INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/10/23 - Annulment Proceedings

TECO GUATEMALA HOLDINGS LLC

v.

REPUBLIC OF GUATEMALA

REPUBLIC OF GUATEMALA'S REJOINDER ON TECO GUATEMALA HOLDINGS LLC'S APPLICATION FOR PARTIAL ANNULMENT OF THE AWARD

14 August 2015

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I. INTRODUCTION

1. The Republic of Guatemala (***Guatemala***) submits this Rejoinder in response to TECO Guatemala Holdings LLC's "Reply on Partial Annulment of the Award" dated 8 May 2015 (***TGH's Reply on Partial Annulment***).[1]

2. TGH seeks annulment of two specific aspects of the Award: *first*, the Tribunal's decision to reject TGH's damages claim for future losses (or "loss of value" as described in the Award); and, *second*, the Tribunal's partial rejection of TGH's claim of pre-award interest. TGH's arguments lack all merit.[2]

3. The Tribunal dismissed TGH's claim for loss of value based upon its assessment of the evidence on the record, which is not reviewable by an annulment committee. As it explained in the Award, "the Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered […]."[3] The reason for the decision is clear: the Tribunal's view is that the loss had not been proven. Likewise, on the issue of pre-award interest, the Tribunal based its decision on its assessment of the evidence, directly citing the report of TGH's damages expert.[4]

4. TGH is obviously dissatisfied with the Tribunal's decisions regarding loss of value and interest, but this does not justify the annulment it seeks. Such annulment would entail a reconsideration of the Tribunal's assessment of the evidence, which is inadmissible under the ICSID Convention. As is well established in ICSID annulment case law, "it would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred."[5]

5. This brief is structured as follows: **Section II** is an executive summary of this

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1 Capitalized terms not defined specifically in this document correspond to defined terms in Guatemala's Memorial on Annulment dated 17 October 2014, Guatemala's Counter-Memorial on Partial Annulment dated 9 February 2015 and Guatemala's Reply on Annulment dated 8 May 2015.

2 *See* Guatemala's Counter-Memorial on Partial Annulment, paras. 67-135 relating to the claim for "loss of value," and paras. 136-141, relating to the claim for pre-award interest. To be clear, Guatemala's position as set out in its Application, Memorial and Reply on Annulment is that: (i) the Award should be annulled in whole but for reasons different from the ones invoked by TGH; and (ii) should the Award not be annulled in whole, it should be annulled in part, but not in the part alleged by TGH. The focus here is on the reasons why TGH's application for annulment should be rejected. Nothing that Guatemala states in the present document may be construed as an acceptance of any part of the Award which Guatemala is challenging in its own annulment application.

3 Award, para. 749 (emphasis added).

4 *Ibid.*, para. 765 and footnote 611.

5 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110,** para. 96.

Rejoinder; **Section III** briefly describes the dispute and the Award; **Sections IV** and **V** elaborate on the flawed nature of TGH's application for partial annulment; and **Section VI** contains Guatemala's request for relief.

II. SUMMARY OF GUATEMALA'S RESPONSE

6. As already explained in Guatemala's previous pleadings in this proceeding,[6] this dispute concerns the manner in which the CNEE (the Guatemalan electricity regulator) conducted the 2007/2008 review of electricity tariffs for the Guatemalan electricity distribution company EEGSA (*Empresa Eléctrica de Guatemala S.A.*).[7] TGH was a shareholder of EEGSA until October 2010 when it sold its shares to the Colombian company EPM (*Empresas Públicas de Medellín*).

7. The 2007/2008 tariff review was an ordinary five-year tariff review provided for in the electricity Regulatory Framework.[8] Its purpose was to determine the tariffs that each Guatemalan electricity distribution company would apply to consumers in the 2008-2013 period. Tariffs were reviewed again in 2013 and are due to be reviewed yet again in 2018 and every five years thereafter until the end of each concession, which for EEGSA is due to terminate in 2048.[9]

8. TGH claimed that the manner in which the CNEE conducted the 2007/2008 review of EEGSA's tariffs was inconsistent with the Regulatory Framework and thus violated the Dominican Republic-Central America Free Trade Agreement (the ***CAFTA-DR***). TGH sought monetary compensation amounting to the difference between the tariffs that were approved by the CNEE and the ones that TGH claimed should be applied until the end of the concession. TGH submitted two heads of damages:

   (a) "Historical losses," which included the supposed tariff revenue lost between August 2008, when the new tariffs were approved, and October 2010, when TGH sold its shares to EPM, amounting to US$21,100,552; and

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6 Guatemala's Memorial on Annulment, paras. 31-49; Guatemala's Counter-Memorial on Partial Annulment, paras. 21-36; Guatemala's Reply on Partial Annulment, paras. 29-30.

7 *See* Guatemala's Memorial on Annulment, paras. 31-49.

8 Term defined below at para. 28. The Regulatory Framework is established in the General Electricity Law (**Exhibit R-8)** and its Regulations (**Exhibit R-36**).

9 On 15 May 1998, EEGSA and the Ministry of Energy and Mines executed an Authorization Contract for the distribution of electricity in the departments of Guatemala, Sacatepéquez, and Escuintla for a term of 50 years. Thus, at the time of the sale in 2010, thirty years remained of the concession contract. *See* Authorization Contract between EEGSA and the Ministry of Energy and Mines, 15 May 1998, **Exhibit C-31**, p. 2.

(b) Alleged future losses, or "loss of value," i.e., the supposed decrease in value of EEGSA due to the lost tariff income between October 2010 until the end of the concession, which TGH argued was reflected in the impaired value at which TGH sold its participation in EEGSA in 2010. These lost value losses were quantified by TGH as US$222,484,783.[10]

9. The Tribunal awarded TGH the historical losses but dismissed the claim for loss of value. Although TGH complains of this in this annulment proceeding, there is no merit to its arguments. The Tribunal's decision to dismiss the lost value claim was based on the lack of evidence of such a loss:

- "[T]he Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale";[11]
- "There is however 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";[12]
- "[T]here [is] no evidence in the record of how the transaction price has been determined;[13]
- "[T]he Arbitral Tribunal also finds 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."[14]

10. The reasoning is clear and not contradictory. The Tribunal simply considered that there was no evidence of either the loss incurred by TGH as a result of the sale, or of the actual quantum of such a loss.

11. This is sufficient to outright dismiss TGH's request for annulment. As is well established, an annulment committee "cannot […] enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by

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10 Award, paras. 716-717.

11 *Ibid.*, para. 749 (emphasis added).

12 *Ibid.*, para. 754 (emphasis added).

13 *Ibid.*, para. 754 (emphasis added).

14 *Ibid.*, para. 755 (emphasis added).

the parties. […] [I]t would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred."[15]

12. TGH nevertheless complains that "the Tribunal ignored the extensive expert and documentary evidence on the record, as well as TECO's related explanations, without providing *any reasons at all* for doing so."[16] This is incorrect. It is well established that the requirement for a reasoned award does "not […] require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party […]."[17] As the *Vivendi ad hoc* committee explained:

> [R]easons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.[18]

13. In order for a failure to state reasons to warrant annulment, the award "must leave the decision on a particular point essentially lacking in any expressed rationale […]."[19] In the present case, however, the rationale adopted by the Tribunal is express and clear.

14. TGH's complaint is merely that the Tribunal's reasoning is wrong and that the Tribunal should have accepted TGH's arguments and interpretation of the evidence. Nevertheless, this is not the standard of review to be applied in an annulment proceeding, as "[t]he correctness of the reasoning or whether it is convincing is not relevant."[20] As confirmed in *Caratube v Kazakhstan*:

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15 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110,** para. 96. *See also Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL- 64**, para. 65 ("[I]t is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party"); *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Annulment, 5 June 2007, **Exhibit RL-56**, para. 111 ("The Tribunal has to decide on the rules of evidence and is certainly the judge of the probative value of the evidence before it.")

16 TGH's Reply on Partial Annulment, para. 72 (emphasis in italics in the original).

17 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 104.

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

19 *Ibid.*, para. 65.

20 ICSID, "Background Paper on Annulment for the Administrative Council of ICSID", 10 August 2012, **Exhibit RL-61,** para. 106.

> [Annulment] Committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion.[21]

15. Here the Tribunal's decision is perfectly understandable to any neutral reader: it is based on TGH's failure to prove the relevant loss. This conclusion cannot be challenged by an annulment application under the ICSID Convention.

16. The same applies to the Tribunal's decision on interest. The decision is based on the evidence on the record. In particular, in finding that interest would start running only as from October 2010, the Tribunal referred to the expert report of TGH's own damages expert, Mr. Kaczmarek,[22] in addition to the Claimant's Post-Hearing Brief, Respondent's Reply Post-Hearing Brief, expert report RER-1 and Exhibit C-415. This assessment of the evidence on the record by the Tribunal cannot be challenged. ICSID Arbitration Rule 34(1) is clear in this respect:

> **Rule 34. Evidence: General Principles**
>
> (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

17. In the absence of better arguments, TGH also alleges that Guatemala had agreed with TGH on all relevant issues of damages and interest and thus the Tribunal did not need to decide on either of those points; instead, it just had to accept TGH's position. TGH further argues that the Tribunal was under some obligation to consult it before making the relevant decisions. All this is plainly incorrect.

18. Guatemala reiterates that it did not agree regarding any of the debated issues. Guatemala simply addressed TGH's damages methodology in order to explain the flaws in its implementation and that no damages would result from it, in the unlikely event that the Tribunal were to decide to endorse that methodology (which it did not).

19. Further, the Tribunal made its decision on the basis of the evidence, upon which the Parties had every opportunity to comment. There is certainly no obligation imposed

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21 *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102.

22 Award, para. 765, referring to Kaczmarek, **Appendix CER-2**.

upon any tribunal to consult the Parties on the conclusions it reaches on either the assessment of the evidence or its deliberations in general. As held in the annulment decision in *Iberdrola v Guatemala*, a tribunal has "no obligation to advance to the parties what will be its decision" on any given point, "nor ask their opinion on the same"; "it is in the award that the Tribunal decides."[23]

III. THE DISPUTE AND THE AWARD

20. In Section II of the Reply on Partial Annulment, TGH presents a "Summary of the Dispute and the Award."[24] As in its Memorial on Partial Annulment, such section is neither a "summary" (it runs for about 30 pages, which is half the length of TGH's brief), nor is it an objective or accurate description of the dispute or the Award.[25] Once again, TGH confuses fact and argument and in essence reargues its case in the Arbitration, which is impermissible in ICSID annulment proceedings. In any event, Guatemala reiterates the flaws in TGH's arguments below.

A. ISSUES OF LIABILITY

1. TGH's description of the liability issues in the Arbitration continues to be incorrect and misleading

21. As already explained,[26] this case concerns the manner in which the CNEE, the Guatemalan electricity regulator, conducted the review of electricity tariffs for the electricity distributor EEGSA in 2007/2008, in order to establish the tariffs that would apply from 2008 to 2013. TGH asserts categorically that "the CNEE arbitrarily disregard[ed] EEGSA's entire 2008-2013 tariff review process," that it acted "in breach of the specific representations that Guatemala had made during EEGSA's

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23 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision on Annulment, 13 January 2015, **Exhibit RL-130**, para. 108. Unofficial English translation. In its original Spanish language it reads:

> […] [E]l Tribunal, así como cualquier otro tribunal establecido bajo el Convenio del CIADI, no tiene la obligación de adelantar a las partes cuál sería su decisión relativa a la admisibilidad del cambio en el *petitum*, ni tampoco solicitarles su opinión al respecto. Por el contrario, es precisamente en el Laudo donde el Tribunal debe pronunciarse sobre la admisibilidad de los cambios en la presentación de sus acciones.

24 Reply on Partial Annulment, heading to Section II, p. 4.

25 *See* Guatemala's Counter-Memorial on Partial Annulment, para. 15 *et seq.*

26 Guatemala's Memorial on Annulment, paras. 31-49; Guatemala's Counter-Memorial on Partial Annulment, paras. 21-36; Guatemala's Reply on Partial Annulment, paras. 29-30.

privatization process," and "in complete disregard of the legal and regulatory framework that Guatemala had adopted to induce foreign investment in EEGSA."[27]

22. TGH also claims that the CNEE's actions were "fundamental changes to the regulatory framework, which was adopted specifically to induce foreign investment in Guatemala's failing electricity sector,"[28] and repeatedly accuses the CNEE of "bad faith conduct taken in connection with EEGSA's 2008-2013 tariff review."[29]

23. TGH makes these assertions as if they were demonstrated facts, but they are not. They are only allegations, the same as those that TGH made during the Arbitration and that the Tribunal largely dismissed. For example, regarding the accusation of manipulating the tariff review, the Tribunal found that "the Arbitral Tribunal is not convinced that […] the regulator acted improperly."[30] Regarding its allegation of bad faith on the part of the CNEE, the Tribunal held that "[t]he Arbitral Tribunal does not find support in the record for such a submission. Quite to the contrary, the facts show that the regulator had continuous and intensive contacts with the distributor."[31] The Tribunal found that generally speaking, the CNEE and Guatemala held a correct interpretation of the Regulatory Framework.[32]

24. The Tribunal also rejected all allegations regarding the fundamental alteration of the Regulatory Framework, which TGH reargues here.[33] The Tribunal concluded that such argument by TGH "is ill-grounded"[34] and "as rightly pointed out by the Respondent, Guatemala never agreed or represented that the regulatory framework would remain unchanged. In absence of a stabilization clause, it is perfectly

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27 TGH's Reply on Partial Annulment, para. 11.

