012

example, the tribunal considered that "the starting point in an award of costs is that it should reflect the relative success of parties in the proceeding and that, if a party has clearly prevailed, there is no reason in principle why that party should not be paid [its] costs by the unsuccessful party."[785] The *Pezold* tribunal found that, because the claimants had "been successful in respect of both jurisdiction and merits," there was "no reason why the [r]espondent, the unsuccessful party, should not bear the costs of the arbitrations," and thus ordered the respondent to bear the claimants' share of the arbitration costs and to reimburse the claimants "their full costs of legal representation."[786]

263. In *Kardassopoulos v. Georgia*, the tribunal likewise observed that "ICSID arbitration tribunals have exercised their discretion to award costs which follow the event in a number of cases, demonstrating that there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs."[787] The tribunal found that, in that case, it was "appropriate and fair . . . to award the Claimants their costs of the arbitrations, including legal fees, experts' fees, administrative fees and the fees of the Tribunal."[788] The tribunal in *Deutsche Bank v. Sri Lanka* similarly awarded the claimant "a full recovery of its costs, legal fees and expenses," finding that "[t]he Respondent's jurisdictional challenges have

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("*Deutsche Bank v. Sri Lanka*, Award") ¶¶ 588, 590 (CL-1054); *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012 ¶ 282 (CL-1009); *Lemire v. Ukraine*, Award ¶ 380 (CL-1013); *Kardassopoulos v. Georgia*, Award ¶ 692 (CL-1027); *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 ¶¶ 618-631 (CL-1055); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 Feb. 2008 ("*Desert Line v. Yemen*, Award") ¶ 304 (CL-1056); *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 Feb. 2007 ("*Siemens v. Argentina*, Award") ¶ 402 (CL-1057); *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 Jan. 2007 ("*PSEG v. Turkey*, Award") ¶¶ 352-353 (CL-1058); *ADC v. Hungary*, Award ¶ 533 (CL-1059); *Azurix v. Argentina*, Award ¶ 441 (CL-1020); *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Award of 17 Dec. 2003 ¶ 63 (CL-1060); *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award of 26 Apr. 2017 ¶¶ 207-212 (CL-1061).

[785] *Pezold v. Zimbabwe*, Award ¶ 1002 (CL-1053).

[786] *Id.* ¶¶ 1002-1010.

[787] *Kardassopoulos v. Georgia*, Award ¶ 689 (CL-1027).

[788] *Id.* ¶ 692.

failed as have its attempts to resist findings against it on the merits."[789]

264. As detailed above, Claimant successfully demonstrated in the Original Arbitration that the CNEE's deliberate, arbitrary, and bad faith actions during EEGSA's 2008-2013 tariff review, culminating in the unilateral imposition of the Sigla VAD and tariffs on EEGSA in August 2008, breached Respondent's obligation under Article 10.5 of the DR-CAFTA to accord Claimant's investment in EEGSA fair and equitable treatment.[790] The Original Tribunal also awarded Claimant loss of cash flow damages in the full amount claimed.[791] Claimant thus was the prevailing party on jurisdiction, liability, and, partially, quantum, and, as the cases above demonstrate, was justified in receiving an award of costs in its favor.[792] If Claimant now is awarded loss of value damages in the present arbitration, this Tribunal, applying the general principle that costs follow the event, should award Claimant 100 percent of the costs it incurred in the Original Arbitration, as Claimant would have prevailed in establishing jurisdiction, liability, *and* quantum, thus warranting an award of full costs.[793] Furthermore, even if Claimant does not prevail in this arbitration, *at a minimum*, Claimant should be awarded 75 percent of the costs it incurred in the Original Arbitration, as Claimant still would be the prevailing party on jurisdiction, liability, and, partially, quantum, thus warranting an award of partial costs.[794]

265. In this regard, there is no reason to disturb the Original Tribunal's conclusion that Claimant's costs and fees in the Original Arbitration were reasonable.[795] Claimant's costs were reasonable and justified in view of the length of the proceeding, which spanned more than three years, and the complexity of the issues in dispute, requiring seven rounds of pleadings, and

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[789] *Deutsche Bank v. Sri Lanka*, Award ¶¶ 588, 590 (CL-1054).

[790] Award ¶¶ 664-665, 668, 670, 707-711.

[791] Award ¶¶ 717, 742.

[792] *See supra* ¶¶ 262-263.