28 *Ibid.*, para. 18.

29 *Ibid.*

30 Award, para. 652. *See also Ibid.*, paras. 644, 650.

31 *Ibid.*, para. 644. Likewise, the Tribunal dismissed the claims that the CNEE manipulated the terms of reference (Award, paras. 639-643), did not cooperate in the tariff review process (Award, para. 644), and had breached its agreement with EEGSA to delegate power to the Expert Commission (Award, paras. 649-650). It also found that the CNEE did not try to unduly influence the Expert Commission (Award, paras. 645-652) and had not engaged in any kind of reprisals against EEGSA (Award, paras. 712-715).

32 For example, the Tribunal rejected the argument that the CNEE was unauthorized to dissolve the Expert Commission once it had issued its report (Award, paras. 653-657), and also accepted Guatemala's argument that the report of the Expert Commission was not binding but advisory (Award, paras. 565, 670).

33 Award, para. 619. *See also Ibid.*, para. 256, referring to Reply, paras. 8, 246 *et seq.*

34 Award, para. 629. *See also Ibid.*, para. 638.

acceptable that the State amends the relevant laws and regulations as appropriate."[35] The Tribunal concluded: "the Arbitral Tribunal does not find the amendment to [the Regulatory Framework] to be unfair or arbitrary."[36] The Tribunal also rejected TGH's claims regarding Guatemala's alleged representations and TGH's legitimate expectations.[37]

25. In its Reply on Partial Annulment, TGH now seems to recognize that its summary of the dispute and Award is actually a restatement of its claims in the Arbitration.[38] A restatement of arguments and claims is, however, irrelevant and inappropriate in annulment proceedings, which are not concerned with the merits of the case.

2. Summary description of the liability issues in the Arbitration

26. Meanwhile, Guatemala's pleadings in these proceedings contain an objective account of the dispute that was submitted to Arbitration and of the Tribunal's decisions in the Award.[39] That account is incorporated here by reference. What follows is only a brief summary of the main issues for the convenience of the Committee.

27. As explained above,[40] this dispute relates to the manner in which the CNEE conducted the 2007/2008 tariff review process of the Guatemalan electricity distributor company EEGSA. Electricity tariffs in Guatemala are subject to ordinary five-year reviews. The main exercise, at each five-year review, is to redefine the VAD for each distribution company. The VAD is the part of the tariff that remunerates electricity distributors for their service. The rest of the tariff is the cost of energy, which the distributor simply passes through from the energy producers to the customers.

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35 *Ibid.*, para. 629.

36 *Ibid.*, para. 630.

37 In the words of the Tribunal, "[t]he legitimate expectations upon which the Claimant relies are […] that the relevant applicable legal framework will not be disregarded […]" and such "expectations" are "irrelevant to the assessment of whether a State should be held liable […]." (Award, paras. 618, 620-621).

38 TGH's Reply on Partial Annulment, para. 18 ("the mere fact that some of TECO's claims ultimately were not accepted by the Tribunal does not mean that they did not form the basis of the dispute between the parties.")

39 Guatemala's Memorial on Annulment, paras. 31-66; Guatemala's Counter-Memorial on Partial Annulment, paras. 15-66; Guatemala's Reply on Annulment, paras. 26-41.

40 *See* paras. 6-8, 21.

28. The procedure for electricity tariff reviews in Guatemala is established in the General Electricity Law (the ***LGE***) and its Regulations (the ***Regulations***) (together the ***Regulatory Framework***).[41] The CNEE, as the regulator, is responsible for conducting the process and approving the tariffs.[42]

29. The tariff review process starts when the CNEE adopts the terms of reference, which provide the "methodology for determination of the tariffs."[43] The distribution companies, through a consultant firm prequalified by the CNEE, prepare their tariff studies on the basis of the terms of reference.[44] The final study is a proposal to the regulator on behalf of the distribution company regarding the VAD that should be incorporated in the tariff to be charged to customers.

30. Once the VAD study is presented by the distribution company, the CNEE reviews it and may request any necessary corrections to ensure that the study complies with the terms of reference.[45] The company must incorporate the corrections[46] and, if discrepancies arise between the CNEE and the distributor, article 75 of the LGE provides that the parties may establish an expert commission to issue a pronouncement.[47] The Regulatory Framework then requires the CNEE to establish the VAD and the tariffs.[48]

31. During the 2008 tariff review, EEGSA commissioned its VAD study from the consulting firm Bates White, LLC (***Bates White***). Bates White presented its VAD study for EEGSA on 31 March 2008. The CNEE determined that there were numerous irregularities in the Bates White study including numerous deviations from the terms of reference (423 deviations to be precise).[49]

32. Bates White and EEGSA disagreed with the CNEE's findings. Thus, the Parties agreed to establish an expert commission to issue a pronouncement on the

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41 LGE, **Exhibit R-8**; RLGE, **Exhibit R-36**.

42 LGE, **Exhibit R-8**, arts. 4(c), 61, 71, 77; RLGE, **Exhibit R-36**, art. 29.

43 LGE, **Exhibit R-8**, art. 77. *See also Ibid.*, art. 4(c).

44 *Ibid.*, art. 74; RLGE, **Exhibit R-36**, art. 97.

45 *Ibid.*, art. 98.

46 *Ibid.*

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

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

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

disagreements (the ***Expert Commission***). After receiving the Expert Commission's report, the CNEE considered that: (a) the CNEE could not use the Bates White study to establish the new tariffs because it did not comport with the Regulatory Framework; and (b) the CNEE was obliged to establish EEGSA's VAD on the basis of the tariff study established by the independent and pre-qualified consultant Sigla, as permitted by the Regulatory Framework.[50] These decisions were contained in CNEE Resolution 144-2008 of 29 July 2008.

33. EEGSA disagreed with the CNEE's interpretation of the Regulatory Framework. In EEGSA's view, the CNEE could neither reject the Bates White study nor approve tariffs based upon another independent study. In EEGSA's view, the Expert Commission's report was binding, and Bates White was entitled to revise its study to incorporate the pronouncements for approval by the Expert Commission. According to EEGSA, the CNEE ought to calculate the new tariff on the basis of that study.

34. EEGSA resorted to the Guatemalan courts to argue its position. The proceedings went all the way up to the Guatemalan Constitutional Court, which dismissed EEGSA's position. The Constitutional Court held that the CNEE had properly interpreted and applied the Regulatory Framework in deciding that the Expert Commission's report was not binding, and in rejecting the Bates White study and establishing the tariffs on the basis of the Sigla study.

35. In the Arbitration, TGH reargued many of the claims submitted to the Constitutional Court regarding the manner in which the CNEE conducted the tariff review. As stated above,[51] and contrary to TGH's continued arguments otherwise,[52] the Tribunal dismissed the following claims made by TGH: (i) that the CNEE had violated TGH's legitimate expectations;[53] (ii) that the CNEE and the Government had fundamentally altered the Regulatory Framework;[54] (iii) that the CNEE manipulated the Terms of Reference;[55] (iv) that the CNEE did not cooperate in the tariff review process;[56] (v)

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

51 *See* paras. 23-24.

52 TGH's Reply on Partial Annulment, para. 24.

53 Award, paras. 618, 621.

54 *Ibid.*, paras. 624-638.

55 *Ibid.*, paras. 639-643.

56 *Ibid.*, para. 644.

that the CNEE had breached an agreement with EEGSA (the alleged Operating Rules)[57] by which it had accepted to delegate power to the Expert Commission;[58] (vi) that the CNEE tried to unduly influence the Expert Commission;[59] (vii) that the CNEE had engaged in reprisals against EEGSA;[60] (viii) that the CNEE could not dissolve the Expert Commission once it had issued its report;[61] and (ix) that the report of the Expert Commission was binding.[62]

36. The Tribunal took issue only with CNEE's Resolution 144-2008, and specifically, the fact that such Resolution did not provide sufficient reasons for rejecting the Bates White Study and not incorportating the Expert Commission's pronouncements. As stated by the Tribunal, "in adopting Resolution No. 144-2008, in disregarding without providing reasons the Expert Commission's report, […] the CNEE acted arbitrarily and in violation of fundamental principles of due process in regulatory matters."[63] Despite TGH's continued assertions to the contrary,[64] and as argued in Guatemala's other pleadings in these proceedings,[65] the Award is solely based on Guatemala's failure to provide reasons for rejecting the Bates White Study and not fully implementing the Expert Commission's report, and not on a finding that those decisions were *per se* unlawful.

B. DAMAGES AND INTEREST

37. As explained above,[66] in the Arbitration TGH claimed that the CNEE's decision to adopt tariffs based upon the Sigla study (instead of its own Bates White study) resulted in two sets of damages. On the one hand, "historical losses," i.e., losses for the tariff revenue lost between 1 August 2008 and the sale of shares to EPM on 21 October 2010; and on the other, "loss of value," i.e., losses from the 2010 sale until

57 *Ibid.*, para. 650.

58 *Ibid.*, para. 649.

59 *Ibid.*, paras. 645-652.

60 *Ibid.*, paras. 712-714.

61 *Ibid.*, para. 657.

62 *Ibid.*, paras. 565, 670.

63 *Ibid.*, para. 664.

64 TGH's Counter Memorial on Annulment, paras. 30-32, 82-84; TGH's Reply on Partial Annulment, paras. 24-25.

65 Guatemala's Memorial on Annulment, paras. 127 *et seq.*, 217-218; Guatemala's Counter-Memorial on Partial Annulment, paras. 35-36; Guatemala's Reply on Annulment, paras. 27, 93 *et seq*.

66 *See* para. 8.

the end of the concession, which TGH argued was reflected in the impaired value at which it sold its shares.[67]

38. The Tribunal dismissed the loss of value claim. This is the decision which TGH now seeks to annul.

39. As explained in Guatemala's Counter-Memorial on Partial Annulment,[68] TGH never presented a credible case on damages, particularly with regard to the alleged "loss of value" of EEGSA. In its Notice of Arbitration of 20 October 2010, TGH argued that as a result of Guatemala's actions, EEGSA had suffered "severe financial damage," that its "operational viability" was "severely undermined" and that its "long-term sustainability" was jeopardized.[69] Yet, the day after – on 21 October 2010 – TGH and its partners in EEGSA sold their stakes in EEGSA for at least US$498 million, of which US$115 million corresponded to TGH's share.[70]

40. Further, as also explained by Guatemala,[71] a document obtained by Guatemala in the document production phase of the Arbitration revealed that EEGSA's foreign shareholders presented the company to the buyer in September 2010 as: "[o]ne of the best and most solid companies in the country."[72]

41. TGH now back-tracks by saying that these were not its "own words," and that in any case Guatemala did cause damage to EEGSA.[73] This is incorrect, and the evidence plainly contradicted TGH's lost value theory. The sale did not show that EEGSA was unviable, severely undermined or jeopardized. Nor, contrary to what TGH stated in its Memorial on Partial Annulment, was the tariff approved by the CNEE in 2008

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67 Award, para. 716.

68 Guatemala's Counter-Memorial on Partial Annulment, paras. 9(e), 37-44, 83, 126.

69 Notice of Arbitration, para. 69.

70 Guatemala's Counter-Memorial on Partial Annulment, paras. 9(e), 42. These figures were presented by TGH's expert because, as explained below, TGH did not provide information containing a breakdown of the overall deal value.

71 Guatemala's Counter-Memorial on Partial Annulment, paras. 9(e), 39-40.

72 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22 (Emphasis in bold in the original). The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país." *See also* Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

73 TGH's Reply on Partial Annulment, para. 37.

"economically devastating."[74] In its Reply on Partial Annulment, TGH has apparently rectified this statement, and no longer makes this point.

42. In sum, as Guatemala has already explained,[75] TGH's claim for loss of value depended upon assessing the actual price at which TGH sold its participation in EEGSA to EPM. However, TGH did not disclose such price, and instead asserted that no price was calculated or negotiated specifically for EEGSA. Rather, it provided only a price for the whole of DECA II, the holding company through which TGH and its partners controlled their shares in EEGSA.[76] The DECA II partners received US$605 million for the whole of DECA II, which owned 80.8 percent of EEGSA as well as other minor related companies.[77] During the Arbitration, TGH submitted a mere calculated value of EEGSA that its damages expert, Mr. Kaczmarek, prepared for the exclusive purpose of the litigation.[78] Mr. Kaczmarek calculated this value to be US$498 million,[79] and TGH's share to be US$115 million.[80]

43. Thus, TGH never produced any contemporaneous internal or external valuations reflecting the price that EPM paid for EEGSA, nor any contemporaneous evidence that the sale price had been based upon the improbable assumption that EEGSA's 2008 tariffs would remain unchanged until the end of the concession in 2048.