[793] *See, e.g.*, *Pezold v. Zimbabwe*, Award ¶¶ 1002-1010 (CL-1053); *Kardassopoulos v. Georgia*, Award ¶¶ 689, 692 (CL-1027); *Deutsche Bank v. Sri Lanka*, Award ¶¶ 588, 590 (CL-1054); *ADC v. Hungary*, Award ¶ 533 (CL-1059).

[794] *See, e.g.*, *Lemire v. Ukraine*, Award ¶ 380 (CL-1013); *Desert Line v. Yemen*, Award ¶ 304 (CL-1056); *Siemens v. Argentina*, Award ¶ 402 (CL-1057); *PSEG v. Turkey*, Award ¶¶ 352-353 (CL-1058); *Azurix v. Argentina*, Award ¶ 441 (CL-1020).

[795] Award ¶ 775.

various expert evidence and witness testimony, in addition to having the merits hearing suspended and rescheduled months later.[796] Furthermore, as noted above, numerous investment tribunals have rejected the position advanced by Guatemala in the annulment proceedings that the reasonableness of TECO's costs should be judged by the costs claimed by the respondent, recognizing that claimants often incur significantly higher costs.[797] Indeed, there are numerous examples of claimants incurring and being awarded similar, or even greater, costs. For example, in *ČSOB v. Slovak Republic*, the tribunal awarded costs to the claimant of US$ 10 million;[798] in *PSEG v. Turkey*, the tribunal awarded the claimants approximately US$ 13.6 million in costs;[799] and, in *Pezold v. Zimbabwe*, the tribunal awarded the claimants approximately US$ 12.9 million in costs.[800]

266. In addition, Respondent's suggestion in the annulment proceedings that a cost award should be mathematically proportional to the amount of damages sought or awarded not only is contradicted by its agreement in the Original Arbitration that the Tribunal should allocate

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[796] *See* TECO's Submission on Costs; TECO's Reply on Costs.

[797] *See, e.g.*, *Gemplus v. Mexico*, Award ¶ 17-25 ("[T]he Claimants claim costs in the total sum of US$ 5,362,973.22. This amount significantly exceeds the Respondent's claim for costs, being less than 45% of the Claimants' costs; but the Tribunal does not consider the latter excessive for this case. It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty.") (CL-1021); *ADC v. Hungary*, Award ¶ 535 ("The Tribunal rejects the submission that the reasonableness of the quantum of the Claimants' claim for costs should be judged by the amount expended by the Respondent. It is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.") (CL-1059); *see also Deutsche Bank v. Sri Lanka*, Award ¶ 589 ("The Tribunal further notes that the Respondent's claim for costs including legal fees and expenses is far less than that of the Claimant. This notwithstanding, the parties' costs appear to be reasonable in the circumstances.") (CL-1054).

[798] *Československá Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award of 29 Dec. 2004 ¶ 374(5) (CL-1062).

[799] *PSEG v. Turkey*, Award ¶¶ 352-353 (US$ 13,553,563.80) (CL-1058).

[800] *Pezold v. Zimbabwe*, Award ¶¶ 1023-1024 (total costs for the claimants were US$ 12,811,903.62, corresponding to £ 7,149,386.82 (US$ 11,163,052.58 at date of the Award), US$ 1,648,851.04 and ZAR 609,402.13 (US$ 48,033.08 at date of the Award)) (CL-1053); *see also Hrvatska v. Slovenia*, Award ¶ 612 (awarding costs to the claimants of US$ 10 million) (CL-1029); *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, UNCITRAL, Final Award of 18 July 2014 ¶¶ 1869, 1887 (awarding costs to the claimant of US$ 60 million and € 4,240,000) (CL-1063); *Deutsche Bank v. Sri Lanka*, Award ¶¶ 576, 590 (awarding costs to the claimant of US$ 7,995,127.36) (CL-1054); *Kardassopoulos v. Georgia*, Award ¶¶ 687-692 (awarding costs to the claimants of US$ 7,942,297) (CL-1027); *ADC v. Hungary*, Award ¶¶ 535-543 (awarding costs to the claimants of US$ 7,623,693) (CL-1059).

costs in accordance with the principle that costs follow the event, but also is wholly unsupported by any legal authority. There is no such requirement in the Treaty, the ICSID Convention, or in international law.[801] Nor have investment treaty tribunals applied any such rule: in *PSEG v. Turkey*, for instance, the approximately US$ 13.6 million awarded in costs was greater than the US$ 9 million awarded in damages, which, in turn, was a fraction of the US$ 450 million sought by the claimants.[802]

267. As noted above, Respondent's procedural misconduct throughout the Original Arbitration proceeding provides a further basis for the costs of that proceeding to be awarded in their entirety to Claimant.[803] As the tribunal in *Cementownia v. Turkey* observed, "the misconduct of an arbitration proceeding leads generally to the allocation of all costs on the party in bad faith."[804] Finding, among other things, that the claimant had "caused excessive delays and thereby increased the costs of the arbitration," and that there was "an accumulation of liabilities—abuse of process and procedural misconduct," the tribunal in *Cementownia* ordered the claimant to pay all of the respondent's costs.[805] The tribunal in *Pezold v. Zimbabwe*, in ordering the respondent to bear the claimants' costs in their entirety, likewise found that it was "relevant to its decision the fact that some of the Respondent's conduct in these arbitrations resulted in an unnecessary escalation of the costs of the proceedings," noting, for instance, "the late elaboration by the Respondent of certain objections to jurisdiction, admissibility and defences as well as the inclusion by the Respondent of inadmissible material in the Hearing

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[801] *See* DR-CAFTA, Art. 10.26.1 ("A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.") (CL-1005); ICSID Convention, Art. 61(2) ("In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."); *see also, e.g.*, *Gemplus v. Mexico*, Award ¶¶ 18-1 to 18-11 (awarding costs of US$ 5,450,000, representing 35 percent of the damages awarded of US$ 15.5 million) (CL-1021); *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012 ¶ 360 (awarding costs of € 350,000, representing 100 percent of the damages awarded of € 350,000) (CL-1064).

[802] *PSEG v. Turkey*, Award ¶¶ 284-285, 352-354 (CL-1058).

[803] *See supra* § II.A.6.d.

[804] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award of 17 Sept. 2009 ¶ 159 (CL-1065).

[805] *Id.* ¶¶ 159, 177-179.

transcripts and Post-Hearing Briefs."[806] In this case, as detailed above, Respondent likewise sought to unfairly prejudice Claimant, and significantly and unnecessarily increased Claimant's costs through its misconduct.[807]

268. For all of the reasons set forth above, the Tribunal should order Respondent to bear all of Claimant's costs incurred in the Original Arbitration, or, *at a minimum*, 75 percent of Claimant's costs incurred in the Original Arbitration, as set forth in the chart below, plus interest from the date of the Award in the Original Arbitration.

	INCURRED COSTS (US$)
WHITE & CASE LEGAL FEES & EXPENSES	
WHITE & CASE LLP FEES	**US$ 5,883,811.65**
WHITE & CASE LLP COSTS (NOT INCLUDING TRANSLATION COSTS)	**US$ 217,867.86**
WHITE & CASE LLP TRANSLATION COSTS	**US$ 226,223.78**
TOTAL WHITE & CASE FEES & EXPENSES	**US$ 6,327,903.29**
EXPERT & CONSULTANT FEES & EXPENSES	**US$ 2,932,603.33**
TECO ARBITRATION EXPENSES	**US$ 17,087.24**
ICSID COSTS	**US$ 750,000**
TOTAL INCURRED COSTS	**US$ 10,027,593.86**

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[806] *Pezold v. Zimbabwe*, Award ¶¶ 1003-1009 (CL-1053).

[807] *See supra* § II.A.6.d; TECO's Submission on Costs ¶¶ 5-21; TECO's Reply on Costs ¶¶ 2, 7-9.

VI. CONCLUSION

269. For the foregoing reasons, Claimant respectfully requests that the Tribunal issue an award:

1. Ordering Respondent to pay compensation to Claimant in the amount of US$ 222,484,783;

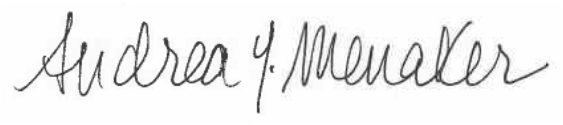
2. Ordering Respondent to pay interest on the above amount at the United States Prime Rate plus 2 percent, compounded annually, from 21 October 2010 until full payment has been made;

3. Ordering Respondent to pay compound pre-sale interest, which as of 1 September 2017 amounted to US$ 1,200,509;

4. Ordering Respondent to pay Claimant's legal fees and costs incurred in the Original Arbitration in the amount of US$ 10,027,593.86; and

5. Ordering Respondent to pay Claimant's legal fees and costs incurred in this resubmitted proceeding.

Respectfully submitted,



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1 September 2017