44. There was an additional fundamental problem in TGH's loss of value argument. The 2008 tariffs were to last for only five years, until 2013, and would be reviewed every five years thereafter up to the end of EEGSA's concession in 2048. Despite the temporary nature of the tariffs, TGH argued that the 2008 tariffs would last until 2048 and had caused a permanent loss to EEGSA which was reflected in the sale price.[81]

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74 TGH's Memorial on Partial Annulment, title to Section II.A.4; Claimant's Memorial, title of Section II.F.7.

75 Guatemala's Counter-Memorial on Partial Annulment, para. 44.

76 Of the remaining 19.2 percent of EEGSA's shares, 14 percent remained in the hands of the Guatemalan State, and 5.12 percent in the hands of private investors. *See* Memorial on Objections and Counter-Memorial, para. 241; *see also* Teco Energy, Inc. Board of Directors Meeting (Proposed Sale of DECA II), 14 October 2010, **Exhibit C-353**.

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

78 Claimant's Memorial, para. 305; Kaczmarek, **Appendix CER-2**, para. 241.

79 Claimant's Memorial, para. 240; Kaczmarek, **Appendix CER-2**, para. 241, Table 23.

80 Kaczmarek II, **Appendix CER-5**, para. 141, Table 14; TGH's Memorial on Partial Annulment, para. 45.

81 Guatemala's Counter-Memorial on partial Annulment, paras. 44, 55-57.

Guatemala pointed to the 2013 tariff review process to prove the temporary nature of the 2008 tariffs, to which TGH now objects.[82] Curiously, TGH nevertheless cites repeatedly to the terms of reference of the 2013 tariff review, while avoiding any reference to the actual outcome of that review.[83]

45. It is telling that TGH failed to voluntarily disclose any documents regarding how EEGSA's sale price was calculated. Guatemala requested those documents during the discovery phase of the original proceeding.

46. In its first discovery request which contained a section called "Category C," entitled "Sale of the Shares of TECO in DECA II,"[84] Guatemala requested five specific types of documents: (i) accounting or valuation documents relating to the sale, "including any preparatory or final reports discussing legal, financial and valuation matters of DECA II, EEGSA [and Related Companies];" (ii) documentation relating to discussions between the shareholders of DECA II, or between EEGSA and DECA II and the shareholders, "in relation to the sale of DECA II to Empresas Públicas de Medellín;" (iii) documentation relating to "the bid made by Empresas Públicas de Medellín, including drafts or preliminary versions which were exchanged, presented or discussed and their annexes;" (iv) documentation relating to pre-sale exchanges "between the parties and/or their advisors and representatives related to the preliminary talks which led to the sale or transfer by TECO of its shares in DECA II, EEGSA, and/or in the Relating Companies;" and (v) documentation relating to "notifications by TECO or DECA II to securities authorities, lenders, guarantors, administrative or judicial authorities and brokers, agents, sales representatives, etc., in Guatemala or in the United States regarding the sale operation."[85]

47. TGH did not produce a single document in response to these requests. Rather, it responded that it "ha[d] not located any documents" in any of those categories, adding that some of the documents were also "confidential" or "privileged."[86] After further

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82 Letter from Andrea Menaker to the Members of the Annulment Committee, 26 February 2015, pgs. 4-6; Letter from Andrea Menaker to the Members of the Annulment Committee, 11 March 2015, pgs. 1-3.

83 TGH's Reply on Partial Annulment, paras. 29, 43-48, 75.

84 Letter from Nigel Blackaby to Andrea Menaker on document production, 7 November 2011, p. 5.

85 *Ibid.*, pgs. 5-6. For a more extensive account of the document production phase of the Arbitration, *see* Guatemala's Counter-Memorial on Partial Annulment, paras. 46-52.

86 Letter from Andrea Menaker to Nigel Blackaby on document production, 18 November 2011, p. 2.

exchanges on this issue,[87] the Tribunal ordered TGH to produce all documents that would lead the Tribunal to understand precisely how the sale price had been calculated.[88] TGH, however, disclosed only two documents,[89] which did not provide any direct proof of EEGSA's sale price. TGH continued to refuse to provide any relevant evidence, in spite of the Tribunal's requests.[90]

48. TGH argues in its Reply on Partial Annulment that its document production was not deficient or incomplete.[91] However, it is not credible that a transaction of this size was undertaken without any kind of valuation of its principal component. The Tribunal noted its concern regarding the lack of evidence of the sale price of EEGSA: how it was established and negotiated, whether it was determined solely based upon the 2008 tariffs, or to what extent it was influenced by those tariffs. Further, the Tribunal raised the obvious concern that TGH could not calculate a loss of value based on a wholly unrealistic assumption that tariffs fixed for a single five year tariff period would never be altered in the remaining 35 years of the concession (until 2048). At the final Hearing, the President of the Tribunal asked the Parties the following question:

> PRESIDENT MOURRE: […] And the second question is: How was the 2008 tariff, which is in this interview [Exhibit R-133] referred to as being low, how was that taken into account in the sale – in fixing the sale − the sale price to Energía de Medellín?[92]

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87 Letter from Nigel Blackaby to Andrea Menaker on document production, 21 November 2011, pgs. 1-2. Letter from Andrea Menaker to Nigel Blackaby on document production and enclosed privilege log, 28 November 2011; Letter from Nigel Blackaby to the Tribunal on document production, 29 November 2011, p. 2.

88 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 20, 26-28, 30-31, 33, 39-40, 42-43, 45 regarding the need to produce documents or, with respect to certain documents, the need to produce the respective affidavits affirming that the documents whose production was in dispute contained protected information, indicating the nature of such information, and identifying the persons who provided such information.

89 Document produced as C3-01: Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**. Document produced as C1-01: Citibank Fairness Opinion, Presentation to the Board of Directors of TECO Energy, Inc., 14 October 2010, **Exhibit C-531**.

90 Procedural Order No. 1, 16 December 2011: Document Production Request by Respondent, Exhibit A, Tribunal's Decision column, pgs. 27-28. Letter from Andrea Menaker to the Tribunal, 6 January 2012, failing to provide any documents under Category C3.

91 TGH's Reply on Partial Annulment, para. 51.

92 Tr. (English), Day Two, 403:16-20, Mourre.

49. The President of the Tribunal also asked specifically how it could be assumed that the 2008 tariffs could be projected into future, given that they were reviewed every five years:

> PRESIDENT MOURRE: There is an exhibit which has been discussed yesterday, which is R-133, which is the interview of the CEO, I believe, of Energía de Medellín; and there is a question there which says: "The shareholders argued that there would be low revenue and profitability due to the VAD. Despite this issue, you decided to buy." And the answer is: "This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout is the one that exists." So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods. And my question is: Why was there such an assumption, given that the tariff is reviewed every five years?[93] (Emphasis added.)

50. On this issue, TGH's damages expert Mr. Kaczmarek explained at the Hearing that he assumed that the 2008 tariffs would last permanently, which contradicted the Regulatory Framework:

> PRESIDENT MOURRE: Basically, you have taken as a basis to calculate the loss, the future loss, the difference between the tariff that has been applied by the CNEE on the basis of the SIGLA Tariff, and the but-for scenario which would have been in your testimony the 28 July Bates White Study. And I wonder if by doing this, in the way you are not assuming, that the tariff as applied on the basis of the SIGLA Tariff would be applied for the alternative, as you said, and that is − there is something that I don't understand because it's a five-year Tariff Period, so what tells you that in 2013, the CNEE would not adopt a different basis for fixing the tariff? Maybe the CNEE would realize that this is too low and increase the VAD, and the same thing for future periods, tariff periods.
>
> MR. KACZMAREK: So, maybe two responses to that. One, then I would be, of course, inserting some speculation about what the CNEE might

[93] Tr. (English), Day Two, 402:22-403:15, Mourre.

> do, and assuming they're going to go back to a non-depreciated asset base, the value of new replacement, and they're arguing that that's not what the law says. So I can't imagine that they're then going to turn around in this particular rate period right now and put forth Terms of Reference saying valuate as new because that's really what the law says, and they're just arguing something contrary in this arbitration. So, on that basis, I think it's entirely appropriate to run it to perpetuity.[94] (Emphasis added.)

51. As Guatemala's damages expert, Dr. Abdala, explained during the Hearing, TGH's assumption that the 2008 tariffs would have a permanent effect was entirely wrong:

> Like any damages eventually if you were to do a DCF versus DCF, DCF but-for and DCF actual, then you have to control for the fact that we don't know the outcome in 2013, and thus there is no reason to assume that the gap between tariffs that we are modeling for the 2008-2013 period should be prolonged over perpetuity, and that's one of the issues as well in the Kaczmarek model because, I mean, he has just confirmed as this gap forever.[95]

52. On 11 March 2013, after the Hearing but before the Post-Hearing Brief submissions, the Tribunal wrote to the Parties reinforcing the importance of understanding how the sale price was calculated and requesting evidence of how EEGSA's value was calculated in the sale. The Tribunal also asked how the tariffs, which were to last only for five years, could have caused a permanent loss to EEGSA:

> The Arbitral Tribunal also reminds the parties that the Post-Hearing Briefs should address the questions raised by the Arbitral Tribunal on Monday 21 and Tuesday 22 of January […].
>
> The Arbitral Tribunal would also be grateful if the parties could address in their Post-Hearing Briefs the following additional questions:
>
> […]
>
> - Evidence of the value attributed to EEGSA in the sale to EPM;

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94 Tr. (English), Day Six, 1602:16-1604:1.

95 Tr. (English), Day Six, 1604:21-1605:7, Abdala.

> - Is it right to assume for the purposes of loss assessment that the 2008-2013 tariff would remain in place forever? If not, what are the consequences on Teco's claim?[96]

53. TGH again failed to respond to these questions in its Post-Hearing Brief and its Reply Post-Hearing Brief. Instead, it continued repeating that "[b]ecause EEGSA's VAD was significantly decreased in 2008 […] EEGSA's value was diminished,"[97] and that "[b]ecause TECO sold its shares in EEGSA in October 2010, its losses have crystallized."[98] In other words, TGH asserted there was a loss regardless of the lack of evidence regarding the real value calculated for EEGSA in the sale, or how such value was influenced by the 2008 tariffs. Curiously, TGH claimed that "[t]he fact that the tariffs may change over time does not matter."[99] In other words, not only did TGH provide no evidence as to how the sale price was influenced by the 2008 tariffs, but it insisted against all logic that temporary tariffs like those established in 2008 would result in a permanent loss of value of EEGSA.

54. Guatemala, for its part, answered the Tribunal's questions by reiterating that TGH did not provide internal or external valuations reflecting the price that EPM paid for EEGSA and that Guatemala "does not have in its possession any direct evidence of the value assigned to EEGSA in the purchase price."[100] Guatemala added that with regard to "the concerns expressed by the Tribunal as to whether it is correct to assume for the purposes of calculation of damages that the tariffs set in the 2008-2013 period will remain fixed forever," "[c]learly this is not correct given that there is potential for increases over this five-year period and in subsequent five-year periods."[101] Guatemala further explained:

> As was established at the Hearing, Mr. Kaczmarek's model not only contains projections for the 50 years of the contract, it also assumes that there will be automatic renewals of this contract in perpetuity. The main problem with this approach is that it is actually impossible to

96 Letter from the Tribunal to the Parties, 11 March 2013, p. 2.

97 Claimant's Post-Hearing Brief, para. 172.

98 Claimant's Reply Post-Hearing Brief, para. 125.

99 *Ibid.*, para. 127.

100 Respondent's Post-Hearing Brief, para. 358.

101 *Ibid.*, para. 355.

> know what will happen with the tariffs in the future. The fact that a possible rate increase of 15% is being discussed in the 2013-2018 tariff review shows that the "measures" really cannot be considered beyond the five-year period.[102]

55. In its Reply on Partial Annulment, TGH maintains that it had never argued in the Arbitration that the 2008 tariffs would remain unaltered for the remaining years of EEGSA's concession. It asserts that its damages expert Mr. Kaczmarek did consider "inflation for costs and materials, growth of the network, and the network's technical losses" which "would have impacted EEGSA's VNR and VAD."[103] However, this is incorrect. The adjustments made by Mr. Kaczmarek, as he himself explained in the Arbitration, were in fact based on keeping the same tariff evaluation made by the CNEE in 2008. As he explained, "[a]fter 2013, we increased all of the respective VNRs by the implied growth of the network determined in the respective Bates White and SIGLA VNR studies for the Third Rate Period."[104] This means that no new tariff review was considered and that instead the result of the 2008 tariff review, in Mr. Kaczmarek's own words at the Hearing, is "run […] to perpetuity."[105]

56. Curiously, and in complete contradiction with this approach, Mr. Kaczmarek had also affirmed in his reports that the future evolution of tariffs should be taken into account:

> [T]here is no reason to presume that the VNR and the tariffs ought to follow a consistent historical trend because the VNR and the tariffs were to be established every five years from a fresh study of the new replacement cost of the network. Given the unknown impact of inflation, technology, and commodity prices, one could not expect there to be a consistent trend in the tariffs.[106] (Emphasis added.)

57. Yet a permanent tariff is precisely what Mr. Kaczmarek assumed in his analysis – that there would be no complete tariff reviews from 2008 onwards.

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102 *Ibid.*, para. 354.

103 TGH's Reply on Partial Annulment, para. 43.

104 Kaczmarek, **Appendix CER-2**, para. 163.

105 Tr. (English), Day Six, 1603:20-1604:1.

106 Kaczmarek II, **Appendix CER-5**, para. 173.

58. Also in contradiction with its own position, TGH continues to argue in its Reply on Partial Annulment that it provided evidence in the Arbitration on the 2013 tariff review process. TGH refers to this no fewer than three times in its Reply on Partial Annulment.[107] Clearly, it would be unnecessary to refer to the 2013 tariff review if it were true that the future evolution of tariffs was irrelevant for its damages case.

59. TGH also argues in its Reply on Partial Annulment that Mr. Kaczmarek "assigned a terminal value to EEGSA in 2018,"[108] as if that would make the future evolution of tariffs irrelevant. This is again incorrect. As Mr. Kaczmarek himself explained, the terminal value is based on the "the cash flows after 2018 to perpetuity."[109] In carrying out this calculation, and in contradiction with the Regulatory Framework, Mr. Kaczmarek assumed that there would be no full review of the future tariffs. He argued instead that EEGSA "will generate cash flows to the firm in the same amounts than those observed in the regulatory year 2018 plus a stable growth rate of 2.4% from regulatory year 2019 onwards,"[110] i.e., without any future tariff review.

60. Finally, TGH argues in its Reply on Partial Annulment that "the actual development of the tariffs subsequent to EEGSA's sale on 21 October 2010 was not relevant to the fair market value of EEGSA at the time of the sale."[111] Rather, according to TGH, "[t]he only relevant issue was what assumptions the parties would have made at the time in order to establish the price of the transaction."[112] This is plainly wrong. The Tribunal found Guatemala liable for the way in which the CNEE determined EEGSA's 2008-2013 tariffs; thus, Guatemala could only be held responsible for the damage caused by such tariffs and not by any future tariff review that could be assessed on its own terms at the appropriate time. In any case, TGH was not able to demonstrate that the Parties to the transaction made any assumption regarding future tariff reviews when negotiating the price.

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107 TGH's Reply on Partial Annulment, paras. 29, 43-48, 75.

108 *Ibid.*, para. 29.

109 Kaczmarek, **Appendix CER-2**, para. 197.

110 *Ibid.*, para. 197; Appendix 3.B (Financial Projections), Table "Bates White but for Projection", p. 140.

111 TGH's Reply on Partial Annulment, para. 48.

112 *Ibid.*

61. In the Award, the Tribunal accepted TGH's claim for historical losses.[113] However, it rejected the lost value claim for lack of evidence: "the Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale;"[114] "[t]here is […] 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;" there is "no evidence in the record of how the transaction price has been determined;" the "Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent."[115]

62. Further, the Tribunal found "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."[116] Thus, the claim was held to be "speculative,"[117] as "there was nothing preventing the distributor from seeking an increase of the tariffs at the end of the 2008-2013 tariff period."[118] The Tribunal thus concluded that "[a]s a consequence, the Arbitral Tribunal cannot accept that the sale price to EPM was based on the assumption that tariffs would remain forever unchanged post-2013."[119]

63. On interest, the Tribunal asserted 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" because "the US$21,100,552 historical losses damages correspond to revenues that would have progressively flowed into EEGSA from August 2008 until October 2010, and because such amount has not been discounted to August 2008."[120] To reach this conclusion, the Tribunal cited to the evidence provided

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113 Award, para. 742.

114 *Ibid.*, para. 749.

115 *Ibid.*, para. 754.

116 *Ibid.*, para. 755.

117 *Ibid.*, para. 757.

118 *Ibid.*, para. 758.

119 *Ibid.*, para. 760.

120 *Ibid.*, para. 765.

by the Claimant, in particular the damages report of the Claimant's expert Mr. Kaczmarek.[121]

64. The interest rate adopted by the Tribunal was "the US Prime rate of interest plus a 2 percent premium in order to reflect a rate that is broadly available to the market."[122]

IV. THE TRIBUNAL'S DISMISSAL OF DAMAGES FOR LOSS OF VALUE DOES NOT GIVE RISE TO ANY GROUND FOR ANNULMENT

A. THERE IS NO CONTRADICTION IN THE AWARD IN RELATION TO THE LOST VALUE CLAIM WARRANTING ANNULMENT

65. TGH argues that Guatemala "overstates the applicable legal standard" regarding the threshold for annulment of an ICSID award for contradictory reasoning.[123] This is incorrect. The case law is clear that contradictory reasoning may only give rise to annulment in "extremely rare" cases of "contradictory reasons [that] completely cancel each other out and therefore amount to a total absence of reasons."[124] In *MTD v Chile*, the committee referred to the standard as one of "outright or unexplained contradictions."[125] In *Malicorp v Egypt*, the committee held that the applicant faces a "high burden"[126] to prove a contradiction, that a committee must look "beyond what may, at a first glance, appear to be a contradiction,"[127] and that "[i]n construing awards […] one necessarily should construe the language in issue, whenever possible, in a way that results in consistency."[128] The committee in *Daimler v Argentina* also found that "[a] committee before it proceeds to annul an award on the ground of contradictory reasons must examine their context and satisfy itself that these have the

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121 Kaczmarek, **Appendix CER-2**.

122 Award, para. 767.

123 TGH's Reply on Partial Annulment, para. 61.

124 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 82.

125 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Decision on Annulment, 21 March 2007, **Exhibit RL-55**, para. 78.

126 *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18) Decision on Annulment, 3 July 2013, **Exhibit RL-48**, para. 42.

127 *Ibid.*, para. 45.

128 *Ibid.*, para. 44, citing *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment, 29 June 2005, **Exhibit RL-58**, para. 81.

effect of cancelling each other out leaving the decision on an outcome-determinative issue without any rational basis."[129]

66. In the words of the committee in *Alapli Elektrik v Turkey*:

> Although the Committee does consider that genuinely contradictory reasons cancel each other out and amount to no reasons at all, it also notes that annulment committees should not be quick to find contradiction when in fact what is evident from the award is the compromise reached in an international collegiate adjudicative body. […] The Committee is persuaded that, if possible, an interpretation which confirms an award's consistency as opposed to its alleged inner contradictions should be preferred.[130] (Emphasis added.)

67. Similarly, the committee in *Vivendi v Argentina* held as follows:

> It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.[131]

68. Hence, contrary to TGH's contentions, the standard for annulment for contradictory reasoning is high. Mere conflicting considerations in an award are insufficient, and annulment committees must attempt to reconcile any apparent contradictory reasoning.

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129 *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) Decision on Annulment, 7 January 2015, **Exhibit RL-115**, para. 135. *See also Señor Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Decision on Annulment, 12 February 2015, **Exhibit RL-132**, para. 172.

130 *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13) Decision on Annulment, 10 July 2014, **Exhibit RL-51**, paras. 200-201. *See also Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) Decision on Annulment, 7 January 2015, **Exhibit RL-115**, para. 78.

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

69. In any event, as explained in Guatemala's previous submission,[132] there is no contraction or even conflicting considerations in the Tribunal's decision to deny damages to TGH for the alleged loss of value of EEGSA. TGH seeks to create a contradiction where there is none.

70. TGH argues that the Award is contradictory because the Tribunal did not find evidence that the price of the transaction would have been higher had the 2008 tariffs been higher, but had earlier found "that EEGSA's fair market value depended upon its VAD; that EPM paid fair market value for EEGSA; and that, absent Guatemala's breach, EEGSA's VAD for the *entire* 2008-2013 tariff period would have been significantly higher."[133] But none of these assertions, which TGH attributes to the Tribunal in its Reply on Partial Annulment,[134] can actually be found in the Award. TGH simply misconstrues the Award.

71. The Award merely states that "[t]he Arbitral Tribunal has no reasons to doubt that, as reflected in the minutes, the decision to divest was taken primarily as a consequence of the breach by the CNEE of the regulatory framework," and that "the existing tariffs were taken into account in fixing the price of the transaction."[135] But this is distinct from determining that the sale was made at a loss, the measure of the loss or whether any loss could be imputed only to the tariffs. The possible motivation for the sale and that tariffs could have been a factor in determining the price could not automatically lead to any conclusion on any of those points. The Tribunal still needed to be convinced and was still bound to decide, whether the price of the sale actually evidenced a loss and its quantum, as well as whether the tariffs were the sole cause for any such loss.

72. The Tribunal did not find sufficient evidence regarding this point:

> [T]he existing tariff were considered a relevant factor in determining the price of the transaction. There is, however no sufficient evidence that, had the 2008-2013 tariffs been higher, the

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132 Guatemala's Counter-Memorial on Partial Annulment, paras. 79-85.

133 TGH's Reply on Partial Annulment, para. 65 (emphasis in italics in the original).

134 *Ibid.*, para. 66.

135 Award, paras. 748, 752, referred to by TGH in its Reply on Partial Annulment, paras. 65-117.

> transaction price would have reflected the higher revenues of the company until 2013.[136]
>
> [T]he Arbitral Tribunal finds no sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale.[137] […]
>
> [T]here [*sic*] no evidence in the record of how the transaction price has been determined. The Arbitral Tribunal therefore ignores what other factors might have come into play and cannot conclude with sufficient certainty that an increase in revenues until 2013 would have been reflected in the purchase price and to what extent.[138]

73. As Guatemala has already explained,[139] and as confirmed by the Tribunal,[140] TGH did not provide evidence to ascertain how the sale price was determined, nor of the extent of any possible increase in price had the 2008 tariffs been higher. Further, it was simply impossible for the sale to have crystallised a permanent loss of value of EEGSA because "*it is actually impossible to know what will happen with the tariffs in the future*."[141] In that regard, the Tribunal further explained that:

> [T]he VAD is recalculated every 5 years. […] [T]here is no indication that the distributor will be prevented from seeking a change in the tariffs in 2018. […] [T]he regulatory framework may change, with consequences on future tariff review processes as well as on the future level.[142]

74. Hence, there is nothing surprising or contradictory in the decision of the Tribunal. The fact that tariffs could have motivated the sale or were taken into acccount in setting the price is different from whether the sale price was actually depressed, whether such impairment was due only to the tariffs, and if so, to what extent. The Tribunal needed to be convinced of the latter, and it was not.

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136 Award, para. 754.

137 *Ibid.*, para. 749.

138 *Ibid.*, para. 754.

139 Guatemala's Counter-Memorial on Partial Annulment, para. 81.

140 Award, para. 754.

141 *Ibid.*, para. 757 (emphasis in italics in the original).

142 *Ibid.*, paras. 758-759.

75. Nor is there any contradiction, as TGH argues,[143] between the Tribunal's decision to dismiss the lost value claim on the one hand and to award historical losses on the other. Unlike the historical losses, the claim for loss of value was based on the price of the transaction. Therefore, the Tribunal needed to be convinced – and it never was − that the sale price reflected a loss and that the loss was attributable only to the tariffs. Further, the claim for loss of value was baseless given that the 2008 tariffs were temporary, which undermines any claim of permanent loss.

B. THE TRIBUNAL DID NOT FAIL TO STATE REASONS FOR ITS DECISION

76. Aside from TGH's unmeritorious arguments regarding contradictory reasoning, TGH claims that the Award fails to state reasons regarding the weight the Tribunal attributed to certain evidence. For example, TGH argues that, "in denying TECO's claim for the loss of value arising from the sale of EEGSA, the Tribunal ignored the extensive expert and documentary evidence on the record, as well as TECO's related explanations, without providing *any reasons at all* for doing so."[144] It also states that the Tribunal "relied extensively upon the interview in the Guatemalan press of EPM's CEO, Mr. Restrepo," and that it "failed to state any reasons as to why this reported statement of a non-witness who was not available for examination at the Hearing should prevail over the comprehensive documentary and expert evidence adduced by the parties."[145]

77. However, none of this is relevant for annulment. A Tribunal is not bound to refer to all the evidence on the record or provide reasons for relying on one piece of evidence rather than another. As the *Rumeli v Kazakhstan* annulment committee held, the ICSID Convention does "not […] require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party, surely an excessive burden for any court or tribunal."[146] TGH seeks to distinguish this holding, arguing that earlier the *Rumeli* annulment committee had found that the tribunal had given due consideration to the evidence in the case. This is not the point. While the cases are

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143 TGH's Memorial on Partial Annulment, paras. 90-94; TGH's Reply on Partial Annulment, paras. 61-68.

144 *Ibid.*, para. 72 (emphasis in italics in the original).

145 *Ibid.*, para. 72.

146 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 104.

obviously different, what matters is that the *Rumeli* decision affirms categorically the principle that a tribunal is not required to address all the evidence on the record in the Award.

78. Similarly, another annulment committee stated: "it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party."[147] Indeed, article 48(3) of the ICSID Convention clearly provides that a tribunal "is under no obligation to decide each and every question or sub-question raised by a party irrespective of its view whether it is material or immaterial."[148]

79. The requirement under the ICSID Convention is that an award be reasoned, which means that the conclusions of a tribunal and its grounds be comprehensible. The test for annulment is "limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion."[149] As explained above, the conclusions and grounds for the Tribunal's decison are clear: the lack of evidence of the loss claimed. This is sufficient to reject TGH's annulment application for failure to state reasons.

80. There is no requirement that an award tackle all evidence submitted by the Parties. Nor is there a requirement that it provide convincing reasons for affording greater weight to some evidence over other. Otherwise, an annulment committee would need to review the entire record presented to the tribunal, assess all of the evidence *de novo* and second-guess the tribunal's decision. This is strictly excluded in the ICSID annulment process. An *ad hoc* committee "cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced

147 *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL-64**, para. 65. *See also Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07) Award, 30 June 2009, **Exhibit RL-137**, para. 112 ("[…] the Tribunal has full discretion in assessing the probative value of the evidence before it"); *Compañía de Aguas del Aconquija and Vivendi v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 7 July 2002, **Exhibit RL-50**, para. 87 ("No doubt an ICSID tribunal is not required to address in its award every argument made by the parties"); C Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2nd ed, 2009, **Exhibit RL-40,** p. 1017 ("The mechanical requirement that every argument put forward by the party must be addressed is replaced by the requirement that the reasoning must be coherent.")

148 *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13) Decision on Annulment, 10 July 2014, **Exhibit RL-51**, para. 144.

149 *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102 (emphasis added).

by the parties."[150] In other words, "it would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred."[151]

81. Nor is it necessary that reasoning be adequate, convincing or even correct. Taking issue with whether reasons are correct or adequate would turn an annulment into a re-evaluation of the record that was before the tribunal and thereby turn an annulment into an appeal. In the words of another annulment committee:

> [A]n examination of the reasons presented by a tribunal cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based. Committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion. Broadening the scope of Article 52(1)(e) to comprise decisions with inadequate reasons would transform the annulment proceeding into an appeal.[152] (Emphasis added.)

82. In the words of the annulment committee in *Enron v Argentina*, for example:

> It is generally accepted that this ground of annulment only applies in a clear case when there has been a failure by the tribunal to state any reasons for its decision on a particular question, and not in a case where there has merely been a failure by the tribunal to state correct or convincing reasons.[153] (Emphasis added.)

83. Similarly the annulment committee in *Mine v Guinea* held:

> The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard

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150 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 96.

151 *Ibid.*, para. 96.

152 *Caratube v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102.

153 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **Exhibit RL-117**, para. 221.

> of the exclusion of the remedy of appeal by Article 53 of the Convention.[154] (Emphasis added.)

84. Another annulment committee has put it as follows:

> The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not.[155] (Emphasis added.)

85. In its Reply on Partial Annulment, TGH does not adress any of these case law excerpts, which were previously cited by Guatemala.[156]

86. The Tribunal's reasons for rejecting TGH's lost value claim were correct, but even if they were not, the Award clearly provided reasons. The Tribunal's failure to award damages due to lack of evidence is fully comprehensible. In such circumstances, there is no basis for annulment.

87. In any case, and although this is entirely irrelevant for annulment purposes, the Tribunal's decision to afford greater weight to certain evidence was entirely correct and justified. Since TGH based its case regarding the claim for loss of value on the price at which it sold its participation in EEGSA, it needed to prove that such a price included a loss. The Tribunal found that no loss had been established, which rendered useless a detailed discussion of the experts' contrasting views as to the quantum of the loss.

88. Although TGH labels the evidence it produced on the lost value claim as "extensive," as explained above,[157] TGH did not produce a single piece of evidence contemporary to the sale showing the price at which EEGSA was sold or how such price had been

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154 *Maritime International Nominees Establishment (MINE) v. Government of Guinea* (ICSID Case No. ARB/84/4) Decision on the Application by Guinea for Partial Annulment, 14 December 1989, **Exhibit RL-47**, para. 5.08.

155 *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL-64**, para. 78.

156 Counter-Memorial on Partial Annulment, paras. 74-77.

157 *See* paras. 43-48.

determined.[158] TGH failed in this respect despite Guatemala's and the Tribunal's multiple requests to TGH to provide evidence on the matter.[159]

89. As explained above,[160] during the discovery phase of the Arbitration, Guatemala requested five categories of documents on the sale, including documents that would explain the method applied to determine the sales price, the negotiations that took place, and the valuations performed. TGH refused to disclose any documents at all, answering that either no documents existed or that those that existed were confidential. Only after the Tribunal's disclosure order did TGH disclose two documents that related – if only indirectly – to the issue: EPM's Non-Binding Offer Letter[161] and Citibank's Fairness Opinion of 14 October 2010.[162] These documents were virtually ignored by TGH during the Arbitration and contain no direct evidence regarding the sale price.[163]

90. As TGH concedes in its Reply on Partial Annulment, EPM's Non-Binding Offer Letter was mentioned only once in all of TGH's 750 pages of pleadings in the Arbitration[164] and never in relation to the sale price of EEGSA or to how that price had been calculated. Similarly, as explained in Guatemala's Counter-Memorial on Partial Annulment,[165] TGH never argued that the Non-Binding Offer Letter showed that the purchase price was determined solely based upon the 2008 tariffs, or that had tariffs been higher, the sale price would have also been higher. This is so because EPM's Non-Binding Offer Letter does not contain such evidence.

91. TGH now argues that the letter is proof that EPM did not expect the tariff to change because it includes a DCF analysis "not includ[ing] an increase in tariffs for the years

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158 *See* paras. 45-48. *See also* Guatemala's Counter-Memorial on Partial Annulment, paras. 95-101.

159 *Ibid.*, paras. 44-52.

160 *See* paras. 46-48.

161 Document produced as C3-01: Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**.

162 Document produced as C1-01: Citibank Fairness Opinion, Presentation to the Board of Directors of TECO Energy, Inc., 14 October 2010, **Exhibit C-531**.

163 **Exhibit C-531** was referred to in order to justify EEGSA's actual value and the reasonability of TGH's comparable companies analysis (Claimant's Post-Hearing Brief, paras. 169, 171, 173; Reply, para. 293), while **Exhibit C-557** was referred to exclusively to justify the reasonability of TGH's comparable companies analysis, as a response to Guatemala's argument that there was no company comparable to EEGSA (Reply, para. 293, footnote 1427).

164 TGH's Reply on Partial Annulment, para. 58.

165 Guatemala's Counter-Memorial on Annulment, para. 98.

2013 and 2014."[166] Nevertheless, this was only because the letter went on to say – in the part that TGH omits – that this would be an "analysis that will be part of any eventual due diligence."[167] Despite this, TGH declined to provide the relevant due diligence documents in the course of the Arbitration[168] and instead chose to rely on a non-binding offer presented months prior to the sale.[169]

92. With regard to the Citibank Fairness Opinion,[170] this document also provides no evidence as to how the 2008 tariffs affected the sale value, or that higher tariffs would have led to a higher price.[171] Further, in the Arbitration, TGH referred to the Fairness Opinion in only two of its own pleadings and with regard to unrelated matters.[172]

93. TGH's complaint that the Tribunal assigned relevance to the press interview of Mr. Restrepo, the CEO of EPM, regarding the sale price, is unjustified and irrelevant for annulment purposes.[173] TGH had every opportunity to address this evidence. Guatemala submitted this exhibit with its first pleading, its Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits, but TGH placed little importance on it. In fact, TGH never even cited to this exhibit in the Arbitration until the Tribunal specifically requested that it do so during the Hearing and even then did so only in its first post-hearing submission.[174]

94. As explained in Guatemala's Counter-Memorial on Partial Annulment,[175] at the Hearing the Tribunal showed interest in this interview regarding the determination of the actual sale price of EEGSA, how it was established and negotiated, and, in

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166 Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**, p. 2. *See also* TGH's Reply on Partial Annulment, para. 41.

167 Non-Binding Offer Letter from Empresas Públicas de Medellín to P. Azagra, 26 July 2010, **Exhibit C-557**, p. 2.

168 Guatemala's Counter-Memorial on Partial Annulment, para. 97.

169 *Ibid.*, para. 98.

170 Document produced as C1-01: Citibank Fairness Opinion, Presentation to the Board of Directors of TECO Energy, Inc., 14 October 2010, **Exhibit C-531**.

171 TGH's Reply on Partial Annulment, paras. 72, 81-82.

172 The Citibank Fairness Opinion, **Exhibit C-531**, was referred to a total of four times, three of them in the next to last pleading in the case: Claimant's Post-Hearing Brief, paras. 169, 171, 173; and once in the Reply, at para. 293. This Exhibit was referred to in order to justify EEGSA's actual value and the reasonability of TGH's comparable companies analysis.

173 TGH's Reply on Partial Annulment, para. 72.

174 Claimant's Post-Hearing Brief, paras. 169, 171-172.

175 Guatemala's Counter-Memorial on Partial Annulment, paras. 53-56.

particular, whether it had been determined solely on the basis of the 2008 tariffs.[176] Accordingly, the Tribunal asked the Parties the following:

> PRESIDENT MOURRE: […] And the second question is: How was the 2008 tariff, which is in this interview [Exhibit R-133] referred to as being low, how was that taken into account in the sale – in fixing the sale – the sale price to Energía de Medellín?[177]

95. Indeed, the Tribunal so clearly signalled the importance it placed on Mr. Restrepo's interview that it asked the Parties to specifically brief this issue twice during the Hearing:

> There is an exhibit which has been discussed yesterday, which is R-133, which is the interview of the CEO, I believe, of Energía de Medellín, and there is a question there which says: "The shareholders argued that there would be low revenue and profitability due to the VAD. Despite this issue, you decided to buy. And the answer is" "This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout is the one that exists. So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods. And my question is: Why was there such an assumption, given that the tariff is reviewed every five years?[178]

96. Despite these very clear indications from the Tribunal regarding the importance it placed on the exhibit, TGH dedicated a mere two sentences of its Post-Hearing Brief to this document.[179] Thus, the fact that the Tribunal quoted portions of the interview

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176 *Ibid.*, para. 53.

177 Tr. (English), Day Two, 403:16-20, Mourre. *See also* Counter-Memorial on Partial Annulment, para. 53.

178 Tr. (English), Day Two, 402:22-403:15, Mourre. *See also* Counter-Memorial on Partial Annulment, para. 54.

179 TGH's Post Hearing Brief, para. 172. Specifically, TGH's reference to the interview in the entire Arbitration is the following:

> EPM likewise made these same assumptions. In this regard, EPM's statement highlighted by the Tribunal, that "[w]e bought on the basis that the current tariff model and layout is the one that exists. So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods," is correctly understood as an assumption that the CNEE would continue to calculate the VAD on a depreciated

in the Award could not have taken the Parties by surprise. The Tribunal used the interview in support of its view that there was no evidence that the purchase price was exclusively and determinatively established on the basis of the 2008-2013 tariffs and that an increase of the tariffs would have led to a higher price. However, the Tribunal's decision was not based on the interview alone. Rather, the Tribunal believed the interview was an example of the absence of evidence regarding the long-term impact of the tariffs:

> Such statements show that the existing tariff were considered as a relevant factor in determining the price of the transaction. There is however no sufficient evidence that, had the 2008-2013 tariffs been higher, the transaction price would have reflected the higher revenues of the company. The interview of 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.[180] (Emphasis added.)

97. The interview was not outcome-determinative for the Tribunal; rather, it was the interview, in combination with TGH's failure to prove that a higher tariff would have resulted in a higher sale price – which TGH had the burden to prove to support its claim of lost value – that turned the tables in favour of rejecting this part of TGH's claim.

98. TGH also claims that the Tribunal "disregard[ed] the reports of the parties' quantum experts."[181] As Guatemala explained in its Counter-Memorial on Partial Annulment,[182] the Tribunal addressed the expert reports,[183] which in any event, could not provide contemporaneous evidence regarding how EPM had calculated the sale price of EEGSA.[184]

> VNR, and that it would calculate EEGSA's VNR within the same range of values as it did in the 2008-2013 tariff review.

180 Award, para. 754.

181 TGH's Reply on Partial Annulment, para. 83.

182 Guatemala's Counter-Memorial on Partial Annulment, para. 103.

183 Award, paras. 718, 720, 730, 750.

184 Guatemala's Counter-Memorial on Annulment, para. 104.

99. Contrary to TGH's allegations, Guatemala is not suggesting that the "Tribunal was at liberty to disregard the reports of the parties' quantum experts or other evidence."[185] Indeed, the Tribunal did not disregard those reports. The Tribunal dedicated 72 paragraphs of its Award to discussing evidence presented by the damages experts.[186] In the substantive damage analysis, it referred, directly or by reference to the Parties' pleadings, to the following expert reports and witness statements: CER-2, CER-5, RER-1, RER-2, RER-4, RER-5, CWS-2, CWS-4, CWS-5, CWS-6, CWS-8;[187] as well as to at least the following pieces of documentary evidence: C-217, C-218, C-246, C-267, C-297, C-303, C-324, C-326, C-352, C-353, C-354, C-356, R-8, R-80, R-83, R-130, R-132, R-133, R-134, R-162.[188] The Tribunal also abundantly referred to the Hearing transcript.[189]

100. Further, as the annulment committee indicated in *Rumeli*, absence of references is not a ground for annulment, as the tribunal has already reviewed the evidence before it

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185 TGH's Reply on Partial Annulment, para. 83.

186 Award, paras. 341-59, 415-33, 717-50, 762-68.

187 Kaczmarek, **Appendix CER-2**; Kaczmarek II, **Appendix CER-5**; M Abdala and M Schoeters, **Appendix RER-1**; Damonte **Appendix RER-2**; Mr. Abdala and Mr. Schoeters Rejoinder Expert Report, **Appendix RER-4**; Damonte Rejoinder, **Appendix RER-5**; Callahan I, **Appendix CWS-2**; Giacchino, **Appendix CWS-4**; Gillette, **Appendix CWS-5**; Maté, **Appendix CWS-6**; Callahan II, **Appendix CWS-8**.

188 Award, paras. 716-768; *See also* Email from M Calleja to G Perez forwarding Email from M Quijivix to L Maté and M Calleja, 28 May 2008, **Exhibit C-217**; Email from M Calleja to L Giacchino, forwarding Email from M Quijivix to L Maté and M Calleja, 28 May 2008, **Exhibit C-218**; Expert Commission's Report, 25 July 2008, **Exhibit C-246**; Sigla Report, 28 July 2008, **Exhibit C-267**; Standard & Poor's, *Empresa Electrica de Guatemala S.A. Ratings Lowered to 'BB-' from 'BB'/on CreditWatch Neg*, **Exhibit C-297**; TECO Guatemala, Inc. Operations Summary for Periods Ended September 30, Board Book Write-up, October 2008, **Exhibit C-303**; TECO Energy Form 10-k, 26 February 2009, **Exhibit C-324**; TECO Guatemala, Inc. Operations Summary for Periods Ended March 31, Board Book Write-up, April 2009, **Exhibit C-326**; Letter from EPM to Iberdrola, TPS, and EDP, 6 October 2010, **Exhibit C-352**; Teco Energy, Inc. Board of Directors Meeting (Proposed Sale of DECA II), 14 October 2010, **Exhibit C-353**; Minutes of TECO Energy, Inc. Board of Directors meeting, 14 October 2010, **Exhibit C-354**; Stock Purchase Agreement between Iberdrola, TPS, EDP, and EPM, 21 October 2010, **Exhibit C-356**; LGE, **Exhibit R-8**; Notarial Act Establishing the Expert Commission, 6 June 2008, **Exhibit R-80**; Letter from Jean Riubrugent, Carlos Bastos, and Leonardo Giacchino to Carlos Colom Bickford and Luis Maté, 12 June 2008, **Exhibit R-83**; Press Release by EDP, "EDP sells its stake in DECA II", 21 October 2010, **Exhibit R-130**; Press Release from Iberdrola Energía S.A., 22 October 2010, **Exhibit R-132**; "We won't wave a flag. We respect people's roots," *Prensa Libre*, 23 October 2010, **Exhibit R-133**; Press release of Teco Guatemala Holdings, LLC, "Teco Energy Reports Third Quarter Results," 28 October 2010, **Exhibit R-134**; Press release of Teco Guatemala Holdings, LLC, "Teco Guatemala Holdings LLC sells its interest in Guatemalan electric distribution company," 21 October 2010, **Exhibit R-162**.

189 Award, paras. 273, 298, 323, 324, 330, 355, 384, 389, 395, 396, 402, 453, 601, 602, 648, 726, 739, 740, 746.

and summarized it in an earlier section of the award.[190] As the Tribunal explained repeatedly, however, it simply wanted evidence contemporaneous to the sale in order to understand why it should adopt the sale price as evidence of the loss, a logical request given the critical importance that TGH placed on the sale. It found such evidence to be missing.

101. In short, the Tribunal was perfectly entitled to choose the evidence that it considered to be more pertinent to its decision and to interpret the evidence in the way it considered appropriate. An ICSID tribunal's treatment of the evidence on the record is within its discretion and is beyond the scope of annulment under the ICSID Convention. Indeed, ICSID Arbitration Rule 34(1) is clear in this respect:

> **Rule 34. Evidence: General Principles**
>
> (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

102. An ICSID annulment committee cannot second-guess the determinations made by a tribunal on the basis of the evidence:[191] "it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party;"[192] "the *Ad hoc* Committee does not consider it to be its task to determine whether the test employed by the Tribunal and the weight given by the Tribunal to various elements were 'right' or 'wrong;'"[193] and "[i]t is not for the *ad hoc* Committee to review, within the confines of the annulment proceeding, the consideration of the factual record by the Arbitral Tribunal."[194]

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190 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Kazakhstan* (ICSID Case No. ARB/05/16) Decision on Annulment, 25 March 2010, **Exhibit RL-110**, para. 104. *See also Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) Decision on Partial Annulment, 16 September 2011, **Exhibit RL-138**, para. 130 ("the Tribunal is not required to cite or expressly deal with every authority cited to it in relation to a particular argument.")

191 Guatemala's Counter-Memorial on Partial Annulment, paras. 12-14, 86-94.

192 *Wena Hotels v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, **Exhibit RL- 64**, para. 65.

193 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, **Exhibit RL-60**, para. 112.

194 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) Decision on Annulment, 23 December 2010, **Exhibit RL-118**, para. 84.

103. The task of an annulment committee "is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion."[195] The Tribunal largely fulfilled this requirement, as the Tribunal explained that the lack of evidence led it to its decision to dismiss the loss of value claim. Hence, there is no failure to state reasons for this decision in the Award.

C. THE DECISION DOES NOT DEPART FROM ANY FUNDAMENTAL RULE OF PROCEDURE REGARDING THE BURDEN OF PROOF

104. TGH argues that an award is subject to annulment "where a tribunal departs from a fundamental rule of procedure in its treatment of the evidence and burden of proof."[196] In particular, TGH claims that the Tribunal imposed "an insurmountable burden" of proof on its damages claim,[197] and that it was wrongly penalized for the "evidentiary difficulties concerning damages."[198]

105. As a preliminary point, Guatemala explained at length in its Counter-Memorial on Partial Annulment that there is no fundamental rule of procedure regarding the treatment of evidence.[199] Indeed, TGH's Reply on Partial Annulment cannot point to a single *ad hoc* committee that annulled a decision for the reasons it now asserts, that is, because of the burden of proof imposed on the claimant to establish damages.

106. It is well established that tribunals have discretion regarding the standard of proof to be applied. As the *Unglaube v Republic of Costa Rica* tribunal held, "no single precise standard has been articulated, tribunals ultimately exercise discretion in this area."[200]

107. This principle arises from the fact that each tribunal is the judge of the probative value of evidence submitted to it. As explained in *Alpha Projektholding v Ukraine*, "[i]t is generally understood that 'the probative force of the evidence presented is for the Tribunal to determine,' there being no 'strict judicial rules of evidence' binding upon

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195 *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Decision on Annulment, 21 February 2014, **Exhibit RL-52**, para. 102.

196 TGH's Reply on Partial Annulment, para. 88.

197 *Ibid.*, para. 90.

198 *Ibid.*

199 Guatemala's Counter-Memorial on Partial Annulment, paras. 114, 119.

200 *Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1) Award, 16 May 2012, **Exhibit RL-120**, para. 34.

international arbitral tribunals."[201] Similarly, the *Rompetrol v Romania* tribunal held that "the rules of evidence are neither rigid nor technical. [...] [A] tribunal should possess a large measure of discretion over how the relevant facts are to be found and to be proved."[202] TGH responds to none of these authorities[203] in its Reply on Partial Annulment.

108. Hence, contrary to TGH's contentions, there is no "fundamental rule of procedure" imposing a given standard of proof on a tribunal. In sum, the standard of proof is an issue over which arbitral tribunals have wide discretion because they alone are responsible for assessing the probative value of the evidence.

109. Further, the Tribunal did not impose an "insurmountable" burden of proof, nor did Guatemala create any "evidentiary difficulties," nor did it take "advantage of its own wrong," as TGH argues.[204] It is clear that a claimant has the onus of proof on damages. As held by the *Gemplus v Mexico* tribunal,[205] the claimant bears the burden of proof on damages and if a "loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent."[206] In a similar manner, in *Grand River v United States*, the tribunal held that "a claimant has the burden of proving both the breach and the claimed loss or damage."[207] Likewise, in *Gold Reserve v Venezuela*, the tribunal held that the "Claimant bears the burden of proving its claimed damages" and that "damages cannot be speculative or merely 'possible.'"[208]

110. That speculative or uncertain damages cannot be awarded is a well established principle of international law. For example, the Iran-US Claims Tribunal in *Amoco v*

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201 *Alpha Projektholding v. Ukraine* (ICSID Case No. ARB/07/16) Award, 8 November 2010**, Exhibit RL-121**, para. 238.

202 *Rompetrol v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013, **Exhibit RL-123,** para. 181.

203 Guatemala's Counter-Memorial on Partial Annulment, paras. 116, 118.

204 TGH's Memorial on Partial Annulment, paras. 110-115; TGH's Reply on Partial Annulment, paras. 88-97.

205 TGH's Memorial on Partial Annulment, para. 110.

206 *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4) Award, 16 June 2010, **Exhibit RL-124**, para. 12-56.

207 *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, **Exhibit RL-125**, para. 237.

208 *Gold Reserve Inc. v. Bolivarian Republic of* Venezuela (ICSID Case No. ARB(AF)/09/1) Award, 22 September 2014, **Exhibit RL-126**, para. 685.

Iran held that: "[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."[209] As another authority clearly provides: "[t]ribunals have been reluctant to provide compensation for claims with inherent speculative elements."[210]

111. It follows that a tribunal may determine that a breach has occurred and still be unable to award damages. To award damages, claimant must be able to show that a loss has taken place as a result of the breach. For example, the *Rompetrol v Romania* tribunal decided that, despite finding that Romania had breached the fair and equitable treatment standard under the Netherlands-Romania BIT,[211] no damages could be awarded because "[o]n the evidence presented to the Tribunal, the Claimant has not […] met the onus on it of proving that it suffered economic loss or damage resulting from the breach."[212] Referring to the relationship between breach and damages, the tribunal explained:

> As a matter of law, though, it remains the case that breaches […] may give rise to claims for relief of different kinds: for example for the cessation of host State measures against an investor, or for the re-instatement of a status quo ante, or (if the circumstances were appropriate) for a bare declaration of breach. To the extent, however, that a claimant chooses to put its claim […] in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach.[213] (Emphasis added.)

112. All of this is applicable to this case. TGH's claim for future losses was too speculative because TGH chose to calculate its damages on the price at which it sold its investment, and yet provided no direct contemporaneous evidence on what that price

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209 *Amoco International Finance v. Islamic Republic of Iran* (Iran-US Claims Tribunal Case No. 56) Partial Award, 14 July 1987, **Exhibit RL-127**, para. 238.

210 United Nations, "Materials on the Responsibility of States for Internationally Wrongful Acts" (ST/LEG/SER.B/25), in *United Nations Legislative Series* (2012), **Exhibit RL-129**, p. 241.

211 *Rompetrol v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013, **Exhibit RL-123,** para. 299(c).

212 *Ibid.*, para. 299(d).

213 *Ibid.*, para. 190.

was. Further, TGH could not prove the permanent loss it claimed because the measure at issue was a five year tariff that was due to expire in 2013. Tariffs were to be reviewed every five years thereafter, and thus by definition were temporary. It simply could not be assumed that EEGSA would be subject to the 2008 tariffs forever. Thus, it was the nature of TGH's claim itself that generated TGH's alleged unsurmountable burden of proof. The truth is that TGH sought permanent damages for a temporary measure, and now it seeks to argue that the Tribunal (or Guatemala) imposed upon it a threshold of proof that could not be met.

113. Further, contrary to TGH's allegations, Guatemala never conceded that TGH suffered any damages. It actually argued the contrary; for example, that "TGH has not suffered any loss,"[214] and that "[t]he hearing demonstrated that TGH's claim for damages is not credible."[215] Guatemala reviewed TGH's damages valuation model in order to demonstrate that even under that model there had been no losses.[216] Nowhere in the pleadings can TGH identify the statement that it attributes to Guatemala, that "if liability were found, TECO would have suffered damages upon the sale of its interest in EEGSA."[217]

114. Guatemala also clearly explained that it did not accept that TGH had proven losses due to the alleged lost value of EEGSA, arguing, for example: that Guatemala "does not have in its possession any direct evidence of the value assigned to EEGSA in the purchase price,"[218] and that "it is incorrect to consider the alleged measures as perpetual in nature for the purposes of calculating damages […] given the imminent possibility that a tariff increase will be granted to EEGSA in the tariff review that is under way."[219]

115. Thus, the issue of whether TGH had suffered loss, and any quantification of such a loss, had to be decided by the Tribunal. The fundamental rule of procedure applicable in this scenario is provided in article 48(3) of the ICSID Convention, which states that "[t]he award shall deal with every question submitted to the Tribunal, and shall state

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214 Rejoinder, Section VI.

215 Respondent's Post-Hearing Brief, Section V.

216 Rejoinder, paras. 508-510.

217 TGH's Memorial on Partial Annulment, para. 124.

218 Respondent's Post-Hearing Brief, para. 358.

219 Respondent's Reply Post-Hearing Brief, para. 161.

the reasons upon which it is based." To comply with this rule, the Tribunal decided on the merits of all aspects of TGH's damages claim.

D. THE TRIBUNAL'S TREATMENT OF THE EVIDENCE DID NOT DEPRIVE TGH OF THE RIGHT TO BE HEARD

116. TGH complains that in its decision to dismiss the lost value claim, the Tribunal relied on the press interview of the CEO of EPM, Mr. Restrepo, the buyer of EEGSA in 2010, "without warning" and "failed to inform the parties of the central importance that it intended to attach to the interview."[220] TGH takes particular issue with the fact that the Tribunal refers to "the untranslated portion of the interview," a point which TGH repeatedly refers to,[221] and even claims that the Tribunal "failed to afford the parties an opportunity to present arguments" on it.[222]

117. TGH's allegations are incorrect. First, there is no rule imposing a duty on an ICSID tribunal to consult with the parties regarding the tribunal's assessment of evidence on the record.[223] A tribunal need not consult with the parties regarding the precise part, or the extent to which, it intends to rely upon a given piece of evidence.[224] In response to this, TGH cites the annulment decision in *Pey Casado v Chile*, arguing that Chile's right to be heard was infringed when the tribunal "awarded the claimants damages for a violation of fair and equitable treatment notwithstanding the fact that the parties' pleadings focused almost exclusively on damages relating to the claimants' expropriation claim."[225] TGH also claims that "similar circumstances exist in the present case."[226]

118. However, this is plainly wrong. In *Pey Casado*, the parties had not presented any arguments <u>whatsoever</u> regarding damages for breach of fair and equitable treatment, but rather focused almost exclusively on damages for expropriation. Despite the failure to brief the issue, the tribunal decided to award damages for breach of fair and equitable treatment. Thus, the parties had been deprived of their right to present

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220 TGH's Memorial on Partial Annulment, paras. 4, 117; TGH's Reply on Partial Annulment, paras. 98, 100.

221 *Ibid.*, paras. 98, 100, 103.

222 *Ibid.*, para. 101.

223 Guatemala's Counter-Memorial on Partial Annulment, para. 130.

224 Guatemala's Counter-Memorial on Partial Annulment, para. 130.

225 TGH's Reply on Partial Annulment, para. 102.

226 *Ibid.*

arguments on the legal standard applicable to the calculation of damages that the Tribunal applied. Further, TGH's reliance on *Fraport v Philippines*[227] is irrelevant because that annulment committee took issue with the fact that the claimant had no opportunity to address a new piece of evidence that had been filed by the respondent after the hearing.

119. The situation in this proceeding could not be more different from that in *Fraport* and *Pey Casado*. The Tribunal relied on a piece of evidence that was on the record since Guatemala's first filing: its Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits.[228] The exhibit had been subject of abundant discussion during the Arbitration,[229] in particular at the final Hearing. For example, the press interview to Mr. Restrepo was referenced in Guatemala's Opening Statement and slides.[230] TGH could have commented on it at any point during the Hearing, particularly after the Tribunal's direct questioning on that very exhibit. In fact, the very first intervention on the second day of Hearing was that of the President of the Tribunal, Alexis Mourre, who directly questioned TGH regarding the interview:

> PRESIDENT MOURRE: […] There is an exhibit which has been discussed yesterday, which is R-133, which is the interview of the CEO, I believe, of Energía de Medellín; and there is a question there which says: "The shareholders argued that there would be low revenue and profitability due to the VAD. Despite this issue, you decided to buy." And the answer is: "This is reflected in the value of the transaction. We bought on the basis that the current tariff model and layout is the one that exists." So there is an assumption that the tariff, as established in 2008, would remain the same for future tariff periods. And my question is: Why was there such an assumption, given that the tariff is reviewed every five years?
>
> And the second question is: How was the 2008 tariff, which is in this interview [Exhibit R-133]

227 *Ibid.*

228 Memorial on Objections and Counter-Memorial, para. 446, footnote 636.

229 **Exhibit R-133** was referred to by both TGH and Guatemala in their respective written pleadings during the Arbitration: *see* Memorial on Objections and Counter-Memorial, para. 446; Claimant's Post-Hearing Brief, paras. 169, 171; Respondent's Post-Hearing Brief, paras. 361-362.

230 Tr. (English), Day One, 190:1-10, Respondent's Opening Statement, and slides 3 and 30.

> referred to as being low, how was that taken into account in the sale –in fixing the sale− the sale price to Energía de Medellín?[231] (Emphasis added.)

120. More importantly, the Tribunal asked the Parties to address the general issue discussed in the interview – the issue quoted in the Award – of how EEGSA's sale price had been determined,[232] and whether it was impacted by the 2008 tariffs and the future evolution of tariffs. Particularly, President Mourre came back to the issue of the sale price during the Hearing. At that point, he asked Ms. Callahan, Chief Financial Officer of Teco Energy, of which TGH was an affiliate at the time:[233]

> PRESIDENT MOURRE: My understanding is that DECA was sold to Empresas Públicas de Medellín for $605 million.
>
> THE WITNESS: Yes.
>
> PRESIDENT MOURRE: And that is for 80 percent of EEGSA?
>
> THE WITNESS: Yes. Well, DECA II included not only EEGSA but quite a few other assets as well.
>
> PRESIDENT MOURRE: And what was, in your view, the price or allocation of this transaction to the 80 percent held by DECA in EEGSA?
>
> THE WITNESS: We never had a specific allocation of that purchase price done. And I'm not aware that that was calculated by any of the parties that we had access to information from.
>
> PRESIDENT MOURRE: Was that − if you don't have the answer, that's fine. Do you believe that was in the range which was calculated here by Citibank?
>
> THE WITNESS: The 605 million in total?

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231 Tr. (English), Day Two, 402:22-403:20, Mourre.

232 Award, paras. 754-759.

233 *See* Tr. (English), Day Two, 576:9-577:6, where Ms. Callahan said that she had "financial and investment decision-making responsibility for all of TECO Energy's […] affiliates, including [TGH] and its investment in EEGSA," as well as responsibility for "[r]isk management."

PRESIDENT MOURRE: The 605 includes other assets?

THE WITNESS: Yes.

PRESIDENT MOURRE: So I suppose this figure here from 572 to 670, this − this − does this also include the other assets?

THE WITNESS: That's correct. This 572 to 670 is for DECA II.

PRESIDENT MOURRE: So we're comparing the same thing?

THE WITNESS: We are comparing the same thing.

PRESIDENT MOURRE: What we don't know is what the evolution of the value of the other assets have been, because it's irrelevant to our arbitration, of course.

THE WITNESS: That's right.

[…]

PRESIDENT MOURRE: Very well. I only have one question. And I'm coming back to what I asked you earlier on about the value of EEGSA within DECA II. And you told me that this calculation was never made by anyone.

But I suppose that, at least in the accounts of DECA II, there was some value given to its participation into EEGSA. Is it not correct?

THE WITNESS: Within the accounts of DECA II, that's correct. They would have been accounted for separately. With our 30 percent interest, it meant that this was what we call an equity investment in U.S. accounting terms. And so it was accounted for as a single entity and a single investment amount in our financial statements. So at TECO we did not track that individually.

PRESIDENT MOURRE: What do you mean by, "We did not track that"?

THE WITNESS: We didn’t have − we didn't have separate accounts on the books of TECO Energy for the different companies.

PRESIDENT MOURRE: But you had that on the books of −

THE WITNESS: On DECA II −

PRESIDENT MOURRE: On DECA II.

THE WITNESS: − that’s correct.

PRESIDENT MOURRE: But you had no idea what the value − what the book value of EEGSA was in DECA II? Or do you know that?

THE WITNESS: I don’t. I do know that, at − at the time we sold our interest in DECA II, the net income that we were realizing from DECA II was probably coming about − and this is U.S. generally accepted accounting principles. So it’s a little bit different than − than the Guatemalan accounting numbers.

But our net income was coming, you know, maybe 60 percent or so from the other companies and the rest from EEGSA. So it was the majority of the net income at that time. Now –

PRESIDENT MOURRE: Was coming from EEGSA?

THE WITNESS: No; was coming from the other companies.

PRESIDENT MOURRE: From the other companies?

THE WITNESS: Correct.

PRESIDENT MOURRE: So what you say is that EEGSA represented, at least in terms of cash flows for DECA, 40 percent?

THE WITNESS: Well, in terms of net income −

PRESIDENT MOURRE: Of net income.

THE WITNESS: − from DECA II. And so net income, of course, isn't cash flow because it has depreciation coming out of it. Right. And that’s

> really the only order of magnitude that I really have that I can report to you on in terms of kind of how to think about the piecing of that.
>
> PRESIDENT MOURRE: Okay. Thank you very much.[234]

121. Additionally, after the Hearing, the Tribunal sent a letter to the Parties similarly asking the following questions:

> The Arbitral Tribunal also reminds the parties that the PHBs should address the questions raised by the Arbitral Tribunal on Monday 21 and Tuesday 22 of January (Transcripts pages 386 et seq.).
>
> The Arbitral Tribunal would also be grateful if the parties could address in their PHBs the following additional questions:
>
> […]
>
> - Evidence of the value attributed to EEGSA in the sale to EDM;
>
> - Is it right to assume for the purposes of loss assessment that the 2008-2013 tariff would remain in place forever? If not, what are the consequences on Teco's claim?[235]

122. In sum, TGH had the opportunity to address Mr. Restrepo's press interview and all the relevant questions arising from it. This was an exhibit on the record that TGH could tackle before the Hearing, during the Hearing and, having had all the indications that the Tribunal was interested in that exhibit, in its post-hearing briefs. Beyond that, the Tribunal certainly had no further duty to consult TGH on this issue, or any other aspect of its decisions expressed in the Award.

123. In the absence of better arguments, TGH argues that the Tribunal relied on a different portion of the press interview than the one it appeared to be interested in during the Hearing, and a portion that was not translated by the Parties when submitting the exhibit. This is irrelevant, because the Tribunal was entitled to rely on any aspect of that or any other exhibit in its decision. Guatemala knows of no rule limiting the Tribunal's authority to assess all the evidence as it sees fit. Further, the Arbitration

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234 Tr. (English), Day Two, 590:7-591:20 and 603:10-606:4, Callahan and Mourre.

235 Letter from the Tribunal to the Parties, 11 March 2013, p. 2.

was bilingual.[236] In any case, the part of the interview referred to by TGH relates to the same issue as other parts of the interview, of how the sale price was determined, and the extent to which it was influenced by the 2008 tariffs and the future evolution of such tariffs.

124. The untranslated portion of the interview – three of the 12 lines cited by the Tribunal in the Award − did not add to the translated portion to which the Tribunal also referred. If anything, it corroborated that portion. In any event, the issue of the sale price and the influence of tariffs on that price is the same issue that Guatemala and the Tribunal repeatedly raised during the Hearing. TGH certainly was not deprived of the right to be heard on any aspect of this issue or of its claim for damages in general.

125. Further, contrary to TGH's submissions, the *Iberdrola* decision is perfectly applicable to the facts of this case.[237] In that case, the claimant complained in the annulment phase that the tribunal had afforded certain relevance to the claimant's change of *petitum* (request for relief) without allowing Iberdrola to explain it. The *Iberdrola* annulment committee rejected this claim, holding that a tribunal has "no obligation to advance to the parties what will be its decision" on any given point, "nor ask their opinion on the same." For the *Iberdrola* committee, "it is in the award that the Tribunal decides."[238]

126. TGH argues that the *Iberdrola* annulment committee reached this conclusion having found that the parties had had an opportunity to address the issue. The same applies in the present case: the Parties had an opportunity to address the issue. Further, the general principle that a tribunal has "no obligation to advance to the parties what will be its decision," upheld by the *Iberdrola* committee, is certainly relevant and applicable here.

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236 Minutes of the First Session, 23 May 2011, first bullet point ("The parties agree that the procedural languages of the arbitration should be English and Spanish.")

237 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision on Annulment, 13 January 2015, **Exhibit RL-130**.

238 *Ibid.*, para. 108. Unofficial English translation. In its original Spanish language it reads:

> […] [E]l Tribunal, así como cualquier otro tribunal establecido bajo el Convenio del CIADI, no tiene la obligación de adelantar a las partes cuál sería su decisión relativa a la admisibilidad del cambio en el petitum, ni tampoco solicitarles su opinión al respecto. Por el contrario, es precisamente en el Laudo donde el Tribunal debe pronunciarse sobre la admisibilidad de los cambios en la presentación de sus acciones.

127. Similarly, in *Tza Yap Shum v Peru*, the annulment committee rejected Peru's argument that it should have been given the opportunity to comment on the meaning of a particular word contained in a provision of the relevant BIT, despite the fact that the meaning of the provision was widely discussed in the arbitration. The annulment committee rejected this claim, explaining that the tribunal "did not ground [its decision] on something that none of the Parties would have alleged nor on anything which they could not have reasonably expected, even if the reasons given by the Arbitral Tribunal may not have been foreseeable."[239] The tribunal continued:

> If the Committee adhered to the Republic of Peru's criticism, it would create an obligation in the mind of every arbitrator to submit their legal reasoning to discussion by the parties, with the consequence that no award could ever be adopted before the parties had the opportunity to submit arguments regarding the relevance of the Tribunal's legal reasoning. […] Similarly, an arbitrator may never be able to render an award as a result of its obligation to continuously submit the award's reasoning to the parties for comment.[240]

128. Further, TGH could have exercised its right under article 10.20.9(a) of the CAFTA-DR, to comment on a draft of the Award but it did not do so. This provision reads as follows:

> In any arbitration conducted under this Section, <u>at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability,</u>

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239 *Señor Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Decision on Annulment, 12 February 2015, **Exhibit RL-132**, para. 129. Unofficial English translation. In its original Spanish language it reads:

> […] [E]l Tribunal de Arbitraje no se fundó en algo que ninguna de las Partes hubiese alegado ni tampoco en lo que ellas no habrían podido esperar razonablemente, aun si los motivos expuestos por el Tribunal de Arbitraje pueden no haber sido previstos. […]

240 *Ibid.*, paras. 130-131. Unofficial English translation. In its original Spanish language it reads:

> […] Si el Comité adhiriera a la crítica de la República del Perú, crearía una obligación en cabeza de los árbitros de someter su razonamiento jurídico a discusión por las partes, lo que tendría como consecuencia que ningún laudo podría jamás ser adoptado antes de que las partes tuvieran la oportunidad de presentar argumentos acerca de la pertinencia del razonamiento jurídico del Tribunal. […]De manera similar, un árbitro nunca podrá dictar un laudo debido a la obligación de someter continuamente la motivación del laudo a las partes para sus observaciones. […]

> transmit its proposed decision or award to the disputing parties and to the non-disputing Parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period. (Emphasis added.)

129. In short, TGH was not deprived of its right to be heard on any aspect of its damages claim, and in particular in relation to the press interview of EPM's CEO Mr. Restrepo. This exhibit was on the record and both Parties had ample opportunity to express their views on it.

E. THE DECISION DOES NOT CONSTITUTE A MANIFEST EXCESS OF POWERS OR A VIOLATION OF A FUNDAMENTAL RULE OF PROCEDURE BECAUSE GUATEMALA PURPORTEDLY AGREED TO TGH'S DAMAGES CLAIM

130. TGH repeats its argument that, because Guatemala allegedly accepted certain elements of its damages claim, the Tribunal's dismissal of the entire claim for the alleged lost value constituted a manifest excess of powers because the Tribunal did not have to decide upon issues agreed between the Parties.[241]

131. As explained above,[242] Guatemala denies that it ever agreed to any aspect of TGH's claim. In fact, it denied the damages claim entirely.[243] Guatemala merely addressed TGH's methodology in order to demonstrate that even under that methodology, TGH could not show any damages.[244] This in no way constituted an agreement with TGH's claim.

132. Nowhere in the pleadings can TGH identify the statement that it attributes to Guatemala, that "were liability found […] TECO had suffered damages for loss of value upon the sale of its shares in EEGSA."[245]

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241 TGH's Memorial on Partial Annulment, paras. 125-133, 137.

242 *See* paras. 17-18.

243 *Ibid. See also* Rejoinder, Section VI.

244 Rejoinder, paras. 508-510.

245 TGH's Reply on Partial Annulment, para. 109.

133. Guatemala clearly explained its position that TGH had failed to prove any alleged loss of value of EEGSA. Guatemala argued, for example that "TGH has not suffered any loss,"[246] and that "[t]he hearing demonstrated that TGH's claim for damages is not credible."[247]

134. As to the argument that the sale evidenced a loss of value, Guatemala pointed to evidence to the contrary: that Guatemala "does not have in its possession any direct evidence of the value assigned to EEGSA in the purchase price,"[248] that "it is incorrect to consider the alleged measures as perpetual in nature for the purposes of calculating damages […] given the imminent possibility that a tariff increase will be granted to EEGSA in the tariff review that is under way,"[249] that in the Management Presentation dated September 2010, TGH and its partners presented EEGSA to interested parties as "one of the best and most solid companies in the country," due to *inter alia*, the "solidity of the value of its shares,"[250] and that similarly, the Press Release following the sale confirmed that EPM bought EEGSA because it considered it to be "the best and most solid electricity distribution and marketing company in Central America."[251]

135. Therefore, there was never an agreement on damages. This is evident from the summary of arguments of the Parties on damages as contained in the Award.[252] The Tribunal did have to decide all claims for damages, including TGH's claim for EEGSA's alleged lost value.

V. THE TRIBUNAL'S DECISION ON INTEREST DOES NOT INCUR IN ANY GROUND OF ANNULMENT

136. TGH rehashes its position that the Tribunal's decision on interest constitutes a manifest excess of powers, because Guatemala and TGH agreed on the date from

246 Rejoinder, title to Section VI.

247 Respondent's Post-Hearing Brief, title to Section V.

248 *Ibid.*, para. 358.

249 Respondent's Reply Post-Hearing Brief, para. 161.

250 DECA II Management Presentation, September 2010, **Exhibit R-127**, p. 22 (Emphasis in bold in the original). The Spanish original reads as follows: "EEGSA, una de las mejores y más sólidas empresas del país;" "[p]or la solidez en el valor de sus activos." *See also* Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

251 Informative Bulletin from Empresas Públicas de Medellín, 21 October 2010, **Exhibit R-129**.

252 Award, paras. 333-359, 413-433.

which interest would start accruing and on the applicable interest rate.[253] Thus, according to TGH, the Tribunal did not need to decide these issues.

137. However, Guatemala and TGH did not agree on any of these issues. TGH points to no pleading by Guatemala on which that agreement would be expressed. For example, Guatemala argued that "[t]he interest rate applicable between the sale and the date of the Award is not the WACC,"[254] but "a risk-free rate, such as (for example) US 10-year government bonds."[255] Hence, the issue of the interest applicable had to be decided by the Tribunal.

138. TGH also argues that the decision on interest constitutes a departure from a fundamental rule of procedure because the Tribunal decided not to award interest before the date of the sale, 21 October 2010, arguing that this would constitute "unjust enrichment," and that the application of this "theory" had not been briefed by the Parties.[256]

139. As stated above, there is no rule requiring a tribunal to communicate, consult or check with the parties regarding its analysis or the conclusions it reaches during deliberations. Once again, as announced in the *Iberdrola v Guatemala* annulment decision, a tribunal has "no obligation to advance to the parties what will be its decision" on any given point, "nor ask their opinion on the same"; "it is in the award that the Tribunal decides."[257] Further, the *Tza Yap Shum* annulment committee also explained that, as long as the tribunal does not "ground [its decision] on something that none of the Parties would have alleged, or on anything which they could not have reasonably expected, […] the reasons given by the Arbitral Tribunal need not be

253 TGH's Memorial on Partial Annulment, paras. 126-132.

254 Respondent's Reply Post-Hearing Brief, title to Section V.D.

255 *Ibid.*, para. 175.

256 TGH's Memorial on Partial Annulment, paras. 125, 133-135.

257 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Decision on Annulment, 13 January 2015, **Exhibit RL-130**, para. 108. Unofficial English translation. In its original Spanish language it reads:

> […] [E]l Tribunal, así como cualquier otro tribunal establecido bajo el Convenio del CIADI, no tiene la obligación de adelantar a las partes cuál sería su decisión relativa a la admisibilidad del cambio en el petitum, ni tampoco solicitarles su opinión al respecto. Por el contrario, es precisamente en el Laudo donde el Tribunal debe pronunciarse sobre la admisibilidad de los cambios en la presentación de sus acciones.

foreseeable."[258] Finally, TGH could have exercised its rights under article 10.20.9(a) of the CAFTA-DR, to comment on a draft of the Award, but it did not do so.

140. In any case, TGH mischaracterizes the Tribunal's decision. The Tribunal did not apply any "theory" of "unjust enrichment." The relevant sentence from the Award is as follows:

> The Arbitral Tribunal considers that interest should only accrue from the date of the sale of EEGSA to EPM in October 2010. As a matter of fact, because the US$21,100,552 historical losses damages correspond to revenues that would have progressively flowed into EEGSA from August 2008 until October 2010, and because such amount has not been discounted to August 2008, 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.[259] […]

141. As is clear, the Tribunal simply used the notion of unjust enrichment to explain that interest should not accrue on sums that already contained such interest (as those sums had not been discounted to the date of valuation). This clearly does not involve application of any "unjust enrichment theory," as alleged by TGH, but just a reference in passing to the fact that interest could not be accounted for twice.

142. Rather than any theory of unjust enrichment, the Tribunal decided on the basis of the evidence on the record. One sentence prior, the Tribunal cited to the expert report of the Claimant's damages expert, Mr. Kaczmarek.[260] Further, within its decision on interest, the Tribunal referred to the Claimant's Post-Hearing Brief, Respondent's Reply Post-Hearing Brief; expert reports RER-1 and CER-2; and Exhibit C-415.

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258 *Señor Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) Decision on Annulment, 12 February 2015, **Exhibit RL-132**, para. 129. Unofficial English translation. In its original Spanish language it reads:

> […] [E]l Tribunal de Arbitraje no se fundó en algo que ninguna de las Partes hubiese alegado ni tampoco en lo que ellas no habrían podido esperar razonablemente, aun si los motivos expuestos por el Tribunal de Arbitraje pueden no haber sido previstos.

259 Award, para. 765.

260 *Ibid.*, para. 765, footnote 611.

Hence, the Tribunal decided on the basis of its assessment of the evidence. Right or wrong, this decision cannot be challenged on annulment.[261]

143. In fact, tribunals enjoy discretionary power on how to calculate and allocate interest. In the words of the *Vivendi II* annulment committee:

> In the matter of interest and its calculation, the *ad hoc* Committee considers that no *ultra petita* exists, even with regard to the issue of determining the starting date for the calculation of the interest due to the Claimants, since the allocation of interest, like the evaluation of damages, falls within the discretionary power of the Tribunal in the light of all relevant circumstances of the case.[262] (Emphasis added.)

144. TGH argues that this "discretion to rule on interest is not limitless."[263] However, TGH does not deny that such discretion exists. Such discretion must therefore be taken into account in denying TGH's annulment application regarding the Tribunal's decision on interest.

145. Thus, the Tribunal's decision on interest does not constitute a manifest excess of powers, nor does it represent a serious departure from a fundamental rule of procedure.

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261 *See* paras. 4, 15-16, 19, 118.

262 *Compañía de Aguas del Aconquija and Vivendi v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment, 10 August 2010, **Exhibit RL-111**, para. 256.

263 TGH's Reply on Partial Annulment, para. 119.

VI. REQUEST FOR RELIEF

146. In light of the above, the Republic of Guatemala respectfully requests the Annulment Committee to:

(a) Reject TGH's annulment application in full;

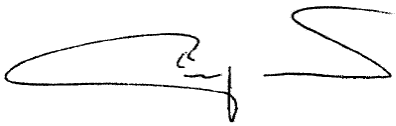
(b) Order TGH to pay Guatemala's legal fees and costs, and all the fees and costs of the *ad hoc* Committee and ICSID in these proceedings, including all costs relating to the phase of these proceedings related to the stay of enforcement of the Award.

Respectfully submitted,

Nigel Blackaby

Alejandro Arenales

Alfredo Skinner Klée



Rodolfo Salazar